THE
LAWS OF ENGLAND.

VOLUME XX.

THE

LAWS OF ENGLAND

BEING

A COMPLETE STATEMENT OF THE WHOLE LAW OF ENGLAND.

BY

THE RIGHT HONOURABLE THE

EARL OF HALSBURY

LORD HIGH CHANCELLOR OF GREAT BRITAIN,
1885-86. 1886-92. and 1895—1905,

AND OTHER LAWYERS.

VOLUME XX.

MARKETS AND FAIRS.
MASTER AND SERVANT.
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Animals - - - - - ,, ANIMALS.
Boundaries - - - - ,, BOUNDARIES, FENCES, AND PARTY WALLS.
Canals - - - - - ,, RAILWAYS AND CANALS.
Capital and Income - - ,, REAL PROPERTY AND CHATTELS REAL; RENTCHARGES AND ANNUITIES; SETTLEMENTS; WILLS.
Carriers - - - - - ,, CARRIERS.
Commons - - - - - ,, COMMONS AND RIGHTS OF COMMON.
Compulsory Purchase - - ,, COMPULSORY PURCHASE OF LAND AND COMPENSATION.
Copyholds - - - - - ,, COPYHOLDS.
Cost-book Companies - - ,, COMPANIES.
Criminal Law - - - ,, CRIMINAL LAW AND PROCEDURE.
Electric Lighting - - ,, ELECTRIC LIGHTING AND POWER.
Employer's Liability - - ,, MASTER AND SERVANT.
Explosives - - - - - ,, EXPLOSIVES.
Factories - - - - - ,, FACTORIES AND SHOPS.
Fences - - - - - ,, BOUNDARIES, FENCES, AND PARTY WALLS.
Highways - - - - - ,, HIGHWAYS, STREETS, AND BRIDGES.
Income Tax - - - - ,, INCOME TAX.
Infants - - - - - ,, INFANTS AND CHILDREN.
Inquests - - - - - ,, CORONERS.
Land Improvement - - ,, LAND IMPROVEMENT.
Land Tax - - - - - ,, LAND TAX.
Land Values - - - - ,, REVENUE.
Landlord and Tenant - - ,, LANDLORD AND TENANT.
Limitation of Actions - - ,, LIMITATION OF ACTIONS.
Local Authorities - - ,, LOCAL GOVERNMENT.
Master and Servant - - ,, MASTER AND SERVANT.
Negligence - - - - ,, NEGLIGENCE.
Nuisance - - - - - ,, NUISANCE.
Open Spaces - - - - ,, OPEN SPACES AND RECREATION GROUNDS.
Public Health - - - - ,, PUBLIC HEALTH AND LOCAL ADMINISTRATION.

For Railways - - - - *See title* RAILWAYS AND CANALS.
Rates - - - - - ,, RATES AND RATING.
Royal Mines - - - - ,, CONSTITUTIONAL LAW.
Sale of Land - - - - ,, SALE OF LAND.
Settlements - - - - - ,, SETTLEMENTS.
Small Holdings - - - - ,, SMALL HOLDINGS AND SMALL DWELLINGS.
Specific Performance - - ,, SPECIFIC PERFORMANCE.
Trade Unions - - - - ,, TRADE AND TRADE UNIONS.
Trespass - - - - - ,, TRESPASS.
Trover - - - - - ,, TROVER AND DETINUE.
Water - - - - - ,, WATER SUPPLY; WATERS AND WATERCOURSES.
Weights and Measures - - ,, WEIGHTS AND MEASURES.
Workmen's Compensation - ,, MASTER AND SERVANT.

MINISTERS.

See ECCLESIASTICAL LAW.

MINISTRY AND CABINET.

See CONSTITUTIONAL LAW.

MINORS.

See INFANTS AND CHILDREN.

MINT.

See CONSTITUTIONAL LAW.

MISDEMEANOUR.

See CRIMINAL LAW AND PROCEDURE.

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For *Administrators* - - - - *See title* EXECUTORS AND ADMINISTRATORS.
Agents - - - - - ,, AGENCY.
Companies - - - - - ,, COMPANIES.
Contract - - - - - ,, CONTRACT.
Corporations - - - - - ,, COMPANIES; CORPORATIONS
Equitable Doctrines - - - ,, EQUITY.
Executors - - - - - ,, EXECUTORS AND ADMINISTRATORS.
Factors - - - - - ,, AGENCY.
Family Arrangements - - ,, FAMILY ARRANGEMENTS.
Fraud, Equitable Extensions of ,, EQUITY.
Fraudulent Assignments under the Bankruptcy Acts - - ,, BANKRUPTCY AND INSOLVENCY.
Fraudulent Conveyances - - ,, FRAUDULENT AND VOIDABLE CONVEYANCES.
Fraudulent Preference - - ,, BANKRUPTCY AND INSOLVENCY.
Gifts - - - - - ,, GIFTS.
Guarantee - - - - - ,, GUARANTEE.
Impeachment of Voluntary Conveyances - - - ,, FRAUDULENT AND VOIDABLE CONVEYANCES.
Indemnity - - - - - ,, GUARANTEE.
Infancy - - - - - ,, INFANTS AND CHILDREN.
Insurance - - - - - ,, INSURANCE
Lunatics - - - - - ,, LUNATICS AND PERSONS OF UNSOUND MIND.
Married Women - - - - ,, HUSBAND AND WIFE.
Masters and Servants - - ,, MASTER AND SERVANT.
Mistake - - - - - ,, MISTAKE.
Money-Lending - - - - ,, MONEY AND MONEY-LENDING.
Partners - - - - - ,, PARTNERSHIP.
Principal and Agent - - ,, AGENCY.
Principal and Surety - - ,, GUARANTEE.
Ratification - - - - - ,, AGENCY; CONTRACT.
Sale of Goods - - - - ,, SALE OF GOODS.
Sale of Land - - - - ,, SALE OF LAND.
Settlements - - - - - ,, BILLS OF SALE; SETTLEMENTS.
Solicitor and Client - - ,, SOLICITORS.
Stocks and Shares - - - ,, STOCK EXCHANGE.
Suretyship - - - - - ,, GUARANTEE.
Unconscionable Bargains - ,, EQUITY; FRAUDULENT AND VOIDABLE CONVEYANCES; MONEY AND MONEY-LENDING.
Undue Influence, Presumption of - - - - - - ,, CONTRACT; EQUITY; FRAUDULENT AND VOIDABLE CONVEYANCES.
Warranty - - - - - ,, AGENCY; ANIMALS; GUARANTEE, SALE OF GOODS.

MISSIONARY CHURCHES.

See ECCLESIASTICAL LAW.

ABBREVIATIONS

USED IN THIS WORK.

A. C. (preceded by date)	Law Reports, Appeal Cases, House of Lords, since 1890 (*e.g.* [1891] A. C.)
A.-G.	Attorney-General
Act.	Acton's Reports, Prize Causes, 2 vols., 1809—1841
Ad. & El.	Adolphus and Ellis's Reports, King's Bench and Queen's Bench, 12 vols., 1834—1842
Adam	Adam's Justiciary Reports (Scotland), 1893—(current)
Add.	Addams' Ecclesiastical Reports, 3 vols., 1822—1826
Adv.-Gen.	Advocate-General
Alc. & N.	Alcock and Napier's Reports, King's Bench (Ireland), 1 vol., 1813—1833
Alc. Reg. Cas.	Alcock's Registry Cases (Ireland), 1 vol., 1832—1841
Aleyn	Aleyn's Reports, King's Bench, fol., 1 vol., 1646—1649
Amb.	Ambler's Reports, Chancery, 2 vols., 1725—1783
And.	Anderson's Reports, Common Pleas, fol., 2 parts in one vol., 1535—1605
Andr.	Andrews' Reports, King's Bench, fol., 1 vol., 1737—1740
Anon.	Anonymous
Anst.	Anstruther's Reports, Exchequer, 3 vols., 1792—1797
App. Cas.	Law Reports, Appeal Cases, House of Lords, 15 vols., 1875—1890
Arkley	Arkley's Justiciary Reports (Scotland), 1 vol., 1846—1848
Arm. M. & O.	Armstrong, Macartney, and Ogle's Civil and Criminal Reports (Ireland), 1840—1842
Arn.	Arnold's Reports, Common Pleas, 2 vols., 1838—1839
Arn. & H.	Arnold and Hodges' Reports, Queen's Bench, 1 vol., 1840—1841
Asp. M. L. C.	Aspinall's Maritime Law Cases, 1870—(current)
Ashb.	Ashburner's Principles of Equity, 1902
Atk.	Atkyns' Reports, Chancery, 3 vols, 1736—1754
Ayl. Pan.	Ayliffe's New Pandect of Roman Civil Law
Ayl. Par.	Ayliffe's Parergon Juris Canonici Anglicani
B. & Ad.	Barnewall and Adolphus' Reports, King's Bench, 5 vols., 1830—1834
B. & Ald.	Barnewall and Alderson's Reports, King's Bench, 5 vols., 1817—1822
B. & C.	Barnewall and Cresswell's Reports, King's Bench, 10 vols., 1822—1830
B. & S.	Best and Smith's Reports, Queen's Bench, 10 vols., 1861—1870
Bac. Abr.	Bacon's Abridgment
Bail Ct. Cas.	Bail Court Cases (Lowndes and Maxwell), 1 vol., 1852—1854
Baild.	Baildon's Select Cases in Chancery (Selden Society, Vol. X.)
Ball & B.	Ball and Beatty's Reports, Chancery (Ireland), 2 vols., 1807—1814
Bankr. & Ins. R.	Bankruptcy and Insolvency Reports, 2 vols., 1853—1855

Bar. & Arn.	Barron & Arnold's Election Cases, 1 vol., 1843—1846
Bar. & Aust.	Barron & Austin's Election Cases, 1 vol., 1842
Barn. (CH.)	Barnardiston's Reports, Chancery, fol., 1 vol., 1740—1741
Barn. (K. B.)	Barnardiston's Reports, King's Bench, fol., 2 vols., 1726—1734
Barnes	Barnes' Notes of Cases of Practice, Common Pleas, 1 vol., 1732—1760
Batt.	Batty's Reports, King's Bench (Ireland), 1 vol., 1825—1826
Beat.	Beatty's Reports, Chancery (Ireland), 1 vol., 1813—1830
Beav.	Beavan's Reports, Rolls Court, 36 vols., 1838—1866
Beav. & Wal.	Beavan and Walford's Railway Parliamentary Cases, 1 vol., 1846
Beaw.	Beawes's Lex Mercatoria
Bellewe	Bellewe's Cases *temp.* Richard II., King's Bench, 1 vol.
Bell, C. C.	T. Bell's Crown Cases Reserved, 1 vol., 1858—1860
Bell, Ct. of Sess. ..	R. Bell's Decisions, Court of Session (Scotland), 1 vol., 1790—1792
Bell, Ct. of Sess. fol. .	R. Bell's Decisions, Court of Session (Scotland), fol., 1 vol., 1794—1795
Bell, Dict. Dec. ..	S. S. Bell's Dictionary of Decisions, Court of Session (Scotland), 2 vols., 1808—1833
Bell, Sc. App.	S. S. Bell's Scotch Appeals House of Lords, 7 vols., 1842—1850
Belt's Sup.	Belt's Supplement to Vesey Sen., Chancery, 1 vol., 1746—1756
Benl.	Benloe's (or Bendloe's) Reports, King's Bench and Common Pleas, fol., 1 vol., 1515—1627
Ben. & D.	Benloe and Dalison's Reports, Common Pleas, fol., 1 vol., 1357—1579
Bing.	Bingham's Reports, Common Pleas, 10 vols., 1822—1834
Bing. (N. C.)	Bingham's New Cases Common Pleas, 6 vols., 1834—1840
Bitt. Prac. Cas.	Bittleston's Practice Cases in Chambers under the Judicature Acts, 1873 and 1875, 1 vol., 1875—1876
Bitt. Rep. in Ch. ..	Bittleston's Reports in Chambers (Queen's Bench Division), 1 vol., 1883—1884
Bl. Com.	Blackstone's Commentaries
Bl. D. & Osb.	Blackham, Dundas, and Osborne's Reports, Practice and Nisi Prius (Ireland), 1 vol., 1846—1848
Bli.	Bligh's Reports, House of Lords, 4 vols., 1819—1821
Bli. (N. S.)	Bligh's Reports, House of Lords, New Series, 11 vols., 1827—1837
Bos. & P.	Bosanquet and Puller's Reports, Common Pleas, 3 vols., 1796—1804
Bos. & P. (N. R.) ..	Bosanquet and Puller's New Reports, Common Pleas, 2 vols., 1804—1807
Bract.	Bracton De Legibus et Consuetudinibus Angliæ
Bro. Abr.	Sir J. Brooke's Abridgment
Bro. C. C.	W. Brown's Chancery Reports, 4 vols., 1778—1794
Bro. Ecc. Rep.	W. G. Brooke's Ecclesiastical Reports, Privy Council, 1 vol., 1850—1872
Bro. (N. C.)	Sir R. Brooke's New Cases, 1 vol., 1515—1558
Bro. Parl. Cas.	J. Brown's Cases in Parliament, 8 vols., 1702—1800
Bro. Supp. to Mor. ..	M. P. Brown's Supplement to Morison's Dictionary of Decisions, Court of Session (Scotland), 5 vols.
Bro. Synop.	M. P. Brown's Synopsis of Decisions, Court of Session (Scotland), 4 vols., 1532—1827
Brod. & Bing.	Broderip and Bingham's Reports, Common Pleas, 3 vols., 1819—1822

Brod. & F.	**Brodrick and Fremantle's Ecclesiastical Reports, Privy Council, 1 vol., 1705—1864**
Broun	**Broun's Justiciary Reports (Scotland), 2 vols., 1842—1845**
Brown. & Lush. ..	**Browning and Lushington's Reports, Admiralty, 1 vol., 1863—1866**
Brownl.	**Brownlow and Goldesborough's Reports, Common Pleas, 2 parts, 1569—1624**
Bruce	**Bruce's Decisions, Court of Session (Scotland), 1714—1715**
Buchan.	**Buchanan's Reports, Court of Session and Justiciary (Scotland), 1806—1813**
Buck	**Buck's Cases in Bankruptcy, 1 vol., 1816—1820**
Bulst.	**Bulstrode's Reports, King's Bench, fol., 3 parts in 1 vol., 1610—1626**
Bunb.	**Bunbury's Reports, Exchequer, fol., 1 vol., 1713—1741**
Burr.	**Burrow's Reports, King's Bench, 5 vols., 1756—1772**
Burr. S. C.	**Burrow's Settlement Cases, King's Bench, 1 vol., 1733—1776**
Burrell	**Burrell's Reports, Admiralty, ed. by Marsden, 1 vol., 1648—1840**
C. A.	Court of Appeal
C. B.	Common Bench Reports, 18 vols., 1845—1856
C. B. (N. S.)	Common Bench Reports, New Series, 20 vols., 1856—1865
C. C. A.	Court of Criminal Appeal
C. C. Ct. Cas.	Central Criminal Court Cases (Sessions Papers), 1834—(current)
C. L. R.	Common Law Reports, 3 vols., 1853—1855
C. P. D.	Law Reports, Common Pleas Division, 5 vols., 1875—1880
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Part I.—The Nature of Markets and Fairs.

SECT. 1. Introductory.

SECT. 1.—*Introductory.*

Several meanings of "market."

1. At common law a market (*a*) is a franchise (*b*) conferring a right to hold a concourse of buyers and sellers (*c*). The term is also applied to the like right when conferred by Act of Parliament. Though strictly applicable to the right itself (*d*), the term is often and not incorrectly applied to the concourse of buyers and sellers (*e*), or to the market-place (*f*), or to the time of holding the market (*e*). A gathering of buyers and sellers, though held at regular intervals in a fixed place, if it is not held by virtue of a franchise or under statutory authority, is not in law a market (*g*).

Meaning of "fair."

2. At common law a fair (*h*) also is a franchise (*i*) conferring a right to hold a concourse of buyers and sellers; and the term is applied also to the like right when conferred by Act of Parliament.

Distinction between market and fair.

3. As regards legal incidents (*k*), there seems to be no distinction, at common law, between a market and a fair. It has been laid

(*a*) The word is derived from the Latin *mercatus*, which signifies trade or traffic, or buying and selling. So also is the word "mart," which, according to 2 Co. Inst. 221, is "a great faire holden every yeare." Markets held for the sale of agricultural live stock are frequently termed "marts." In Latin instruments *mercatus* is the common word for market. *Nundinæ* (really market-day) or *nundinæ* is sometimes used for market, but more often signifies fair. *Forum* is another term sometimes used for market, but it may mean a fair (see 2 Co. Inst. 221). *Feria* is the ordinary word for fair.

(*b*) 2 Bl. Com., 21st ed., 38; 3 Cru. Dig., 4th ed., 264 (tit. XXVII., Franchises, s. 85); see 1 Bl. Com., 21st ed., 273; and title CONSTITUTIONAL LAW, Vol. VI., p. 490.

(*c*) *Downshire* (*Marquis*) v. *O'Brien* (1887), 19 L. R. Ir. 380, *per* CHATTERTON, V.-C., at p. 390.

(*d*) "A market is the privilege within a town to hold a market" (Com. Dig., tit. Market (A.)). "A market is, properly speaking, the franchise right of having a concourse of buyers and sellers to dispose of commodities in respect of which the franchise is given" (*Downshire* (*Marquis*) v. *O'Brien*, *supra*, *per* CHATTERTON, V.-C., at p. 390).

(*e*) For instance, in the New English Dictionary the term is defined as "the meeting or congregating together of people for the purchase and sale of provisions or live-stock, publicly exposed, at a fixed time and place; the occasion, or time during which such goods are exposed for sale; also the company of people at such a meeting."

(*f*) "The usual place where a market is held is the market, not every place within the same town" (Com. Dig., tit. Market (A.)).

(*g*) "The King alone possesses the power of creating markets and fairs" (Chitty, Prerogatives of the Crown, 193, citing 2 Co. Inst. 220); *Downshire* (*Marquis*) v. *O'Brien*, *supra*, at p. 389.

(*h*) The word is derived from the Latin *feria*, which signifies a holiday or festival, and not, as stated in 2 Co. Inst. 221, from *forum*.

(*i*) 2 Bl. Com., 21st ed., 38; 3 Cru. Dig., 4th ed., 264.

(*k*) It is submitted that the legal incidents of a fair do not include the amusements which often accompany the holding of fairs; see *Collins* v. *Cooper* (1893), 68 L. T. 450, *per* GAINSFORD BRUCE, J., at pp. 452, 453. The legislature has, however, recognised that amusements are often to be found in fairs. Thus the Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), s. 38, requires "the business and amusements of all fairs" within the metropolitan police district not to begin before 6 a.m. and to

down that every fair is a market, but every market is not a fair (*l*); and a fair has accordingly been defined to be a great sort of market, which is usually kept once or twice in the year, and a market to be less than a fair, being usually kept once or twice in the week (*m*). The difference, therefore, seems to lie merely in the size or frequency of the gathering (*n*); and whether a particular gathering should be called a market or a fair must depend usually upon the term chosen for it in the instrument by which it is authorised. The two franchises are of equal dignity (*o*).

SECT. 1. Introductory.

4. Statute fairs, or hiring fairs, as they are sometimes called, are survivals of the statute sessions formerly held in connection with proclamations of rates of wages as fixed under the Statutes of Labourers: they are not legal fairs or markets for the sale of commodities (*p*).

Statute fairs or hirings.

SECT. 2.—*General Rights, Duties and Liabilities of the Owner.*

5. A right to hold a market involves the following rights and duties upon the part of the owner:—

Rights of owner:

(1) A right of having a concourse of buyers and sellers for the buying and selling of the commodities vendible in the market (*q*): this right may justify a concourse which, but for the right, would be liable to be put down as a nuisance (*r*);

(i) of having a concourse;

(2) A right of action against persons who unlawfully dispute or interfere with the lawful holding of the market or the perception of the profits thereof (*s*);

(ii) of action;

(3) A right, now practically obsolete, to hold a court of pie poudre (*t*);

(iii.) of holding a court of pie poudre;

cease at 11 p.m.; and the Theatres Act, 1843 (6 & 7 Vict. c. 68), s. 23, exempts from the provisions of that Act a theatrical representation at a lawful fair, if given in a licensed booth or show; see title THEATRES AND OTHER PLACES OF ENTERTAINMENT. In *Collins* v. *Cooper* (1893), 68 L. T. 450, it was held by LAWRANCE, J. (GAINSFORD BRUCE, J., dissenting), that the prohibition in a local Act against the holding of any fair without the licence of the municipal corporation extended to a gathering at which there was no selling nor exposure of goods for sale, but at which roundabouts and other contrivances for amusement were provided.

(*l*) 2 Co. Inst. 406, giving the reason why fairs are included in the term *mercatus* as used in Statute of Westminster II., (1285) 13 Edw. 1, c. 24; see also 2 Co. Inst. 221, on the term *marche* as used in Statute of Westminster I., (1275) 3 Edw. 1, c. 31.

(*m*) Readings upon the Statute Law . . . by a Gentleman of the Middle Temple (1724), Vol. III., 172, citing 2 Co. Inst. 221; 15 Vin. Abr. 244, tit. Market (A. 3); Gunning, Law of Tolls, p. 46.

(*n*) See *Collins* v. *Cooper*, *supra*, *per* GAINSFORD BRUCE, J., at p. 452.

(*o*) See *Newcastle* (*Duke*) v. *Worksop Urban Council*, [1902] 2 Ch. 145, *per* FARWELL, J., at p. 156; and p. 15, *post*.

(*p*) *Simpson* v. *Wells* (1872), L. R. 7 Q. B. 214 (where it was held that there could be no legal custom by immemorial usage to justify the obstruction of a highway by a stall erected for the sale of refreshments at statute sessions).

(*q*) *Downshire* (*Marquis*) v. *O'Brien* (1887), 19 L. R. Ir. 380, *per* CHATTERTON, V.-C., at p. 390.

(*r*) *Elwood* v. *Bullock* (1844), 6 Q. B. 383, 411; and see p. 22, *post*

(*s*) See pp. 43—46, *post*.

(*t*) 2 Co. Inst. 220; 4 Co. Inst. 272. The following authorities may be referred to for the jurisdiction:—Stat. (1477-8) 17 Edw. 4, c. 2, and

SECT. 2. General Rights, Duties and Liabilities of the Owner.

(4) A duty to provide a place for the holding of the market, of a size sufficient for the convenient accommodation of all who are ready to buy and sell in the market (*a*). If the owner's rights are limited to the holding of his market in a fixed spot defined by metes and bounds, his duty is to devote to the accommodation of the public so much of that spot as their convenience requires (*b*).

(iv.) duty to provide accommodation.

Toll.

6. The owner of a market or fair may also have a right to take toll on sales therein, but this right is not incident to a market or fair, and, where it exists, exists as an additional right (*c*).

SECT. 3.—*General Rights of the Public.*

Right of public to attend market.

7. At all times when a market ought lawfully to be held every member of the public has, of common right, the liberty to enter and frequent the market-place for the purpose of bringing thither and there exposing for sale and selling, or of buying, such commodities as are vendible in the market (*d*).

This common right, however, does not entitle any person to take exclusive occupation of any part of the market-place, as by erecting a stall (*e*).

SECT. 4.—*Various Kinds of Markets and Fairs.*

SUB-SECT. 1.—*By Grant from the Crown.*

Crown grant.

8. The Crown has always had, by virtue of the royal prerogative,

stat. (1483-4) 1 Ric. 3, c. 6; 4 Co. Inst. 272; 3 Bl. Com., 21st ed., 32; Com. Dig., tit. Market (G.); Bac. Abr., tit. Court of Pipowders; and see title COURTS, Vol. IX., p. 136.

(*a*) *Islington Market Bill* (1835), 3 Cl. & Fin. 513, 518, H. L.; and see pp. 20, 49, *post*. A market owner who receives payment for the standing of cattle in the market-place is also bound to provide a place which is not dangerous for the purpose (*Lax* v. *Darlington Corporation* (1879), 5 Ex. D. 28, C. A.). As to certain duties imposed by statute, see, for example, the provision of weights and measures, p. 25, *post*; provision for weighing cattle, p. 27, *post*; furnishing accounts, p. 29, *post*.

(*b*) *Islington Market Bill*, *supra*, at p. 519.

(*c*) *Newcastle* (*Duke*) v. *Worksop Urban Council*, [1902] 2 Ch. 145, 156; *Heddy* v. *Wheelhouse* (1597), Cro. Eliz. 558, 591; *R.* v. *Maidenhead Corporation* (1620), Palm. 76; *Osbuston* v. *James* (1688), 2 Lutw. 1377; *Hollouay* v. *Smith* (1742), 2 Stra. 1171; *Austin* v. *Whittred* (1747), Willes, 623; *Lowden* v. *Hierons* (1818), 2 Moore (C. P.), 102; *Stamford Corporation* v. *Pawlett* (1830), 1 Cr. & J. 57; *Egremont* (*Earl*) v. *Saul* (1837), 6 Ad. & El. 924.

(*d*) *Austin* v. *Whittred*, *supra*; *Townend* v. *Woodruff* (1850), 5 Exch. 506; *Newcastle* (*Duke*) v. *Worksop Urban Council*, *supra*, at p. 159. The owner of goods which have been wrongfully abstracted from him may lawfully seize them to his own use if he finds them in a fair (3 Bl. Com. 5, cited in *Anthony* v. *Haney* (1832), 8 Bing. 186, by TINDAL, C.J., at p. 192), and therefore, apparently, has a right of entry into the fair for the purpose of seeking for them. As to estrays being proclaimed in markets, see Dalton, Office of Sheriffs, 79; Com. Dig., tit. Waife (F.); 1 Bl. Com. 297; and title CONSTITUTIONAL LAW, Vol. VII., p. 214. Goods brought to market may not be distrained for rent of the market-place (Co. Litt. 47 a). As to the exemption of cattle on their way to market from distress for rent while they are pasturing, for one night, see title DISTRESS, Vol. XI., p. 136.

(*e*) *Northampton Corporation* v. *Ward* (1745), 2 Stra. 1238; *Norwich Corporation* v. *Swann* (1776), 2 Wm. Bl. 1116; *Yarmouth Corporation* v. *Groom* (1862), 1 H. & C. 102. As to stalls, see p. 38, *post*.

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the power of granting to a subject the right of holding a market or fair (*f*), and in former times this power was exercised frequently. A market or fair which depends for its legal existence upon a grant from the Crown is a franchise (*g*).

Limitation to power.

9. The power of the Crown to grant markets and fairs has always been limited by the rule that a later grant, if made without the consent (*h*) of the owner of an earlier grant, and injuriously affecting his rights thereunder, is void as against him (*i*). A grant of a new market usually contains a clause to the effect that the market is not to be to the hurt of any neighbouring market (*k*), and such clause, if not expressed in the grant, is implied by law (*l*).

When grant *primâ facie* void.

10. By reason of this limitation of the powers of the Crown, a grant for a new market to be held by another person at the same times and within seven miles of the place in which an existing market is held is *primâ facie* void as against the owner of the existing market (*m*); and default by him in not providing proper accommodation cannot of itself justify the new grant (*m*). But where a market is held under a grant which confines it to a fixed place defined by metes and bounds, if those limits are not sufficient for the accommodation of buyers and sellers, and the owner has no power to enlarge them, that circumstance, coupled with the fact that it would be to the advantage of the public that a new market should be erected, would justify the Crown in granting a new market, so limited as to provide, without affecting the existing market, the further accommodation which is needed, but which that market cannot afford (*m*). Upon the same principle, where in the case of a market granted to be held within a district the district is so small and the residue of the district not appropriated to the market is so occupied that the grantee cannot possibly provide all the accommodation which is needed, the Crown has power to grant such new market as may be required for that portion of the public which cannot be accommodated in the existing market (*m*).

(*f*) In early times the Crown occasionally established a market or fair by ordinance, without granting it to any subject (see *Burgesses of Parliament Case* (1614), Hob. 14; 2 Roll. Abr. 197 (H.) 4; 17 Vin. Abr. 145, tit. Prerogative of the King (H. c.), 4; Chitty, Prerogatives of the Crown, 193). For instances, *temp.* John, see Rot. Chart. I., i., 77 (Portsmouth), 135 (Marlborough); *temp.* Edw. 2, Calendar of Close Rolls (1318-23), p. 166 (Woodstock), p. 173 (Middleton, Kent). It seems that an ordinance was the appropriate mode of establishing a market or fair in a royal manor. The ordinance took the form of a letter to the sheriff or other officer directing him to proclaim that a market or fair would be held; see Calendar of Close Rolls, *supra*.

(*g*) See title CONSTITUTIONAL LAW, Vol. VI., p. 490; 2 Bl. Com., 21st ed., 37, 38.

(*h*) Consent may be presumed from long acquiescence (*Great Eastern Rail. Co.* v. *Goldsmid* (1884), 9 App. Cas. 927; *Holcroft* v. *Heel* (1799), 1 Bos. & P. 400; *Campbell* v. *Wilson* (1803), 3 East, 294, 298).

(*i*) *Keeble* v. *Hickeringall* (1707), Holt (K. B.), 19, *per* HOLT, C.J.; 13 Vin. Abr. 514, tit. Franchises (G.), 9; *Islington Market Bill* (1835), 3 Cl. & Fin. 513, H. L.

(*k*) "*Ita ut non sit ad nocumentum vicinorum mercatorum*"; see 2 Co. Inst. 406; 2 Wms. Saund., 6th ed., 174, n. (2).

(*l*) *R.* v. *Butler* (1685), 3 Lev. 220, 222.

(*m*) *Islington Market Bill*, *supra*.

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11. The usual practice of the Crown has been not to make a grant of a new market or fair until an inquisition has been held under a writ of *ad quod damnum*, and a return has been made to the writ, stating that the jury found that such market would not be to the damage of the Crown or any subject (*n*). But the inquisition does not bar the Crown from proceeding by *scire facias* to obtain the repeal of a grant which is in fact injurious to an earlier grant, or which for any other reason, as, for instance, that the Crown was deceived in the making of it, is void (*o*); nor does it bar an action for damages against the holder of the new market, and the owner of the earlier grant may bring that action without waiting until the grant of the new market has been repealed (*p*).

Writ of *ad quod damnum*.

Remedies not barred by writ.

Crown cannot extend protection.

12. A clause in a grant made solely by the Crown, purporting to give to a market a protection greater than that which is attached by the common law to such a grant, would be void (*q*).

SUB-SECT. 2.—*By Prescription or Lost Grant.*

Prescription.

13. The right of holding a market or fair or of taking tolls may, in the absence of a grant from the Crown, be established by prescription (*r*); and an uninterrupted modern user raises a presumption in favour of prescription (*s*), rebuttable by evidence that the user arose within the time of legal memory (*a*).

Lost grant.

14. A lawful origin in a lost grant may be presumed from long user, though not immemorial (*b*).

SUB-SECT. 3.—*By Local Act of Parliament.*

Statutory markets and fairs.

15. The right to hold a market or fair may be created by statute, and in that case differs from a franchise granted solely by the Crown, since it is not liable to become forfeited to the Crown nor to be called in question by any process of *scire facias* (*c*).

Charter with assent of Parliament.

A charter conferring market privileges, made by the Crown with

(*n*) Fitz. Nat. Brev. 225.

(*o*) 17 Vin. Abr. 102, tit. Prerogative of the King (O. b.), 14; *R.* v. *Aires* (1717), 10 Mod. Rep. 258, 354; S. C., *sub nom. R.* v. *Eyre*, 1 Stra. 43; *R.* v. *Butler* (1685), 3 Lev. 220; *Islington Market Bill* (1835), 3 Cl. & Fin. 513, H. L.; and, as to *scire facias*, see title CROWN PRACTICE, Vol. X., p. 35.

(*p*) 2 Co. Inst. 406; and see p. 46, *post*.

(*q*) *Islington Market Bill*, *supra*, at p. 515.

(*r*) Co. Litt. 114 b; 2 Co. Inst. 220. As to prescription, see, generally, title EASEMENTS AND PROFITS À PRENDRE, Vol. XI., pp. 260 *et seq.*

(*s*) *Penryn Corporation* v. *Best* (1878), 3 Ex. D. 292, C. A.; *R.* v. *Joliffe* (1823), 2 B. & C. 54; *Jenkins* v. *Harvey* (1835), 1 Cr. M. & R. 877, 894; 2 Cr. M. & R. 393; *Shephard* v. *Payne* (1864), 16 C. B. (N. S.) 132, 136, Ex. Ch.

(*a*) Co Litt. 115 a; *Kingston-upon-Hull Corporation* v. *Horner* (1774), 1 Cowp. 102, 108. The Prescription Act, 1832 (2 & 3 Will. 4, c. 71) (see title EASEMENTS AND PROFITS À PRENDRE, Vol. XI., pp. 233 *et seq.*), does not apply to market franchises (*Benjamin* v. *Andrews* (1858), 5 C. B. (N. S.) 299).

(*b*) *A.-G.* v. *Horner* (1884), 14 Q.B. D. 245, C. A.; *Benjamin* v. *Andrews*, *supra*; *Campbell* v. *Wilson* (1803), 3 East, 294, 298; *Holcroft* v. *Heel* (1799), 1 Bos. & P. 400; *Kingston-upon-Hull Corporation* v. *Horner*, *supra*.

(*c*) *New Windsor Corporation* v. *Taylor*, [1899] A. C. 41, *per* Lord DAVEY, at p. 50; see also *ibid.*, *per* Lord HALSBURY, L.C., and Lord WATSON, at pp. 45, 48. As to forfeiture, see pp. 49—51,

the assent of Parliament, has the same force as private, or local and personal, Acts of Parliament have, but no greater force (*d*).

Local Act may supplement or extinguish franchise.

16. The effect of a local Act for the regulation of a market or fair originally created by grant of the Crown may be not merely to supplement the franchise by adding parliamentary rights, but to extinguish the franchise and to substitute the parliamentary rights (*e*). The question whether the rights given by the Act have superseded those that previously existed can be determined only by considering the language of the Act (*f*).

Markets and Fairs Clauses Act, 1847.

17. Modern Acts for the establishment or regulation of markets or fairs generally incorporate the whole or some parts of the Markets and Fairs Clauses Act, 1847 (*g*) (referred to in this title as "the Act of 1847"), the object of which was to avoid repetition and to ensure greater uniformity by comprising in one Act the sundry provisions that had usually been inserted in local Acts authorising such undertakings (*h*).

Incorporation in special Acts.

The Act of 1847 (*i*) extends only to such markets and fairs as are authorised by any special Act which expressly incorporates it, and its clauses apply to the authorised undertaking, subject to any express variations or exceptions in the special Act, and only so far as they are applicable (*k*).

General provisions.

18. The provisions of the Act of 1847 (*i*) are divided by headings into twelve groups, of which the first two are introductory (*l*).

Acquisition of land.

The third (*m*) relates to the following matters. Powers under the special Act of acquiring lands compulsorily must (*n*) be exercised in conformity with the Lands Clauses Consolidation Act, 1845 (*o*). Errors in descriptions given in the special Act of lands or their owners can be corrected upon application to two justices (*p*). In addition to the lands which the undertakers are authorised by the special Act to take compulsorily or to appropriate to the undertaking, they are given a limited power of appropriating lands vested in them, or

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(*d*) *Great Eastern Rail. Co.* v. *Goldsmid* (1884), 9 App. Cas. 927.

(*e*) *Manchester Corporation* v. *Lyons* (1882), 22 Ch. D. 287, C. A.; *Birmingham Corporation* v. *Foster* (1894), 70 L. T. 371; *Stevens* v. *Chown, Stevens* v. *Clark*, [1901] 1 Ch. 894; *Taylor* v. *New Windsor Corporation*, 1898] 1 Q. B. 186, C. A.; affirmed, [1899] A. C. 41.

(*f*) *Manchester Corporation* v. *Lyons*, *supra*; see particularly *ibid.*, *per* COTTON, L.J., at p. 307, and *per* BOWEN, L.J., at p. 310.

(*g*) 10 & 11 Vict. c. 14.

(*h*) *Ibid.*, preamble.

(*i*) Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14).

(*k*) *Ibid.*, s. 1. The effect of an express variation by the special Act is illustrated by *Rutherford* v. *Straker* (1887), 42 Ch. D. 85, n.

(*l*) The Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14), ss. 2, 3, are definition clauses; and *ibid.*, ss. 4, 5, relate to citation and the method for incorporating part only of the Act with a special Act.

(*m*) *Ibid.*, ss. 6—11, "with respect to the construction of the market or fair, and the works connected therewith."

(*n*) *Ibid.*, s. 6.

(*o*) 8 & 9 Vict. c. 18; see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 1 *et seq.*; and see *Richards* v. *Scarborough Public Market Co.* (1853), 23 L. J. (CH.) 110, C. A., upon the construction of an Act conferring compulsory powers to take land for a market-place.

(*p*) Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14), ss 7, 8.

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obtained by contract from a willing vendor, for certain "extraordinary purposes," including the provision of houses and places for weighing carts, and of roads and approaches to the market or fair, and for any other purpose necessary for its formation or convenient use (*q*).

Nature of works of construction.

The nature of the works that may be done for constructing the market-place is defined, and these works include the building and maintenance of stalls, sheds, pens and other conveniences for the use of persons frequenting the market or fair, or for weighing and measuring goods, or for weighing carts (*r*). As little damage as can be is to be done in the exercise by the undertakers of their powers, and for any damage so done full satisfaction is to be made (*s*).

Clauses relating to holding markets.

19. The fourth group of clauses (*t*) is concerned with the holding of the market or fair and the protection thereof.

Before the market or fair is opened for public use, not less than ten days' notice of the time when it will be opened must be given in a local newspaper and by handbills conspicuously posted (*a*). After the market-place is opened (*b*), the sale elsewhere within the prescribed district of articles tollable in the market is prohibited, unless the vendor is selling them in his own dwelling-place or shop (*c*), or is a licensed hawker (*d*), or a certificated pedlar (*e*). Powers are given for putting down sales of unwholesome meat or provisions (*f*); and the assault or obstruction of any person appointed by the undertakers to keep order in the market or fair, whilst in the execution of his duty, is made an offence punishable by fine (*g*).

Miscellaneous clauses.

20. The remaining groups of clauses relate respectively to slaughter-houses (*h*), the weighing of goods and carts (*i*), stallages, rents, and tolls (*k*), bye-laws (*l*), undertakers' accounts (*m*), recovery

(*q*) Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14), s. 9.
(*r*) *Ibid.*, s. 10; see, further, p. 26, *post*.
(*s*) Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14), s. 11.
(*t*) *Ibid.*, ss. 12—16.
(*a*) *Ibid.*, s. 12. For form of notice of date of opening a new market, see Encyclopædia of Forms and Precedents, Vol. VIII., p. 224.
(*b*) As to the days for holding the market or fair, see the Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14), s. 14, and p. 18, *post*.
(*c*) Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14), s. 13; see, further, p. 47, *post*.
(*d*) Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14), s. 13; see, further, pp. 47, 55, *post*.
(*e*) Pedlars Act, 1871 (34 & 35 Vict. c. 96), s. 6; see, further, pp. 47, 55, *post*.
(*f*) Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14), s. 15; see, further, titles FOOD AND DRUGS, Vol. XV., pp. 35 *et seq.*, 40, 41; PUBLIC HEALTH AND LOCAL ADMINISTRATION.
(*g*) Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14), s. 16.
(*h*) *Ibid.*, ss. 17—20; see, further, titles ANIMALS, Vol. I., pp. 427—430; PUBLIC HEALTH AND LOCAL ADMINISTRATION.
(*i*) Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14), ss. 21—30; see, further, p. 27, *post*.
(*k*) Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14), ss. 31—41; see p. 41, *post*. For form of justices' certificate of completion of market, see Encyclopædia of Forms and Precedents, Vol. VIII., p. 224.
(*l*) Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14), ss. 42—49; see p. 23, *post*.
(*m*) Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14), s. 50; see p. 30, *post*.

of damages not specially provided for, and of penalties, to the determination of any other matters referred to justices (*n*), the saving of the rights of the Crown (*o*), and access to the special Act (*p*).

SUB-SECT. 4.—*Under Powers conferred by General Act of Parliament.*

(i.) *By the Public Health Acts.*

Power of district councils to provide markets.

21. Every district council (*q*), whether urban (*r*) or rural (*s*), has, if armed with the requisite consent (*t*), an inalienable (*u*) statutory power (*v*) to do all or any of the following things within its district:—to provide a market-place and construct a market-house and other conveniences for the purpose of holding markets; to provide houses and places for weighing carts (*a*); to make convenient approaches to the market; to purchase (*b*) or take on lease land and public or private rights in markets or tolls (*c*) for any of the foregoing purposes; and to take stallages, rents, and tolls in respect of the use by any person of the market.

Consents necessary.

22. The consents necessary to the exercise of the statutory power are the following:—For the council of an urban district which is not a borough, the consent of the owners and ratepayers of the district (*d*); for a borough council, the consent of two-thirds of its number (*e*); and for a rural district council, the consent of the Local Government Board (*f*). But in no case may a market be

(*n*) Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14), ss. 52—56. *Ibid.*, s. 51 (tender of amends, is repealed by the Statute Law Revision Act, 1894 (57 & 58 Vict. c. 56); see now the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), and title PUBLIC AUTHORITIES AND PUBLIC OFFICERS. The Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c 14), s. 57 (perjury), is repealed by the Perjury Act, 1911 (1 & 2 Geo. 5, c. 6), s 17 (this Act comes into force on 1st January, 1912).

(*o*) Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14), s. 54; see title CONSTITUTIONAL LAW, Vol. VII., p. 200.

(*p*) Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14), ss. 58, 59.

(*q*) As to district councils, see, generally, title LOCAL GOVERNMENT, Vol. XIX., pp. 262 *et seq.*, 329 *et seq.*

(*r*) By the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 166.

(*s*) By the Public Health Act, 1908 (8 Edw. 7, c. 6).

(*t*) See *infra*.

(*u*) *Spurling* v. *Bantoft*, [1891] 2 Q. B. 384

(*a*) As to the weighing of carts, see, further, p. 27, *post*.

(*b*) See title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 163, 171.

(*c*) By the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 168, the directors of a market company, if authorised by a special resolution of the members, have power to sell and transfer to a district council the company's undertaking, subject to all liabilities attached to it, upon such terms as may be agreed upon between the company and the district council. For form of resolution of a market company for sale of a market to a district council, see Encyclopædia of Forms and Precedents, Vol. VIII., p. 217.

(*d*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 166. This consent has to be expressed by resolution passed in manner provided by Sched. III. to the Act; see titles LOCAL GOVERNMENT, Vol. XIX., p. 365; PUBLIC HEALTH AND LOCAL ADMINISTRATION. For form of such resolution, see Encyclopædia of Forms and Precedents, Vol. VIII., p. 216.

(*e*) Public Health Act, 1875 (38 & 39 Vict c. 55), s. 166. As to borough councils, see, generally, title LOCAL GOVERNMENT, Vol. XIX., pp. 302 *et seq.*

(*f*) Public Health Act, 1908 (8 Edw. 7, c. 6, s. 1. As to the Local

SECT. 4. Various Kinds of Markets and Fairs.

established under such statutory power so as to interfere with any rights, powers, or privileges in the nature of a franchise (*g*) enjoyed within the district by any person unless that person consents (*h*).

Tolls and bye-laws.

23. In the establishing or regulating of these statutory markets certain provisions of the Act of 1847 (*i*) apply (*k*). All tolls leviable under the statutory power require the approval of the Local Government Board (*l*). The councils are empowered to make market bye-laws, printed copies of which must be conspicuously exhibited in the market-place (*m*); and powers are given to enable the markets to be lighted by gas or other means (*n*).

(ii.) *By the Diseases of Animals Act*, 1894.

Authorities empowered to establish cattle markets.

24. Wharves, stations, lairs, sheds, and other places provided by the local authorities (*o*) for executing the Diseases of Animals Act, 1894 (*p*), for the landing, reception, keeping, sale, slaughter or disposal of foreign or other animals, carcases, fodder, litter, dung, and other things (*q*) are markets within the meaning of the Act of 1847 (*r*).

Government Board, see, generally, title CONSTITUTIONAL LAW, Vol. VII., pp. 103, 104.

(*g*) *Spurling* v. *Bantoft*, [1891] 2 Q. B. 384; *Woolwich Corporation* v. *Gibson* (1905), 92 L. T. 538; see also *Fearon* v. *Mitchell* (1872), L. R. 7 Q. B. 690; *Ellis* v. *Bridgnorth Corporation* (1861), 2 John. & H. 67; *Ellis* v. *Bridgnorth Corporation* (1863), 15 C. B. (N. S.) 52.

(*h*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 166.

(*i*) Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14); see p. 9, *ante*.

(*k*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 167, whereby the Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14), ss. 12—16, 21—41, inclusive, are incorporated in so far as those sections relate to markets; see the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 316.

(*l*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 167; *A.-G.* v. *Tynemouth Corporation* (1900), 17 T. L. R. 77. It would seem from this case that the approval is not required for stallages or rents, and, according to advice given by the law officers, it is not required for franchise tolls purchased under the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 166 (First Report of Royal Commission on Market Rights and Tolls, 1888, Vol. II., p. 4).

(*m*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 167, which enables bye-laws to be made for any of the purposes mentioned in the Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14), s. 42, so far as those purposes relate to markets.

(*n*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 161.

(*o*) As to these authorities, see title ANIMALS, Vol. I., p. 430.

(*p*) 57 & 58 Vict. c. 57.

(*q*) *Ibid.*, s. 32 (1).

(*r*) Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14); see p. 9, *ante*. The Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), s. 32 (2), incorporates the whole of the Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14), except ss. 6—9, 52, 54—59; and the provisions of the Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), s. 32, are (by *ibid.*, s. 32 (8)) applied to wharves and other places provided by a local authority under the Contagious Diseases (Animals) Act, 1869 (32 & 33 Vict. c. 70) (repealed by the Contagious Diseases (Animals) Act, 1875 (41 & 42 Vict. c. 74)), or under the Contagious Diseases (Animals) Acts, 1878—1893 (repealed by the Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), s. 78). Powers for acquiring land for wharves are given by the Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), s. 33.

Bye-laws and tolls.

25. Bye-laws for the market may be made by the local authority (*s*). They require the approval of the Board of Agriculture and Fisheries, but no other approval or allowance (*t*). Tolls for the use of the market may be imposed by bye-laws (*a*); and the tolls so received are to be carried to a separate account, and to be applied in payment of the interest and the principal of loans which the local authority has contracted under the Diseases of Animals Act, 1894 (*b*), or under the earlier Acts thereby superseded, and, subject thereto, towards the discharge of the local authority's expenses under the Act (*b*).

Returns of receipts and expenditure.

The local authority must make such periodical returns of its expenditure and receipts in respect of the market as the Board of Agriculture and Fisheries may require (*c*). If satisfied on inquiry that the tolls may properly be reduced, regard being had to the expenditure and receipts in respect of the market, to any money secured by the tolls, and to the other circumstances of the case, the Board may require the local authority to submit for approval a new schedule of tolls, and upon its failure to do so to the Board's satisfaction, may, by order, prescribe new tolls (*d*).

SECT. 5.—*Devolution of Market Rights.*

Transfer by deed.

26. A deed is generally necessary for the transfer or lease (*e*) of a franchise market or fair or of franchise tolls; for, being incorporeal hereditaments, they pass only by deed (*f*). A franchise market does not usually pass by the conveyance or demise of the market-place; for the market and the market-place are distinct properties (*g*).

(*s*) Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), s. 32 (3).

(*t*) *Ibid* Notices of application for approval must be given, and the proposed bye-laws must be published before application (*ibid.*), in conformity with the Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14).

(*a*) Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), s. 32 (4).

(*b*) *Ibid.*, s. 32 (5).

(*c*) *Ibid.*, s. 32 (6).

(*d*) *Ibid.*, s. 32 (7).

(*e*) "Fairs and markets are grantable over from man to man, in fee, for life, or years, *in infinitum*" (Shep. Touch., ed. Preston, 240). For forms of conveyance of market or fair, see Encyclopædia of Forms and Precedents, Vol. VIII., pp. 217, 219. If a person dies without an heir and intestate in respect of any estate or interest, whether legal or equitable, in a franchise market, the law of escheat applies in the same manner as if the estate or interest were a legal estate in a corporeal hereditament (Intestates Estates Act, 1884 (47 & 48 Vict. c. 71), s. 4; see title DESCENT AND DISTRIBUTION, Vol. XI., p. 24). A franchise market may be the subject-matter of dower, the widow taking one-third of the profits (Co. Litt. 32 a); see title REAL PROPERTY AND CHATTELS REAL.

(*f*) Co. Litt. 9 a, 49 a, 169 a; *Somerset* (*Duke*) v. *Fogwell* (1826), 5 B. & C. 875; see, generally, titles DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 361 *et seq.*; LANDLORD AND TENANT, Vol. XVIII., pp. 385 *et seq.*

(*g*) See *A.-G.* v. *Horner* (1884), 14 Q. B. D. 245, C. A., *per* BRETT, M.R., at p. 254. If a franchise market is leased at a sum reserved in the nature of rent, the amount due under the reservation is recoverable by action, but not by distress (Co. Litt. 47 a; Bac. Abr., tit. Rent (B.); *Jewel's Case* (1588), 5 Co. Rep. 3 a; *Gardiner* v. *Williamson* (1831), 2 B. & Ad. 336; title LANDLORD AND TENANT, Vol. XVIII., pp. 465, 466; and see *ibid.*, pp. 384, 385); unless the Crown be the lessor, in which case the amount due under the reservation may be distrained for upon any lands of the lessee (*Mountjoy's (Lord) Case* (1589), 5 Co. Rep. 3 b, 4 a, b; *Knight's Case* (1588), 5 Co. Rep. 54 b, 56 a; Chitty, Prerogatives of the

SECT. 5. **Devolution of Market Rights.**

Exceptions to these rules may arise, however, upon the construction of a local Act (*h*).

Limited powers of public bodies to alienate.

27. A public body does not possess the power to convey or demise market rights vested by statute in them, not for their own benefit, but for the benefit of the public, unless such power has been conferred by statute (*i*).

Local authorities.

Borough and district councils have no power to transfer or lease the statutory market rights which they exercise under the Public Health Acts (*j*); nor can they make a valid covenant not to exercise them (*k*).

Municipal corporations

In the absence of statutory authority, municipal corporations which own franchise market rights as part of their corporate lands cannot alienate them without the approval of the Local Government Board, and have only a limited power of leasing them without that Board's approval (*l*).

Trustees under local Acts.

28. The trustees under any local Act for the providing or obtaining of a market in or for a borough or any part of it, whether their powers under the Act do or do not extend beyond the borough, may transfer to the municipal corporation of the borough, with the consent of the town council, all the rights, powers, estates, property, and liabilities vested in or imposed on them under the Act (*m*).

Transfer of powers.

Crown, 208). The lessee's covenant to pay binds his assignee (*Egremont (Earl)* v. *Keene* (1837), 2 Jo. Ex. Ir. 307; *Lucan (Earl)* v. *Gildea* (1831), 2 Hud. & B. 635). A lease of stallage in a street market does not pass such an interest in the soil as to authorise the lessee to occupy the market-place at times when no market is being held (*Coleman* v. *Howard* (1860), 2 L. T. 463). For form of lease of a market or fair, see Encyclopædia of Forms and Precedents, Vol. VIII., p. 221.

(*h*) *Bridgland* v. *Shapter* (1839), 5 M. & W. 375, where it was held that the Act vested the right to the tolls in the plaintiff, who held the market buildings under a parol demise.

(*i*) See *Haynes* v. *Ford*, [1911] 1 Ch. 375, *per* NEVILLE, J., at p. 285; and *Tepper* v. *Nichols* (1864), 34 L. J. (C. P.) 61; *Gardner* v. *London, Chatham and Dover Rail. Co.* (No. 1), *Drawbridge* v. *Same*, *Gardner* v. *Same* (No. 2), *Imperial Mercantile Credit Association* v. *Same* (1867), 2 Ch. App. 201, 212; and see, generally, titles COMPANIES, Vol. V., p. 725; CORPORATIONS, Vol. VIII., p. 359.

(*j*) See p. 11, *ante*.

(*k*) *Spurling* v. *Bantoft*, [1891] 2 Q. B. 384, 392. The point that there was no power to lease the market tolls was not raised in *Kidderminster Corporation* v. *Hardwick* (1873), L. R. 9 Exch. 13; and see title LOCAL GOVERNMENT, Vol. XIX., p. 318.

(*l*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), ss. 108, 109, 110, as altered by the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 72. The definition of "land" in the Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 3, applies to "corporate land" as defined by the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 7, and seems to include incorporeal hereditaments; see *Great Western Rail. Co.* v. *Swindon and Cheltenham Rail. Co.* (1884), 9 App. Cas. 787; and see title LOCAL GOVERNMENT, Vol. XIX., p 318.

(*m*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 136. The effect of the transfer is to make the municipal corporation the trustees for executing by the town council the powers and provisions of the local Act, and to discharge the transferring trustees from their liabilities and obligations thereunder.

SECT 5. Devolution of Market Rights.

29. Upon the creation of a new municipal borough by a charter that extends the Municipal Corporations Act, 1882 (*n*), to such borough, there may be a readjustment of the rights, powers, and duties of any local authority derived from any Act for providing or maintaining a market (*n*).

Newly created boroughs.

Readjustment of powers.

Part. II.—The Holding of Markets and Fairs.

SECT. 1.—*Days and Hours.*

30. Markets and fairs held by grant of the Crown must be held upon the days specified in the grant (*o*), and markets and fairs held by prescription must be held upon the accustomed days, unless, in either case, the days have been lawfully changed (*p*).

Must be held on days in grant.

If the day for holding a market coincides with the day for holding a fair within the same manor, both of them may be held on that day: neither franchise is merged in the other (*q*).

Fair and market on same day.

31. If the grantee of a market or fair unlawfully changes the day, the market or fair is liable to be forfeited to the Crown (*r*). Toll cannot be legally claimed in a market or fair while held on the wrong day (*s*).

Unlawful change of day

32. If a market is held on the authorised day and also without authority on an additional day, the market held on the additional day is not a lawful market, and the Attorney-General may take proceedings to suppress it (*t*).

Unlawful extension of period

The lord of a fair must hold it for the time that he ought to hold it, and no longer: that is to say, if it be a fair by charter, for the time limited by the charter, and if it be a prescriptive fair, for the time that he ought to hold it of right (*u*); and he must, at the beginning of the fair, cry and publish how long the fair shall endure (*u*). The fair, if held over the due time, is liable to be seized on behalf of the Crown until payment of a fine for the

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(*n*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 213; see title LOCAL GOVERNMENT, Vol. XIX., p. 293.

(*o*) 15 Vin. Abr., tit. Market (F.); Com. Dig., tit. Market (I.).

(*p*) As to lawful change of day, see p. 17, *post*.

(*q*) *Newcastle (Duke)* v. *Worksop Urban Council*, [1902] 2 Ch. 145; see p. 5, *ante*.

(*r*) See p. 49, *post*; 15 Vin. Abr., tit. Market (F.); Com. Dig., tit. Market (I.); *Newcastle (Duke)* v. *Worksop Urban Council*, *supra*, at p. 158. There can be no forfeiture to the Crown of a statutory market or fair: see p. 8, *ante*.

(*s*) *Newcastle (Duke)* v. *Worksop Urban Council*, *supra*.

(*t*) *A.-G.* v. *Horner* (1884), 14 Q. B. D. 245, C. A.

(*u*) Stat. (1328) 2 Edw. 3, c. 15. For form of proclamation of fair, and notice of appointment of a bailiff and toll collector, see Encyclopædia of Forms and Precedents, Vol. VIII., p. 225.

SECT. 1. Days and Hours.

offence, after it be duly found (*a*) that the lord held the fair longer than he ought, or that the merchants remained there beyond the time cried and published (*b*). Merchants who sell ware or merchandise at the fair after that time are liable to forfeit to the Crown double the value of what is so sold, at the suit of a common informer, who may have one-fourth of what is recovered by the suit (*c*).

Fairs in metropolis held beyond lawful period.

33. The question whether a fair within the Metropolitan Police District (*d*) has been held longer than the lawful period can be submitted to a magistrate upon a summons, issued by the direction of the Commissioners of Police, against the owner or occupier of the ground upon which the fair is held, requiring him to show his right and title to hold it beyond a given period (*e*). If the owner or occupier fails to show sufficient cause to believe that the fair has been lawfully held for the whole period during which it was held, the magistrate must declare in writing that the fair is unlawful either altogether or beyond a stated period (*e*).

Unlawful days for exposing goods in fairs and markets.

34. It is unlawful to show any goods or merchandises, except necessary victual, in a fair or market on Ascension Day, Corpus Christi Day, Whit Sunday, Trinity Sunday, or other Sunday, Assumption Day, All Saints' Day, or Good Friday (*f*), under pain of forfeiture of the goods to the lord of the franchise or liberty (*g*). Grantees who have by special grant sufficient days before or after

(*a*) "The statute plainly contemplates a proceeding in the nature of office found or *scire facias*" (*Midleton (Lord)* v. *Power* (1886), 19 L. R. Ir. 1, *per* CHATTERTON, V.-C., at p. 9).

(*b*) See note (*u*), p. 15, *ante*.

(*c*) Stat. (1331) 5 Edw. 3, c. 5.

(*d*) See titles MAGISTRATES, Vol. XIX., pp 548, 575; POLICE.

(*e*) Metropolitan Police Act, 1839 (2 & 3 Vict c. 47), s. 39. After notice of the declaration the Commissioners can put down any attempt to hold the fair beyond the prescribed period, by directing caretakers to remove the booths, standings, tents, and carriages conveyed to or being upon the ground for the purpose of continuing the fair, and to take into custody persons erecting or assisting to erect the booths, standings, or tents, persons driving, accompanying, or conveyed in the carriages, and persons resorting to the ground with any show or instrument of gambling or amusement: and every such person is liable, upon summary conviction, to a penalty of not more than £10 (*ibid.*). The owner or occupier of the ground may, when summoned before the magistrate, enter into a recognisance to abide by the judgment of the High Court upon any information which the Attorney-General or Solicitor-General may exhibit against him regarding his right or title to the fair, and, if the requisite recognisance is given, the Commissioners of Police must forbear from giving notice of the magistrate's declaration, and from taking any further measures thereon, until the High Court has given judgment (*ibid.*, s. 40). The magistrate must transmit the recognisance to the Home Secretary, who may have it filed in the High Court, and may give further directions (*ibid.*).

(*f*) As to periods of time and prohibited days generally, see title TIME.

(*g*) Stat. (1448-9) 27 Hen. 6, c. 5. The exception of "the four Sundays in harvest" was repealed by stat. (1850) 13 & 14 Vict. c. 23. Stat. (1448-9) 27 Hen. 6, c. 5, does not take away any right which the lord of a fair or market had of holding it on a Sunday; see *Comyns* v. *Boyer* (1596), Cro. Eliz. 485; *Cork Corporation* v. *Shinkwin* (1825), Sm. & Bat. 395, 399.

SECT. 1. Days and Hours.

the above-mentioned feasts may hold their fairs or markets for the full number of their days, but without recourse to the festival days or Sundays or Good Fridays; and grantees who have no day to hold their fair or market but the above-mentioned festival days have power to hold it, by the authority of their old grant, and without fine or fee to the Crown, within three days next before or next after the feasts, proclamation to certify the day being first made (*h*).

Statutory change of day effected by new calendar.

35. The effect of the Calendar (New Style) Act, 1750 (*i*), was to shift to eleven days later in the new calendar the dates for the holding of all markets and fairs which were fixed to certain nominal days of the month or were dependent upon the beginning or any certain day of any month (*j*). Dates for markets and fairs which had depended upon the date of a movable feast continued to depend thereon, but in accordance with the new calendar (*k*).

Lawful change of day by charter.

36. Although there is no general right in the grantees of a market or fair to change the day for holding it, it would seem that such a change, if authorised by charter or licence of the Crown, may be lawful, and that such charter or licence may sometimes be presumed (*l*).

Change of day authorised by Secretary of State.

37. A Secretary of State, if it appear to him upon representation duly made to him, that it would be for the convenience and advantage of the public that the day or days for holding a fair should be altered, may order the alteration (*m*).

The representation must be made either by the owner of the fair (*n*), or by the council of the county borough or county district in which the fair is held (*o*), or, if it is held within the county of London, by the justices acting in and for the petty sessional division in which the fair is held (*p*).

(*h*) See note (*g*), p. 16, *ante*.

(*i*) 24 Geo. 2, c. 23.

(*j*) *Ibid.*, s. 4.

(*k*) *Ibid.*, s. 3.

(*l*) *Manchester Corporation* v. *Lyons* (1882), 22 Ch. D 287, 300, C. A.; *Midleton* (*Lord*) v. *Power* (1886), 19 L. R. Ir. 1, 12; *Newcastle* (*Duke*) v. *Worksop Urban Council*, [1902] 2 Ch. 145, 158.

(*m*) Fairs Act, 1873 (36 & 37 Vict. c. 37), which replaced the Fairs Act, 1868 (31 & 32 Vict. c. 51). For form of representation by a district council for change of days for holding a fair, see Encyclopædia of Forms and Precedents, Vol. VIII., p. 228.

(*n*) Fairs Act, 1873 (36 & 37 Vict. c. 37), s. 6. By *ibid.*, s. 3, "owner" means any person or persons or body of commissioners or body corporate entitled to hold any fair, whether in respect of the ownership of any lands or tenements or under any charter, letters patent, or otherwise howsoever.

(*o*) For the justices mentioned in the Fairs Act, 1873 (36 & 37 Vict. c. 37), s. 6, the Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 27 (1) (c), substituted the district council, except as regards the county of London (*ibid.*, s. 35). If the fair is held within a borough, including a county borough (see title LOCAL GOVERNMENT, Vol. XIX., p. 300), the borough council may make the representation in the capacity of district council; see the Local Government Act, 1894 (56 & 57 Vict. c. 73), ss. 21, 27, 32.

(*p*) Fairs Act, 1873 (36 & 37 Vict. c. 37), s. 6; see note (*o*), *supra*.

SECT. 1. Days and Hours.

Days for markets under special Act.

Days for markets under Public Health Acts

Hours.

(1.) hay and straw markets in metropolis;

38. The proper days for holding a market or fair held under a special Act with which the Act of 1847 (*q*), s. 14, is incorporated are (*r*) the days, if any, which the special Act prescribes, and such other days as the undertakers from time to time appoint by bye-law made in pursuance of the special Act or of the Act of 1847 (*a*).

In the case of markets established or regulated under the Public Health Acts (*b*), or provided under the Diseases of Animals Act, 1894 (*c*), the market authority has power from time to time to appoint by bye-law the days on which the market is to be held.

39. A market for the sale of hay and straw within the cities of London or Westminster, or thirty miles thereof, must end, between Lady Day and Michaelmas at three o'clock, and between Michaelmas and Lady Day at two o'clock, in the afternoon (*d*), unless it is a market through which there does not exist by law any public right of way for carts and carriages (*e*).

The order, like the representation, may be either (1) that the fair be held in each year on some day or days other than that or those on which it used to be held, or (2) that it be held in each year on the day or days on which it used to be held, and also on any preceding or subsequent day or days, or (3) that it be held in each year on or during a less number of days than those on which it used to be held. Before the representation is considered, notice of it and of the time when the Secretary of State will take it into consideration must be duly given and published. If the representation has been made by a borough or district council or by justices, the notice must be given to the owner of the fair, and if made by the owner of the fair, to the clerk of the council or, in the county of London, to the clerk to the justices (see note (*o*), p. 17, *ante*); and in any case the notice must be published once in the *London Gazette* and also in three successive weeks in some one and the same newspaper published in the county, city, or borough in which the fair is held, or if there be no newspaper published therein, in the newspaper of some county adjoining or near thereto (Fairs Act, 1873 (36 & 37 Vict. c. 37), s. 6). So soon as the order has been made, notice thereof must be published in the *London Gazette* and in such newspaper as is mentioned above, and thereupon the fair must be held only on the day or days mentioned in the order, and the owner of the fair may take all tolls, and do all acts, and enjoy all the rights, powers and privileges in respect thereof, and enforce them, as if the fair were held on the day or days upon which it used to be held before the making of the order (*ibid.*, s. 7).

(*q*) Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14).

(*r*) *Ibid.*, s. 14.

(*a*) Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14). As to bye-laws, see *ibid*, s. 42, and p. 20, *post*.

(*b*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 167; Public Health Act, 1908 (8 Edw. 7, c. 6).

(*c*) 57 & 58 Vict. c. 57, s. 32. As to such bye-laws, see, further, p. 24, *post*.

(*d*) Hay and Straw Act, 1796 (36 Geo. 3, c. 88), ss. 2, 15. The actual limits within which the Act applies are "the cities of London or Westminster or the weekly bills of mortality or thirty miles thereof." The "weekly bills of mortality" included the cities of London and Westminster, and the parishes immediately adjoining the City of London, together with the parishes of Islington, Lambeth, Stepney, Newington, Hackney and Redriff, but did not include Marylebone nor St. Pancras (see Wharton's Law Lexicon). As to the sale of hay and straw, see, further, titles AGRICULTURE, Vol. I., p. 291; TRADE AND TRADE UNIONS.

(*e*) Hay and Straw Act, 1834 (4 & 5 Will. 4, c. 21). This Act casts the burden of proving the public right of way upon the party suing for a

SECT. 1. Days and Hours.

(ii.) fairs in metropolis;

(iii.) under Shop Hours Act, 1904;

(iv.) for statutory markets.

40. The business and amusement of all fairs held within the Metropolitan Police District (*f*) must cease at the hour of eleven in the evening and may not begin earlier than the hour of six in the morning (*g*).

41. The hours during which a market may lawfully be kept open (*h*) may be limited by a closing order made under the Shop Hours Act, 1904 (*i*), but no such order can limit the hours for a fair (*j*).

42. Bye-laws may be made to fix the hours for the holding of a market or fair held under a special Act which incorporates the Act of 1847 (*k*), s. 42, or a market established or regulated under the Public Health Acts (*l*), or provided under the Diseases of Animals Act, 1894 (*m*).

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penalty under the Hay and Straw Act, 1796 (36 Geo. 3, c. 88). The clerk or toll-gatherer, or his deputy, is required, under a penalty, to give notice on each market day, by ringing a large handbell round the market one hour before the time, and again at the time, when the market must end (*ibid.*, s. 15). Penalties are incurred by persons who sell hay or straw in the market after the market hours (*ibid.*), and by persons having the care or direction of any waggon, wain, or cart used for the purpose of bringing hay or straw, who suffer the same to remain in the market after five o'clock in the afternoon of a market day from Lady Day to Michaelmas, or after three o'clock in the afternoon of a market day from Michaelmas to Lady Day (*ibid.*, s. 16). There is also a penalty for permitting horses drawing waggons and carts to feed and remain in the market for fifteen minutes during market hours (*ibid.*, s 17). The penalties, when recovered upon conviction, are payable to the prosecutor (*ibid.*, s. 30)

(*f*) As to this district, see titles MAGISTRATES, Vol. XIX., p. 548; POLICE.

(*g*) Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), s. 38. If, during the continuance of any such fair, any house, room, booth, standing, tent, caravan, waggon, or other place, is open within the prohibited hours for any purpose of business or amusement in the place where the fair is held, the person having the care or management of such house or other place is liable to be taken into custody by a constable, and to be fined not more than £5. Persons in the house or other place who do not quit it at the constable's direction may also be taken into custody, and may be fined not more than 40*s*. As to places of amusement generally, see title THEATRES AND OTHER PLACES OF ENTERTAINMENT.

(*h*) As to the hours for selling in market overt, see p. 53, *post*.

(*i*) 4 Edw. 7, c 31 Markets are not specially mentioned, but a market-place would seem to fall within the definition of shop, as being "premises or a place where retail trade is carried on" (*ibid.*, s. 8). The employment of young persons in markets and fairs after certain hours is prohibited by the Shop Hours Acts, 1892—1895 (55 & 56 Vict. c. 62; 56 & 57 Vict. c. 67; 58 & 59 Vict. c. 5). "Shops" in these Acts means "retail and wholesale shops, markets, stalls, and warehouses"; see title FACTORIES AND SHOPS, Vol. XIV., pp. 509, 510. The Seats for Shop Assistants Act, 1899 (62 & 63 Vict. c. 21), also applies to markets and fairs, as that Act is to be read and construed as one with the Shop Hours Acts, 1892—1895; see title FACTORIES AND SHOPS, Vol. XIV., p. 463.

(*j*) See *ibid.*, p. 511.

(*k*) Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14); see note (*s*), p. 23, *post*.

(*l*) Public Health Act, 1875 (38 & 39 Vict. c. 55); Public Health Act, 1908 (8 Edw. 7, c. 6); see p. 23, *post*.

(*m*) 57 & 58 Vict. c. 57; p. 24, *post*.

SECT. 2. Place and Right of Removal.

SECT. 2.—*Place and Right of Removal.*

General right of removal.

43. The owner of a market or fair has, as a rule, the right to remove it, whenever he thinks fit, to a new place, provided that he keeps within the limits within which his market or fair may be lawfully held, and that he takes care to secure reasonable accommodation for the public (*n*); and if the old market-place has ceased to afford reasonable accommodation it may be his duty to change it (*o*).

Area within which removal legal.

44. The limits within which a market or fair may be lawfully held are those defined by the grant or statute by which it is authorised (*p*). If a statute requires a particular place to be devoted to market purposes, it necessarily curtails the right of removal (*q*). Where a market or fair is granted to be held in a district, such as a borough, township, or manor, it may be held throughout such district or in any one or more places within such district (*r*), but where it is granted to be held in a place defined by metes and bounds it must be held within those metes and bounds (*s*).

(*n*) *Curwen* v. *Salkeld* (1803), 3 East, 538; *R.* v. *Cotterill* (1817), 1 B. & Ald. 67; *De Rutzen* (*Baron and Baroness*) v. *Lloyd* (1836), 5 Ad. & El. 456; *Edinburgh* (*Magistrates*) v. *Blackie* (1886), 11 App. Cas. 665. It seems to be unnecessary that he should have the ownership of the soil, provided he has the permission of the owner (*A.-G.* v. *Horner* (1884), 14 Q. B. D. 245, C. A.; affirmed (1885), 11 App. Cas. 66; *Lockwood* v. *Wood* (1841), 6 Q. B. 31); and it seems that there may be a prescriptive right in the nature of an easement to hold a market on the land of another (see *Austin* v. *Whitlred* (1747), Willes, 623; *R* —— v. —— (1433), Y. B. 11 Hen. 6, fo. 23). But unless he has the soil the market owner cannot take stallage (*Elwood* v. *Bullock* (1844), 6 Q. B. 383, 411). As to stallage, see, further, p. 38, *post*.

(*o*) *Mosley* v. *Walker* (1827), 7 B. & C. 40, *per* BAYLEY, J., at p. 55.

(*p*) As to markets held under charter, see p. 6, *ante*; as to those held by statutory authority, see p. 8, *ante*.

(*q*) *Edinburgh* (*Magistrates*) v. *Blackie*, *supra*.

(*r*) *Islington Market Bill* (1835), 3 Cl. & Fin. 513, 518, H. L. (opinion of the judges); *Dixon* v. *Robinson* (1686), 3 Mod. Rep. 107; *Mosley* v. *Walker*, *supra*, *per* BAYLEY, J., at p. 54. Where the boundaries of an ancient borough have been extended for all purposes by statute, a market held by prescription within the borough may be removed to a place outside the old, but within the new, boundaries (*Dorchester Corporation* v. *Ensor* (1869), L. R. 4 Exch. 335). A market or fair held by authority of a local Act incorporating the Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14), s. 14, must be held in the market-place, *i.e.*, the market-place acquired under the powers of the special Act (*ibid.*, s. 14). A market-place provided under the powers of the Public Health Acts must lie within the district of the urban or rural council by which the market is established (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 166; Public Health Act, 1908 (8 Edw. 7, c. 67)); and the market must be held in the market-place so provided (Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14), s. 14). Land for the purpose of markets held under the Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), may be acquired within or without the district of the authority (as to the authority, see title ANIMALS, Vol. I., p. 430), and it seems, accordingly, that the market-place may be outside the district. The market must be held in the market-place so provided (Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14), s. 14).

(*s*) See *Islington Market Bill*, *supra*, at p. 518; *Prince* v. *Lewis* (1826), 5 B. & C. 363. A grant to hold a market "*in sive juxta*" a certain defined area enables the grantee to hold the market on the land

SECT. 2. Place and Right of Removal.

Where a market is owned by a borough corporation or a lord of a manor by a prescriptive title, a jury may properly infer that it was originally granted to be held anywhere within the borough or the manor, though it has always been held in a particular place within it (*t*).

When removal illegal.

45. A removal is illegal if the public are thereby deprived of any right, such as the right to sell or expose for sale their goods without being required to make any payment for so doing (*a*); and a removal cannot be justified as against particular persons if it deprives them of special market privileges which they had lawfully acquired by grant from the market owner or his predecessors in title, for such a removal would be in derogation of the grant (*b*).

Effect of illegal removal.

46. If a removal be unlawful, the public may still frequent the old market-place (*c*), but this they may not do if the removal is lawful and reasonable notice of the removal has been given (*d*). An unlawful removal cannot, however, justify the wrongful erection of a rival market (*e*). The removal of a charter market to an inconvenient place prejudicial to the object of the grant would lay the foundation of a *scire facias* by the Crown to repeal the grant (*f*).

Removal of part of market.

47. A removal need not be of the whole market: a market for the sale of various commodities may be divided, and a new place may be provided for the sale of some only of the commodities, and not of others (*g*).

Enlargement of market place.

48. The owner of a market or fair has, as a rule, a right of enlarging the place for holding it, similar to the right which he has of changing the place; and where a market has been granted without metes and bounds the market-place may be enlarged or extended from time to time within the authorised limit (*h*).

immediately surrounding such area (*A.-G.* v. *Horner* (1885), 11 App Cas. 66).

(*t*) *R.* v. *Cotterill* (1817), 1 B. & Ald. 67; *De Rutzen* (*Baron and Baroness*) v. *Lloyd* (1836), 5 Ad. & El. 456; *Gingell, Son and Foskett, Ltd.* v. *Stepney Borough Council*, [1906] 2 K. B. 468, [1908] 1 K. B. 115, C. A.; affirmed, [1909] A. C. 245.

(*a*) *R.* v. *Starkey* (1837), 7 Ad. & El. 95.

(*b*) *Ellis* v. *Bridgnorth Corporation* (1863), 15 C. B. (N. S.) 52. But it seems that where the owner of a market has held it on the land of another person, the taking of stallage by that other person will be referred *prima facie* to his ownership of the soil, and not to a grant from the owner of the market, and accordingly a removal of the market by the owner thereof on to his own land is *primâ facie* not a derogation of any grant (*De Rutzen* (*Baron and Baroness*) v. *Lloyd*, *supra*, at p. 458, n.).

(*c*) *R.* v. *Starkey*, *supra*.

(*d*) *Curwen* v. *Salkeld* (1803), 3 East, 538. For form of notice of removal of market or fair, see Encyclopædia of Forms and Precedents, Vol. VIII., p. 226.

(*e*) *Middleton* (*Lord*) v. *Power* (1886), 19 L. R. Ir. 1. As to rival markets, see, further, p. 44, *post*.

(*f*) *R.* v. *Cotterill*, *supra*, *per* Lord ELLENBOROUGH, C.J., at p. 75. As to *scire facias*, see title CROWN PRACTICE, Vol. X., p. 35.

(*g*) *Wortley* v. *Nottingham Local Board* (1870), 21 L. T. 582; *Mosley* v. *Walker* (1827), 7 B. & C. 40, *per* BAYLEY, J., at p. 54.

(*h*) *A.-G.* v. *Horner*, *supra*; *Gingell, Son and Foskett, Ltd.* v. *Stepney*

SECT. 2. Place and Right of Removal.

Markets and fairs on highways.

49. A market or fair may lawfully be held upon a portion of a highway, sufficient room being left for the public to pass and repass, if the dedication of the highway to the public was subject to the right of partial interruption during a certain limited and not unreasonable time for the purposes of the market or fair as often as it might be lawfully held (*i*).

Dedication subject to market rights.

The owner of land, when dedicating it to the use of the public, may reserve the right to use it for market purposes (*k*), and when both the dedication of the highway and the market are immemorial, and the market has always been held upon the highway, it may properly be presumed that the dedication was subject to the right to hold the market thereon (*l*).

Market lawfully held on highway, not a nuisance.

50. Where a market or fair is lawfully held on a highway, an obstruction caused by what is properly done in exercise of the franchise is not an indictable offence, nor is it liable to be abated as a nuisance to the highway (*m*). Proceedings in respect of such an obstruction cannot be taken under Acts of Parliament which, without making illegal that which is otherwise legal, merely provide new remedies for nuisances on highways (*n*).

Borough Council, [1906] 2 K. B. 468; [1908] 1 K. B. 115, C. A.; affirmed, [1909] A. C. 245. Statutory powers for the "enlargement" of a market-place have been construed as authorising the erection of a public corn exchange upon a site which, though not adjacent to the market-place, was sufficiently near to have the effect of increasing the space upon which the market was held (*A.-G.* v. *Cambridge Corporation* (1873), L. R. 6 H. L. 303).

(*i*) *Elwood* v. *Bullock* (1844), 6 Q. B. 383.

(*k*) *A.-G.* v. *Horner* (1885), 11 App. Cas. 66, 86 (where the House of Lords drew the inference from documents and evidence that streets dedicated after the grant of a market in 1682 were dedicated subject to the rights of the owner to extend the market into those streets). In *Gingell, Son and Foskett, Ltd.* v. *Stepney Borough Council*, [1908] 1 K. B. 115, C. A.; affirmed, [1909] A. C. 245, it was held that a statutory dedication of a street was subject to market rights. It has been suggested that the Crown might lawfully grant a franchise to hold a market on an existing highway after proper inquiry; see *A.-G.* v. *Horner* (1884), 14 Q. B. D. 245, C. A., *per* BRETT, M.R., at p. 258, *per* LINDLEY, L.J., at p. 265; *Gingell, Son and Foskett, Ltd.* v. *Stepney Borough Council*, [1908] 1 K. B. 115, C. A., *per* FLETCHER MOULTON, L.J., at p. 132; *Elwood* v. *Bullock*, *supra*, *per* Lord DENMAN, C.J., at p. 407; see also title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p 46.

(*l*) *Elwood* v. *Bullock*, *supra*. Such a presumption will not be made merely from thirty years' user of an ancient highway (*Davis* v. *Harvey* (1887), 3 T. L. R. 800).

(*m*) *Elwood* v. *Bullock*, *supra*; *Goldsmid* v. *Great Eastern Rail. Co.* (1883), 25 Ch. D. 511, C. A., *per* COTTON, L.J., and *per* FRY, L.J., at p. 554; *R.* v. *Smith* (1802), 4 Esp. 111, as explained in *Gerring* v. *Barfield* (1864), 16 C. B. (N. S.) 597, by WILLES, J., at p. 601.

(*n*) *Goldsmid* v. *Great Eastern Rail. Co.*, *supra*; *A.-G.* v. *Horner* (1884), 14 Q. B. D. 245, C. A. (cases upon Paving Acts of Geo. 3); see also *Ball* v. *Ward* (1875), 33 L. T. 170. Some statutes containing provisions prohibiting street nuisances expressly except acts done in exercise of market rights; see the Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 23, and the Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), s. 53; see also titles NUISANCE; STREET AND AERIAL TRAFFIC. Proceedings against a market owner who erects stalls for animals on a highway may be taken under the Public Health Act, 1875 (38 & 39 Vict. c. 55),

SECT. 2. Place and Right of Removal.

51. It is illegal to hold a market or fair in a churchyard (*o*), or upon land which is reserved by statute for a special purpose not consistent with its use as a place for holding markets or fairs (*p*).

Market in churchyard, illegal.

SECT. 3.—*Bye-Laws.*

52. The following authorities may make and from time to time repeal or alter bye-laws for markets:—

What authorities may make bye-laws.

(1) Urban and rural district councils with respect to markets belonging to them (*q*);

(2) The Common Council of the City of London and county councils and borough councils with respect to markets provided or carried on by them in accordance with the provisions of the Diseases of Animals Act, 1894 (*r*);

(3) Persons authorised to construct or regulate markets by special Acts incorporating the Act of 1847 (*s*), s. 42.

53. The purposes for which bye-laws may be made are (*t*):—

Purposes for which bye-laws may be made.

(1) For regulating the use of the market-place and the buildings, stalls, pens and standings therein, and for preventing nuisances and obstructions therein or in the immediate approaches thereto (*u*);

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s. 94, in respect of a nuisance created by the droppings of animals, as the person by whose "act, default, permission or sufferance the nuisance arises," or as the "occupier of the premises on which the nuisance arises" (*Draper* v. *Sperring* (1861), 10 C. B (N. S.) 113); see title NUISANCE. Statutes for the prevention of obstructions or other nuisances upon highways ought not to be construed as prohibiting the exercise thereon of market rights subject to which the highways exist (*A.-G.* v. *Horner* (1885), 11 App. Cas. 66, affirming S. C. (1884), 14 Q. B. D. 245, C. A.; *Great Eastern Rail. Co.* v. *Goldsmid* (1884), 9 App. Cas. 927, affirming S. C. (1883), 25 Ch. D. 511, C. A.) A power to make local bye-laws against such nuisances does not justify a bye-law which purports to interfere with such rights (*Elwood* v. *Bullock* (1844), 6 Q. B. 383); see title NUISANCE.

(*o*) Statute of Winchester (1285) 13 Edw. 1, stat. 2, c. 6.

(*p*) *A.-G.* v. *Southampton Corporation* (1859), 29 L. J. (CH.) 282.

(*q*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 167; Public Health Act, 1908 (8 Edw. 7, c. 6).

(*r*) 57 & 58 Vict. c. 57, s. 32 (2), (3). As to what markets are included, see note (*r*), p. 12, *ante*, and, as to the local authorities, see title ANIMALS, Vol. I., p. 430.

(*s*) Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14). If the special Act authorises the holding of fairs the power to make bye-laws extends to the fairs (*ibid.* s. 42). The bye-laws must not be repugnant to the laws of that part of the United Kingdom where they are to have effect, or to the provisions of the Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14), or of the Act with which those provisions are incorporated, or any Act incorporated therewith (*ibid.*, s. 42).

(*t*) Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14), s. 42. For forms of model bye-laws, see Encyclopædia of Forms and Precedents, Vol. VIII., p. 229.

(*u*) Instances of bye-laws which have been held valid are: Providing that no auctioneer should sell cattle by auction before noon on the market day (*Collins* v. *Wells Corporation* (1885), 1 T. L. R. 328); appropriating particular parts of the market place for the sale of particular kinds of commodities (*Savage* v. *Brook* (1863), 15 C. B. (N. S.) 264); appropriating part of the market place for sales by wholesale (*Strike* v. *Collins* (1886), 55 L. T. 182); providing that sale rings should only be used for public auction sales (*Scott* v. *Glasgow Corporation*, [1899] A. C. 470). A bye-law prohibiting persons from exhibiting for sale in the market

SECT. 3. Bye-laws.

(2) For fixing the days and the hours during each day on which the market or fair shall be held;

(3) For inspection of the slaughter-houses (*a*), for keeping them in a clean and proper state, for removing filth and refuse at least once in every twenty-four hours, for requiring that they be provided with a sufficient supply of water (*b*), and for preventing the exercise of cruelty therein;

(4) For regulating the carriers resorting to the market or fair, and fixing the rates for carrying articles therefrom within the limits of the special Act;

(5) For regulating the use of the weighing machines provided by the undertakers, and for preventing the use of false or defective weights, scales, or measures;

(6) For preventing the sale or exposure for sale of unwholesome provisions in the market or fair.

Confirmation and approval of bye-laws.

54. Bye-laws made by borough councils or district councils with respect to markets belonging to them are made, confirmed, and published, and are enforceable, in the same way as other bye-laws made by them for purposes of the Public Health Acts (*c*). Printed copies must also be conspicuously exhibited in the market (*d*).

Bye-laws (*e*) made by the authorities empowered to make bye-laws under the Diseases of Animals Act, 1894 (*f*), must be approved by the Board of Agriculture and Fisheries (*g*). Bye-laws (*e*) authorised by special Acts which incorporate the Act of 1847 (*h*), s. 44, require the confirmation of the Local Government Board (*i*). Before application can be made for such approval or confirmation, as the case may require, public notice of the intention to apply must be given (*k*), and parties aggrieved may on giving the required notice

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particular kinds of marketable commodities "without being authorised so to do by the superintendent of the market" is bad (*Wortley* v. *Nottingham Local Board* (1870), 21 L. T. 582).

(*a*) As to slaughter-houses, see titles ANIMALS, Vol I., p 413; PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*b*) For form of agreement with water company for supply of water for watering and flushing a market or fair, see Encyclopædia of Forms and Precedents, Vol. VIII, p. 590

(*c*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 167; Public Health, Act, 1908 (8 Edw. 7, c. 6); see titles LOCAL GOVERNMENT, Vol. XIX, pp. 266, 328; PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*d*) Public Health Act, 1875 (38 & 39 Vict. c 55), s. 167; Public Health Act, 1908 (8 Edw. 7, c. 6).

(*e*) Except such as relate solely to the officers or servants of the market authority (Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14), s. 44).

(*f*) 57 & 58 Vict. c. 57, s. 32 (3).

(*g*) See p. 13, *ante*. As to the Board of Agriculture and Fisheries, see title AGRICULTURE, Vol. I., p. 297.

(*h*) Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14).

(*i*) *Ibid.*, s. 44; Public Health (Confirmation of Byelaws) Act, 1884 (47 & 48 Vict. c. 12), ss. 3, 4. If made before 10th August, 1872, such bye-laws must have been confirmed by a Secretary of State (*ibid.*, s. 2); if made on or after that date, by the Local Government Board (*ibid.*). If, however, the special Act expressly provides for some other mode of confirmation, allowance, or approval, the bye-laws, whenever made, must be, or have been, made accordingly (*ibid.*).

(*k*) Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14), ss. 45, 46; Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), s. 32 (3). Notice must

of objection be heard thereon (*l*). After such approval or confirmation, the bye-laws must be printed and published (*m*), and are then binding on all parties and are a sufficient warrant for all persons acting under them (*n*). They are enforceable by the penalties which they impose, not exceeding £5 for each breach (*o*).

SECT. 3. Bye-laws.

Publication and enforcement.

SECT. 4.—*Statutory Regulations.*

SUB-SECT. 1.—*Provision of Weights and Measures* (*p*).

General duty to provide weights and measures.

55. The owners or managers of any public market in which goods are exposed or kept for sale are required to provide and keep at the office of the clerk or toll collector, or some other convenient place, proper scales and balances and weights and measures or

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be given in one or more newspapers of the county in which the market or fair is situate, or if there is none in such county, then of an adjoining county, one month before, and a copy of the proposed bye-laws must be kept open to inspection at the office of the undertakers and another copy put up in the market-place or fair one month before the application (Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14), s. 46).

(*l*) *Ibid.*, s. 45. Ten days' notice to the undertakers, stating the nature of objection, is required. The objector may be heard by counsel, solicitor, or agent (*ibid.*).

(*m*) The original bye-laws must be in writing under the common seal of the undertakers if a body corporate, or, if not, under the hands and seals of two of the undertakers (Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14), s. 42). Publication must be in the manner, if any, prescribed by the special Act; if none be prescribed, the bye-laws must be put up in the office of the undertakers and in the market-place, and a copy must be supplied without charge to every person applying (*ibid.*, s. 47). As no mode of publication is prescribed by the Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), the above is the proper mode of publication for markets under that Act. As to proof of the bye-laws and of their publication, see the Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14), s. 49; see also title EVIDENCE, Vol. XIII., p. 526.

(*n*) Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14), s. 48.

(*o*) *Ibid.*, s. 43. When the market or fair is established under an Act incorporating *ibid*, s. 52, the penalties are by that section recoverable on summary conviction in accordance with the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), ss. 140—161; see title RAILWAYS AND CANALS; compare title FOOD AND DRUGS, Vol. XV, pp. 35 *et seq.* As to enforcement of orders of courts of summary jurisdiction, see title MAGISTRATES, Vol. XIX., pp. 602 *et seq.* The Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14), s. 52, is not incorporated with the Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), and there appears to be no procedure provided for recovery of penalties for breach of bye-laws made in respect of markets under that Act. The Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), ss. 51—57, appear to be inapplicable.

(*p*) The duty of examining, marking and sealing weights and measures was formerly exercised by the officer known as the clerk of the market. By stat. (1535-6) 27 Hen. 8, c. 24, s. 10, the King's clerk of the market, and no other, might exercise the office during the time of the King's abode in any place, notwithstanding any grant to the contrary; see, further, title COURTS, Vol. IX., p. 137. By stat. (1640) 16 Car. 1, c. 19, the jurisdiction of that official was confined to the verge of the King's court, and by stat. (1670) 22 & 23 Car. 2, c. 12, the execution of the office elsewhere was entrusted in all places where markets were holden to the mayor, bailiffs, or head officer, or other person having the benefit of the market, and these persons were required to gauge and seal all measures brought to them for that purpose. The stats. (1640) 16 Car. 1, c. 19, (1670) 22 & 23 Car. 2, c. 12, are repealed (Statute Law Revision Act.

SECT. 4. Statutory Regulations.

other machines for weighing or measuring goods (*q*), and the clerk or toll collector must at all reasonable times weigh or measure goods sold or offered for sale in the market if called on so to do (*r*). He may also, without being called on, weigh or measure such goods, and may take proceedings for recovering any fine to which the person selling them or offering or exposing them for sale is liable by reason of deficiency in weight or measure (*s*).

Under Markets and Fairs Clauses Act, 1847.

56. In markets and fairs to which the clauses of the Act of 1847 (*t*) with respect to weighing goods and carts (*u*) are applicable the undertakers are required to provide sufficient and proper weighing houses or places for weighing or measuring the commodities sold in the market or fair, and to keep therein proper weights, scales and measures, and to appoint persons to attend to the weighing and measuring (*v*). Every person selling or offering

1863 (26 & 27 Vict. c. 125), but without prejudice to existing franchises; and by the Bread Act, 1836 (6 & 7 Will. 4, c. 37), s. 33, "the rights of any clerk or clerks of the market in any place" are preserved. The Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), s. 69, also preserves to corporations their existing rights as clerks of the market. Before the stats. (1640) 16 Car. 1, c. 19, (1670) 22 & 23 Car. 2, c. 12, many corporations were by charter made clerks of the market or empowered to appoint clerks of the market, and the office still exists in such corporations by virtue of their charters; but the duties appear to be practically obsolete. By the Weights and Measures (Purchase) Act, 1892 (55 & 56 Vict. c. 18), county and borough councils are empowered to purchase franchises of weights and measures with the consent of the owners and of the Board of Trade; see title WEIGHTS AND MEASURES.

(*q*) Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), s. 86, Sched. VI., Part II. The owners or managers must have them tested twice a year by the inspector of weights and measures (*ibid.*). The expenses of purchase, adjusting and testing are to be paid out of money collected for tolls in the market (*ibid*). For any contravention of this provision there is a penalty not exceeding £5, recoverable on summary conviction (*ibid*). As to enforcement of orders of courts of summary jurisdiction, see title MAGISTRATES, Vol. XIX., pp. 602 *et seq.*

(*r*) Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), s. 86, Sched. VI., Part II. For contravention of the duty he is liable to a penalty not exceeding £5, recoverable on summary conviction (*ibid.*). He is entitled to be paid for performing this duty such reasonable sum as shall be decided upon by the owners or managers, subject to the approval and revision of the justices in general or quarter sessions (*ibid.*).

(*s*) Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), s. 86, Sched. VI., Part II. Upon conviction of the offender (penalty not exceeding £5), the court may award out of the fine to such clerk or toll collector such reasonable remuneration as to the court seems fit (*ibid.*).

(*t*) Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14).

(*u*) *Ibid.*, ss. 21—30. These clauses are incorporated with the Public Health Act, 1875 (38 & 39 Vict. c. 55), by *ibid.*, s. 167, with the Public Health Act, 1908 (8 Edw. 7, c. 6), by *ibid.*, s. 1, and with the Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), by *ibid.*, s. 32 (2), so as to apply to markets established under any of those Acts.

(*v*) Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14), s. 21. If the person appointed refuses or neglects to weigh or measure when required, he is liable to a penalty not exceeding 40*s.* (*ibid.*, s. 23). By *ibid.*, s. 34, the tolls, *i.e.*, the tolls, if any, authorised by the special Act incorporating the Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14), for weighing or measuring are to be paid in advance to the person appointed to weigh or measure. In markets established by district councils under

for sale any articles in the market or fair must cause them to be weighed by the weights and scales so provided, if required to do so by the buyer (*w*).

Weighing of carts.

57. The undertakers are also bound to keep proper machines for weighing carts in which goods are brought to the market (*x*), and to appoint a person to afford the use of such machines to the public for weighing the carts with or without their loading (*a*). Such weighing may be done at the request of the buyer or seller, and the driver is bound, if required, to take a cart which has been weighed with its loading to the nearest weighing machine to be weighed after its loading is discharged (*b*).

Penalties for frauds.

58. Penalties (*c*) are imposed for frauds and other offences in connection with weighing committed by drivers of carts (*d*), buyers or sellers of goods brought in carts (*e*), or the keepers of weighing machines (*f*), and also upon every person who knowingly acts or assists in committing any fraud respecting the weighing or weight of any cart (*g*).

SUB-SECT. 2.—*Facilities for Weighing Cattle.*

Weighing of cattle.

59. Certain duties are imposed (*h*) upon the market authority (*i*)

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the Public Health Acts, 1875 (38 & 39 Vict. c. 55), and 1908 (8 Edw. 7, c. 6), and markets established under the Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), there appears to be no general power to take tolls for weighing or measuring; but as to tolls for weighing cattle, see p. 29, *post*.

(*w*) Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14), s. 22; under a penalty not exceeding 40*s*. if he refuses (*ibi l.*).

(*x*) Or within "the prescribed limits," as to which see note (*f*), p. 47, *post*.

(*a*) Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14), s. 24.

(*b*) *Ibid*, s. 25. The driver is entitled to be paid upon a scale set out in *ibid.*, s. 25, for taking back the cart if the distance exceeds half a mile. He is liable to a penalty not exceeding 20*s*. if he refuses to take a cart to the weighing machine or to assist in the weighing (*ibid.*, s. 26).

(*c*) Not exceeding £5 for each offence, recoverable on summary conviction (Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14), s. 27).

(*d*) The offences include: (1) knowingly having anything in the cart in addition to its proper loading; (2) altering any ticket, (3) making or using any ticket falsely stating the weight of the cart or its load; (4) removing part of the loading and representing the residue to be the full loading denoted by a ticket; (5) changing the wheels or other parts of the cart after being requested to allow the cart to be weighed without its loading (Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14), s. 27).

(*e*) The offence specified is doing anything to a cart or its loading whereby the true weight is altered before weighing (*ibid.*, s. 28).

(*f*) The offences include: (1) wilfully neglecting to weigh any cart with or without its loading; (2) not fairly weighing; (3) not delivering to the buyer or seller or any person interested a ticket specifying the weight; (4) giving a false ticket; (5) weighing a cart with or without its loading knowing that anything has been done to alter its true weight; (6) knowingly assisting in or conniving at any fraud concerning the weighing, or making or conniving at making any false representation as to the weight (*ibid.*, s. 29).

(*g*) *Ibid.*, s. 30.

(*h*) By the Markets and Fairs (Weighing of Cattle) Acts, 1887 (50 & 51 Vict. c. 27), and 1891 (54 & 55 Vict. c. 70).

(*i*) *I.e.*, the company, corporation, or person by whom the tolls in respect

SECT. 4. Statutory Regulations.

of any market or fair in which tolls (*k*) are for the time being authorised to be taken and actually are taken in respect of cattle (*l*), unless exemption is granted by an order of the Board of Agriculture and Fisheries (*m*). These duties are to provide and maintain, in or near the market or fair, sufficient and proper buildings or places for weighing cattle brought for sale within the market or fair (*n*); to keep therein or near thereto weighing machines and weights for the purpose of weighing cattle (*o*); to appoint proper persons to have charge of such machines and weights, and to afford the use of them to the public for that purpose (*p*); to have the accuracy of such machines and weights tested at least twice in every year by the local inspector of weights and measures, at the cost of the market authority (*q*); and, generally, to provide and maintain, to the satisfaction of the Board of Agriculture and Fisheries, sufficient and suitable accommodation for weighing cattle (*r*).

Tolls in respect of weighing of cattle.

A market authority (*s*) which performs these duties may, unless it

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of cattle are taken (Markets and Fairs (Weighing of Cattle) Act, 1887 (50 & 51 Vict. c. 27), s. 2).

(*k*) It is doubtful whether the provision applies to markets and fairs in which only stallages, or payments in the nature of stallage, are taken. Possibly the phrase "tolls taken in respect of cattle," used in *ibid.*, s. 3, may be held to include payments in the nature of stallage payable in respect of standing room for cattle.

(*l*) Including rams, ewes, wethers, lambs, and swine (*ibid.*, s. 3).

(*m*) By *ibid.*, s. 9, as amended by the Markets and Fairs (Weighing of Cattle) Act, 1891 (54 & 55 Vict. c. 70), s. 1, an order of exemption for a period not exceeding three years may be made by the Board, upon the application of a market authority, on the ground that the sale of cattle at the market or fair is, or is likely to be, so small as to render it inexpedient to enforce the provision and maintenance by them of a place for weighing cattle and of a weighing machine. Any such order may at any time be wholly or partially rescinded, altered, or extended by any subsequent order (*ibid.*). As to the prohibition against a sale by an auctioneer where facilities for weighing are not provided, see title AUCTION AND AUCTIONEERS, Vol. I, p. 509.

(*n*) Markets and Fairs (Weighing of Cattle) Act, 1887 (50 & 51 Vict. c. 27), s. 4.

(*o*) *Ibid.* In the case of a cattle market held on a highway dedicated subject to market rights, the erection of a permanent weighing machine on such highway may be justifiable under this provision (*McIntosh* v. *Romford Local Board* (1889), 61 L. T. 185).

(*p*) Markets and Fairs (Weighing of Cattle) Act, 1887 (50 & 51 Vict. c. 27), s. 4. By *ibid.*, s. 6, any person so appointed is liable to a fine on summary conviction if he refuses or neglects, when required, to weigh cattle sold in the market or fair, or refuses or neglects to deliver to the seller or buyer a ticket specifying the true weight of the cattle weighed, or gives to any person a false ticket or account of any cattle weighed; and so by *ibid.*, s. 7, is any person if he knowingly acts or assists in committing any fraud respecting the weighing of any cattle weighed in pursuance of the Act. By *ibid.*, s. 5, every person selling, offering for sale, or buying any cattle in a market or fair provided with accommodation for weighing cattle may, subject to his paying any authorised tolls in respect thereof, require such cattle to be weighed.

(*q*) *Ibid.*, s. 4.

(*r*) Markets and Fairs (Weighing of Cattle) Act, 1891 (54 & 55 Vict. c. 70), s. 2.

(*s*) See note (*i*), p. 27, *ante*.

is otherwise expressly provided by any Act, take tolls in respect of the weighing of cattle (*t*). But, so long as failure to perform the duties continues, it is unlawful for a market authority (*u*) to demand, receive, or recover any toll whatever in respect of any cattle brought to the market or fair for sale (*a*).

SUB-SECT. 3.—*Accounts and Statistical Returns.*

Annual returns in respect of tolls and dues

60. The proper officer (*b*) of every corporation or body of persons (*c*), not being a municipal corporation (*d*) or a county (*e*) or district council (*f*), authorised by Parliament to levy tolls or dues in respect of markets, must make to the Local Government Board annual returns (*g*) of the sums levied or received by them in respect of such tolls or dues and of the expenditure thereof (*h*).

The local authority having control of a market authorised by the Diseases of Animals Act, 1894 (*i*), must carry to a separate

(*t*) Markets and Fairs (Weighing of Cattle) Act, 1887 (50 & 51 Vict. c. 27), s. 8. The tolls must not exceed the amounts specified in the schedule to the Act, or such other amounts as may be authorised by the Local Government Board to be taken by the market authority (*ibid.*). The Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14), ss. 36—41 (both inclusive) (see p. 42, *post*), apply to these tolls as if the Markets and Fairs (Weighing of Cattle) Act, 1887 (50 & 51 Vict. c. 27), were the special Act and the market authority were the undertakers (*ibid.*, s 8). The tolls are payable by the person requiring the cattle to be weighed (*ibid.*, s. 5).

(*u*) See note (*i*), p. 27, *ante*.

(*a*) Markets and Fairs (Weighing of Cattle) Act, 1887 (50 & 51 Vict. c. 27), s. 4; Markets and Fairs (Weighing of Cattle) Act, 1891 (54 & 55 Vict. c. 70), s. 2. A person who demands or receives any such toll, while the market authority is in default, is liable on summary conviction to a fine not exceeding £5 (Markets and Fairs (Weighing of Cattle) Act, 1887 (50 & 51 Vict. c. 27), s. 4). As to enforcement of orders of courts of summary jurisdiction, see title MAGISTRATES, Vol. XIX., pp. 602 *et seq.*

(*b*) That is, the clerk, or, where there is no clerk, the treasurer or other officer keeping the accounts of the tolls or dues (Local Taxation Returns Act, 1877 (40 & 41 Vict. c. 66), s. 2).

(*c*) *I.e.*, "any corporation, justices, commissioners, district or other board, vestry, inspectors, trustees, or other body of persons" (Local Taxation Returns Act, 1860 (23 & 24 Vict. c. 51), s. 1).

(*d*) Municipal corporations to which the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), applies are excepted by *ibid.*, s. 5 and Sched. I., Part II. As to such corporations, see title LOCAL GOVERNMENT, Vol. XIX., pp. 293 *et seq.*

(*e*) County councils are excepted by the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 71. As to such councils, see title LOCAL GOVERNMENT, Vol. XIX., pp 340 *et seq.*

(*f*) District councils the accounts of which are audited by a district auditor are excepted unless the Board require a return to be made (District Auditors Act, 1879 (42 & 43 Vict. c. 6), s. 3). As to such councils, see title LOCAL GOVERNMENT, Vol. XIX., pp. 262 *et seq.*, 329 *et seq.*

(*g*) The returns are to be made for the financial year ending 25th March, or such other day as the Board may prescribe, and are to show the amounts levied and expended, with such other particulars as the Board may require, and to be in such form as the Board may prescribe

(*h*) Local Taxation Returns Acts, 1860 (23 & 24 Vict. c. 51), and 1877 (40 & 41 Vict. c. 66).

(*i*) 57 & 58 Vict. c. 57.

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account all sums received by it in respect of tolls, and make such periodical returns to the Board of Agriculture and Fisheries of its expenditure and receipts as the Board may require (*j*).

Abstract of annual accounts.

61. In the case of markets established under local Acts incorporating the Act of 1847 (*k*), s. 50, the undertakers must, at the end of each financial year, cause an account in abstract to be prepared showing the whole receipt and expenditure of all rents and other moneys levied by virtue of their statutory powers during that year, with a statement of the balance of such account, duly audited or certified by the chairman of the undertakers, and by the auditors, if any, and they must send a copy of the account to the clerk of the peace of the county in which the market or fair is situate (*l*). There is a penalty of £20 for default (*l*).

Returns as to cattle.

62. The duty is imposed (*m*) upon the market authority (*n*) of every market or fair held in certain places (*o*) of sending to the Board of Agriculture and Fisheries periodical returns (*p*) showing, so far as the market authority can ascertain the same, the number of cattle (*q*) entering the market or fair, and the number and weight of the cattle weighed, and the price of the cattle sold, thereat. For wilful default in the performance of this duty the market authority is liable to a fine upon summary conviction (*r*); and a person commits a misdemeanour by making a fraudulent statement in any return (*s*). For the purpose of making a return the market authority may cause any cattle which have been sold in the market to be weighed without fee (*t*).

(*j*) Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), s. 32 (5), (6).

(*k*) Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14).

(*l*) *Ibid.*, s. 50. This section is incorporated with the Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), s. 32 (2). It seems that the local authority must make this return as well as the returns to the Board of Agriculture and Fisheries. The account sent to the clerk of the peace is to be open to the inspection of the public at all reasonable hours on payment of the sum of 1*s.* for every inspection (Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14), s. 50).

(*m*) By the Markets and Fairs (Weighing of Cattle) Act, 1891 (54 & 55 Vict. c. 70), s. 3 (1).

(*n*) See note (*i*), p. 27, *ante*.

(*o*) Originally the places were those mentioned in the schedule to the Markets and Fairs (Weighing of Cattle) Act, 1891 (54 & 55 Vict. c. 70), but by *ibid*, s. 3 (5), the Board of Agriculture and Fisheries is empowered from time to time to vary or add to the list of places in that schedule; and by the Markets and Fairs (Weighing of Cattle) Returns Order, 10th January, 1905 (Stat. R. & O., 1905, p. 199), the Board so altered the schedule that it is in effect superseded by the order.

(*p*) The returns have to be made at such intervals and in such form and with such particulars as the Board by order prescribes (Markets and Fairs (Weighing of Cattle) Act, 1891 (54 & 55 Vict. c. 70), s. 3 (1)). The Board is authorised to publish the returns, or abstracts or extracts (*ibid.*, s. 3 (2)).

(*q*) See note (*i*), p. 28, *supra*.

(*r*) Markets and Fairs (Weighing of Cattle) Act, 1891 (54 & 55 Vict. c. 70), s. 3 (3).

(*s*) *Ibid.*, s. 3 (4). He is indictable for perjury if he knowingly and wilfully makes a false statement (Perjury Act, 1911 (1 & 2 Geo. 5, c. 6), s. 5 (which will come into operation on the 1st January, 1912)).

(*t*) Markets and Fairs (Weighing of Cattle) Act, 1891 (54 & 55 Vict. c. 70), s. 3 (1). As to the returns required from an auctioneer who sells cattle at a mart, see title AUCTION AND AUCTIONEERS, Vol. I., p. 508.

63. When horses are sold (*a*) in a market or fair special formalities ought to be observed; and to secure their observance special duties are imposed upon the market officials (*b*). For a breach of these duties the defaulter is answerable to the party aggrieved thereby, and is also liable to a penalty, recoverable before justices or by action (*c*). Special formalities and duties.

64. The owner or bailiff of a market or fair at which horses are sold must appoint and limit out yearly a special open place for the sales, appoint an official or officials to take toll and to keep the open place on market or fair days, provide a book in which the requisite particulars of the sales can be entered, and, after each market or fair, sign in the book a note of the true number of the horses sold thereat (*d*). Duties of owner of market or fair.

65. The toll-taker or his deputy must take the toll payable on a sale, if tendered, at the appointed open place and between 10 o'clock in the morning and sunset on the day of the sale, and not at any other time or place; and when he takes the toll he must have before him the parties to the sale and the horse, and he or the book-keeper must enter the requisite particulars in the book (*e*). Duties of toll-keeper and book-keeper.

The entries to be made are of the colour and one special mark at least of the horse (*f*), the price or value given for it (*g*), the Christian names, surnames, and dwelling-places of the buyer and the seller (*f*) and the seller's calling (*g*), and also either an entry that the toll-taker or book-keeper knows the seller and the requisite particulars of him, or an entry of the names, dwelling-place, and calling of a creditable person known and entered as known to the official, and then and there declaring to him that he has the requisite knowledge of the seller (*g*). The entries must not be made nor must the toll be taken if the official knows neither the seller nor the person who avouches him (*g*). Any person who makes an untrue avouchment is liable to a penalty; and so is any person who sells a horse in a market or fair, if he is not known to any of the officials and can produce no avoucher (*g*). Entries to be made by toll-keeper or book-keeper.

66. Every horse which is sold in a market or fair must be openly kept, in the time of that market or fair, for one hour at least between 10 o'clock in the morning and sunset, in the open space where horses are usually sold, and the parties to the sale must, before sunset on the day of the sale, come together and bring the horse to the toll-taker or book-keeper there, cause the requisite Exposure of horse. Entry of sale.

(*a*) As to the warranty on sale, see titles ANIMALS, Vol. I., pp. 388 *et seq.*; SALE OF GOODS.

(*b*) Stat. (1555) 2 & 3 Phil. & Mar. c. 7; stat. (1588-9) 31 Eliz. c. 12.

(*c*) Stat. (1555) 2 & 3 Phil. & Mar. c. 7, ss. 1, 2 (*ad fin.*), 3; stat. (1588-9) 31 Eliz. c. 12, ss. 1, 2.

(*d*) Stat. (1555) 2 & 3 Phil. & Mar. c. 7, s. 1.

(*e*) *Ibid.*; stat. (1588-9) 31 Eliz. c. 12, s. 1.

(*f*) Stat. (1555) 2 & 3 Phil. & Mar. c. 7, s. 1.

(*g*) Stat. (1588–9) 31 Eliz. c. 12, s. 1. The buyer is entitled to a signed copy of the entries on payment of 2*d.* (*ibid.*).

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particulars of the sale to be entered, and pay the toll, if any, or, if no other toll is payable, one penny, to be paid by the buyer, for the entry of the particulars(*h*). Unless all these formalities are strictly observed the sale is not a good sale in market overt (*i*).

SUB-SECT. 5.—*Prevention of Diseases of Animals.*

Powers of Board of Agriculture and Fisheries.

67. For preventing the spread of diseases of animals (*k*) the Board of Agriculture and Fisheries is empowered from time to time to make, alter, and revoke orders relating to the holding and conduct of markets and fairs (*l*) and matters connected therewith (*m*).

(*h*) Stat. (1555) 2 & 3 Phil. & Mar. c. 7, ss. 2, 4.

(*i*) *Ibid.*, s. 2; stat. (1588-9) 31 Eliz. c. 5, s. 1; *Moran* v. *Pitt* (1873), 42 L. J. (Q. B.) 47. As to sales in market overt, see p. 54, *post*. Where the seller's name was entered falsely in the book the sale was held not to be in market overt so as to confer on the buyer a title as against the rightful owner (*Gibbs Case* (1589), 1 Leon. 158; but compare *Wikes* v. *Morefoots* (1588), Cro. Eliz. 86).

(*k*) As to the liability incurred by selling a diseased animal in a market or fair, see title ANIMALS, Vol. I., pp. 419, 420; and see, further, title SALE OF GOODS.

(*l*) Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), s. 22. The orders of the Board are enforceable by penalties recoverable summarily, and take effect as if they were part of the Act (*ibid.*, ss. 49, 51, 57). The Markets and Sales Order of 29th June, 1910, made by the Board under the Diseases of Animals Acts, 1894-1909 (see *infra*), came into force on 1st October, 1911. It deals with the regulation of markets and sales of animals, and the cleansing and disinfection of markets; its provisions are to be enforced by the local authority (see title ANIMALS, Vol. I., p. 429), and contraventions thereof are to be deemed offences against the Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57); see title ANIMALS, Vol. I., p. 431. The Diseases of Animals Acts, 1894 (57 & 58 Vict. c. 57), 1896 (59 & 60 Vict. c. 15) (repealing the Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), s. 26, and varying *ibid.*, s. 24), 1903 (3 Edw. 7, c. 43) (amending the Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), in relation to sheep scab), 1909 (9 Edw. 7, c. 26) (providing for payment of fees to veterinary surgeons for notification of diseases of animals), and 1910 (10 Edw. 7 & 1 Geo. 5, c. 20) (amending the Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), in respect of the exportation and shipment of horses), may be cited together as the Diseases of Animals Acts, 1894 to 1910, and construed as one (Diseases of Animals Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 20), s. 9). By the Poultry Act, 1911 (1 & 2 Geo. 5, c. 11), s. 1 (1), the Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), as amended by subsequent enactment, has effect as if, among the purposes for which orders may be made (see title ANIMALS, Vol. I., p. 421, and *supra*), there were included the protection of live poultry from unnecessary suffering while being conveyed, exposed for sale, and disposed of after sale; and for the purposes of an order made under the Poultry Act, 1911 (1 & 2 Geo. 5, c. 11), the Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), is to be construed as if "animals" included live poultry. The Poultry Act, 1911 (1 & 2 Geo. 5, c. 11), confers powers to examine live poultry and to inspect premises for the purpose of enforcing an order under the Act (*ibid.*, s. 1 (2)), and it (by *ibid.*, s. 2), together with the Diseases of Animals Acts, 1894-1909 (see *supra*), may be cited as the Diseases of Animals Acts, 1894 1911. As to the powers, and the mode of enforcing the orders, of the Board of Agriculture and Fisheries, see title ANIMALS, Vol. I., pp. 419—434; and as to the prevention of infection, see further, title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*m*) The purposes for which orders may be made are, shortly:—(1) For prohibiting or regulating the exposure of diseased or suspected animals in markets or fairs, or the placing of them in lairs or other places adjacent

SUB-SECT. 6.—*Sale of Unwholesome Provisions.*

SECT. 4. Statutory Regulations.

Common law offence.

68. It is a misdemeanour indictable at common law knowingly to expose for sale in a market, as and for sound and wholesome meat fit for human consumption, food which is not so (*n*), or to bring or send such food to market knowing it is unfit and that it is intended to be sold as human food (*o*).

Statutory offences and powers.

69. In the case of markets and fairs to which the Act of 1847 (*p*), s. 15, applies (*q*), it is an offence punishable on summary conviction (*a*) to sell or expose for sale in the market or fair any unwholesome meat or provisions, and any inspector of provisions appointed by the undertakers may seize such articles and carry them before a justice of the peace, who may thereupon order that they be destroyed or otherwise disposed of so as to prevent their being exposed for sale or used for the food of man.

In the case of markets and fairs to which the Act of 1847 (*b*), s. 20, applies (*c*), the inspector of provisions, or any officer appointed by the undertakers for that purpose, may also enter and inspect any building erected or set apart for slaughtering cattle and

to or connected with markets or fairs, or where animals are commonly placed before exposure for sale (Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), s. 22 (ix.)); (2) for prohibiting or regulating the holding of markets and fairs (*ibid.*, s. 22 (xix.)); (3) for prescribing and regulating the cleansing or disinfection of places used for the holding of markets or fairs, exhibitions, or sales of animals, or for lairage of animals (*ibid.*, s. 22 (xx.), (xxii.)); (4) for prohibiting the holding of any such market or fair, exhibition or sale, in an area declared by order to be infected with pleuro-pneumonia or foot-and-mouth disease, or for prescribing the terms and conditions upon which the same may be held (*ibid.*, s. 9); (5) for making provisions respecting the case of animals found to be so infected while exposed for sale or exhibited before exposure for sale (*ibid.*, s. 21); and see title ANIMALS, Vol. I., pp. 422—425.

(*n*) *R.* v. *Stevenson* (1862), 3 F. & F. 106.

(*o*) *R.* v. *Jarvis* (1862), 3 F. & F. 108; *R.* v. *Crawley* (1862), 3 F. & F. 109; see also the statutes specified in title FOODS AND DRUGS, Vol. XV., p. 3, notes (*b*) and (*c*).

(*p*) Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14).

(*q*) *I.e.*, markets held under the provisions of the Public Health Acts, 1875 (38 & 39 Vict. c. 55) and 1908 (8 Edw. 7, c. 6), or the Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), or under local Acts incorporating the Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14), s. 15.

(*a*) Penalty, not exceeding £5 for each offence (*ibid.*). As to the recovery of penalties, in the case of markets held under the Public Health Acts, see the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 167, and title PUBLIC HEALTH AND LOCAL ADMINISTRATION; in the case of markets under the Diseases of Animals Acts, see the Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), s. 54, and title ANIMALS, Vol. I., pp. 432, 433. As to the recovery of penalties in the case of markets and fairs held under local Acts incorporating the Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14), s. 52, see note (*o*), p. 25, *ante*.

(*b*) Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14).

(*c*) *I.e.*, markets held under the provisions of the Public Health Acts, 1875 (38 & 39 Vict. c. 55) and 1908 (8 Edw. 7, c. 6), or under the Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), or under local Acts incorporating the Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14), s. 20.

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seize any cattle or carcase or part of a carcase which is unfit for the food of man and deal with it in the manner above described (*d*).

SUB-SECT. 7.—*Sale of Intoxicating Liquors and Tobacco.*

Intoxicating liquors.

70. The restrictions in any fair, as to the sale of beer, spirits or wine, are dealt with elsewhere (*e*).

Tobacco or snuff.

71. For the sale of tobacco or snuff in a fair an occasional excise licence may be granted by the Commissioners of Customs and Excise (*f*).

SUB-SECT. 8.—*Sale of Hay and Straw in and near the Metropolis.*

District.

72. The sale of hay and straw in the cities of London and Westminster, or within thirty miles thereof, is subject to special regulations (*g*).

Register of sales.

The clerk or toll-collector appointed for any market in that district (*h*) is required to keep in the market a register of sales of hay and straw. Upon any sale of hay or straw exceeding four trusses (*i*) in one quantity, the seller must enter in the register the names and places of abode of the buyer and seller and their principals (if any), the place of sale, and the price paid or agreed (*i*).

Sales not affected.

This provision does not apply to hay or straw delivered within the above-mentioned limits under special contract, but it applies to sales of hay and straw sent to any place within the limits to be sold, and there sold, though such place is not a market. If the sale is not in a market the particulars must be entered in the register of the market nearest the place of sale (*j*).

(*d*) Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14), s. 20. A penalty not exceeding £5 is imposed for obstructing or hindering the inspector (*ibid.*) As to the powers of "an inspector of a market" to procure samples of foods or drugs for analysis under the Sale of Food and Drugs Acts, 1875—1899 (38 & 39 Vict. c. 63; 42 & 43 Vict. c. 30; 50 & 51 Vict. c. 29; 62 & 63 Vict. c. 51), see title FOOD AND DRUGS, Vol. XV., p. 12.

(*e*) See title INTOXICATING LIQUORS, Vol. XVIII., pp. 100, 101. As to offences for selling intoxicating liquor without licence, see *ibid.*, pp 107 *et seq.* Orders exempting licensed victuallers from the provisions of the Licensing Acts with respect to closing licensed premises near markets may be granted under the Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo 5, c. 24), s 55.

(*f*) Revenue (No. 1) Act, 1864 (27 & 28 Vict. c. 18), s. 5; Finance Act, 1908 (8 Edw. 7, c. 16), s. 4; Excise Transfer Order, 1909 (*London Gazette*, 16th February, 1909); see title REVENUE.

(*g*) Under the Hay and Straw Acts, 1796 (36 Geo. 3, c. 88); 1831 (4 & 5 Will. 4, c. 21); and 1856 (19 & 20 Vict. c. 114). As to the precise limits of the Acts, see note (*d*), p. 18, *ante*. Only those provisions which are peculiarly applicable to sales in markets are here referred to. Others are referred to in title AGRICULTURE, Vol. I., p. 291. As to the time of opening and closing these markets for the sale of hay or straw, see p. 18, *ante*.

(*h*) See note (*d*), p. 18, *ante*.

(*i*) As to the weight of a truss, see Hay and Straw Act, 1796 (36 Geo. 3, c. 88), s. 2; and title AGRICULTURE, Vol. I., p. 291.

(*j*) Hay and Straw Act, 1796 (36 Geo. 3, c. 88), ss. 10, 11. The register is open for inspection between 9 a.m. and 6 p.m. (*ibid.*, s. 10). Penalties are imposed on sellers who omit to make the required entries, and upon keepers of registers who knowingly suffer untrue entries to be made (*ibid.*, s. 10). Penalties are also imposed on any clerk or toll-collector who himself buys or sells, or is concerned in buying or selling, hay or straw within the limits (*ibid.*, s. 12). Salesmen selling for a principal in a market must deliver, at the time of the sale or delivery, a ticket showing the number of trusses

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73. For the purpose of settling disputes as to the weight of trusses, proper scales and weights for weighing hay and straw must be provided and kept at the office of the clerk of every hay market within the above-mentioned limits; and the clerk or toll-gatherer, upon complaint, must weigh and examine any hay or straw offered or exposed for sale in any such market, and if it is found to be deficient in weight or mixed with any foreign matter, he must summon the offender before a justice (*k*).

Disputes as to weight.

The buyer of any hay or straw sold within the limits may cause it to be weighed on delivery in the presence of the seller, and either party may send for a hay-weigher, who, in parishes where there is a hay market, is the clerk or toll-gatherer, to ascertain the weight (*l*).

74. Penalties are imposed upon any person who buys and sells again hay or straw that is being conveyed to be sold within the above-mentioned limits; or who buys any hay or straw in any hay market within the limits for the purpose of selling it again in any such market (*m*); or who does not bring to the market on the next market day hay or straw which has been exposed and not sold on any market day, or has been brought for sale within the limits between two market days and has not been sold before the next market day (*n*). Penalties are also imposed upon any seller of hay or straw in any market within the limits who knowingly makes or tenders short delivery, and upon drivers of waggons who are privy to that offence (*o*).

Offences.

Part III.—Tolls and Stallages.

SECT. 1.—*Tolls.*

75. Toll in the more limited sense (*p*) of franchise toll is a sum payable by the buyer (*a*) upon sales of tollable articles in a market or fair. By custom or statute there may be dues in the nature of franchise tolls, payable upon goods brought into a market for sale whether sold or not (*b*); and these are in some cases payable in

Nature of toll.

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sold and the name in full of the owner (Hay and Straw Act, 1856 (19 & 20 Vict. c. 114), s. 2).

(*k*) Hay and Straw Act, 1856 (19 & 20 Vict. c. 114), s. 3. The offender is liable to a penalty not exceeding £10 (*ibid.*, s. 4).

(*l*) Hay and Straw Act, 1796 (36 Geo. 3, c. 88), s. 13. The hay-weigher is entitled to be paid at the rate of 3*s.* a load by the buyer, such sum to be repaid to the buyer by the seller if the hay or straw is not of due weight (*ibid.*)

(*m*) *Ibid.*, s. 18.

(*n*) *Ibid.*, s. 23.

(*o*) *Ibid.*, s. 22.

(*p*) The term "toll" does not strictly include stallage (*Northampton Corporation* v. *Ward* (1745), 2 Stra. 1238), but may be interpreted to include stallage in Acts of Parliament, grants and pleadings (*Bedford* (*Duke*) v. *Emmett* (1820), 3 B. & Ald. 366, 371; *Bennington* v. *Taylor* (1700), 2 Lut. 1517; *Lockwood* v. *Wood* (1841), 6 Q. B. 31). As to stallage, see p. 38, *post*.

(*a*) *Leigh* v. *Pym* (1687), 2 Lut. 1329; 2 Co. Inst. 221. By custom (*ibid.*) or by statute toll may be payable by the seller.

(*b*) *Hill* v. *Hawkur* (1614), Moore (K. B.), 835; *Bedford* (*Duke*) v. *Emmett*

SECT. 1. Tolls.

kind (*c*). But toll cannot be payable, unless by statute, upon goods not actually brought into the market for sale (*d*). Accordingly no toll can be payable by grant or prescription on the bulk of goods sold by sample in a market when the sample only is actually brought into the market (*e*).

Right to toll. How acquired.

76. The right to toll has been described as a subordinate franchise appurtenant to a franchise of market or fair (*f*). It may be acquired (1) by express grant from the Crown (*g*); (2) by statute; or (3) by prescription or long usage from which a lost grant may be presumed (*h*). But unless the right can be established in one of these ways no toll is payable (*i*). It is said that the Crown cannot grant a new toll in an existing market without some proportionable benefit to the subject (*k*).

Interpretation of grant.

77. General words in a grant are not sufficient to create a right to toll (*l*). But in a confirmatory grant of an old market, or a regrant of a market after it has passed by forfeiture or otherwise into the hands of the Crown, general words are sufficient to continue a right to toll which had previously existed (*m*). A grant of toll *eo nomine* is sufficient, although the amount, or the particular articles on which it is to be payable, are not specified (*n*). A general grant of toll without specifying the amount is interpreted to be a grant of a reasonable toll (*o*), and a grant in that form enables the grantee to vary the amount taken from time to time, provided it is always reasonable (*p*).

Toll claimed by prescription.

78. If toll be claimed by prescription or presumed lost grant

(1820), 3 B. & Ald. 366, 371; see *R.* v. *Casswell* (1872), L. R. 7 Q. B. 328; *London Corporation* v. *St. Sepulchre, London, Overseers* (1871), L. R. 7 Q. B. 333, n.

(*c*) *Specot* v. *Carpenter* (1682), T. Jo. 207; *Norman* v. *Bell* (1831), 2 B. & Ad. 190; and see p. 39, *post*. Trover lies for taking too much (*ibid.*; *Hickman's Case* (1599), Noy, 37; *Hill* v. *Hawkur* (1614), Moore (K. B.), 835); and see title TROVER AND DETINUE.

(*d*) *Kerby* v. *Whichelow* (1701), 2 Lut. 1498, *per* POWEL, J., at p. 1502; *Wells* v. *Miles* (1821), 4 B. & Ald. 559.

(*e*) *Ibid.*; *Hill* v. *Smith* (1812), 4 Taunt. 520, Ex. Ch.; see *Moseley* v. *Pierson* (1790), 4 Term Rep. 104.

(*f*) *Newcastle* (*Duke*) v. *Worksop Urban Council*, [1902] 2 Ch. 145, *per* FARWELL, J., at p. 156; see note (*s*), p. 50, *post*.

(*g*) *Stamford Corporation* v. *Pawlett* (1831), 1 Cr. & J. 57, 400, Ex. Ch.

(*h*) *Wright* v. *Bruister* (1832), 4 B. & Ad. 116; see also p. 8, *ante*.

(*i*) *R.* v. *Maidenhead Corporation* (1620), Palm. 76; 2 Co. Inst. 220, 221; *Newcastle* (*Duke*) v. *Worksop Urban Council*, *supra*.

(*k*) 2 Co. Inst. 220; *Lancum* v. *Lovell* (1834), 6 C. & P. 437, 465.

(*l*) Such words as "profits," "commodities," "emoluments," or "free customs belonging to a fair" are insufficient (*Heddy* v. *Wheelhouse* (1597), Cro. Eliz. 558, 591; *Egremont* (*Earl*) v. *Saul* (1837), 6 Ad. & El. 924, 931; *Holloway* v. *Smith* (1742), 2 Stra. 1171); see also *Lightfood* v. *Lenet* (1617), Cro. Jac. 421 (where a grant of "such toll as is used to be taken *ibi et alibi infra regnum Angliæ*" was held void for ambiguity).

(*m*) See *Heddy* v. *Wheelhouse*, *supra*, *per* POPHAM, J., at p. 591; *Egremon* (*Earl*) v. *Saul*, *supra*; *R.* v. *Maidenhead Corporation*, *supra*, at p. 82.

(*n*) *Stamford Corporation* v. *Pawlett*, *supra*; *R.* v. *Maidenhead Corporation*, *supra*.

(*o*) *Ibid.*

(*p*) *Lawrence* v. *Hitch* (1868), L. R. 3 Q. B. 521, Ex. Ch., *per curiam*, at p. 533.

the jury may, if the evidence of user so warrants, find either that the grant was of a reasonable toll, or that it was of a toll of specified amount (*q*).

Reasonableness.

Unreasonable toll void.

79. Reasonableness is a question of law (*r*), and the court will support the payment of tolls in accordance with an express grant or with long usage unless they are shown to be unreasonable (*s*). A continuance of uniform payment and acquiescence therein tends to show that the toll is reasonable (*s*). A grant of toll is void if it be of an unreasonable amount (*t*).

Action for toll.

Distress for toll.

80. Unpaid toll creates a debt recoverable by action without proof of an express contract to pay (*u*).

The owner of a market or fair may prescribe to distrain the goods, or a reasonable part of the goods, in respect of which the toll is payable, after demand of the toll and refusal to pay (*a*).

Taking excessive toll.

81. If excessive toll is taken by the owner of a market or fair, or if toll is taken when none is due, the Crown may seize the franchise of the market or fair, upon office found (*b*), until it is redeemed by the owner (*c*). If a bailiff or any mean officer without the authority of the owner of the market takes excessive toll, or takes toll when none is due, he may be liable to repay the toll wrongfully taken and to pay as much again by way of penalty for such taking (*d*).

(*q*) *Wright* v. *Bruister* (1832), 4 B. & Ad. 116; *Lawrence* v. *Hitch* (1868), L. R. 3 Q. B. 521, Ex. Ch.

(*r*) 2 Co. Inst. 222; *Lowden* v. *Hierons* (1818), 2 Moore (C. P.), 102, 113

(*s*) *Wright* v. *Bruister*, *supra*; and see *Mills* v. *Colchester Corporation* (1868), L. R. 3 C. P. 575, Ex. Ch.

(*t*) 2 Co. Inst. 220; *Heddy* v. *Wheelhouse* (1597), Cro. Eliz. 558, 591.

(*u*) *Newport Corporation* v. *Saunders* (1832), 3 B. & Ad. 411, *per* LORD TENTERDEN, C.J., at p. 412. The plaintiff must prove that he is entitled to receive the tolls, *i.e.*, that he is in possession of the market or fair and the tolls; see *Tewkesbury Corporation* v. *Diston* (1805), 6 East, 438. For form of *indebitatus* count, see *Bedford* (*Duke*) v. *Emmett* (1820), 3 B. & Ald. 366; *Reading Corporation* v. *Clarke* (1821), 4 B. & Ald. 268. A county court has no jurisdiction in any action in which the title to any toll, fair, market, or franchise is in question; see title COUNTY COURTS, Vol. VIII., p. 431.

(*a*) *Agar* v. *Lisle* (1613), Hob. 187. It is said that the right to distrain is incident to every toll and need not be specially prescribed for (*Whitstable* (*Free Fishers*) v *Gann*, 11 C. B. (N. S.) 387, *per* ERLE, C.J., at p. 416; Gilbert, Law and Practice of Distress, 19; Gunning, Law of Tolls, 216); and this is probably correct, but the authorities are not clear; see *London Corporation* v. *Lynn Regis Corporation* (1796), 1 Bos. & P. 487, H. L.; *Heddy* v. *Wheelhouse*, *supra*; *Smith* v. *Shepherd* (1599), Cro. Eliz. 710; *Hickman's Case* (1599), Noy, 37; *Harris* v. *Hawkins* (1662), 1 Keb. 342; *Leight* v. *Pym* (1686), 2 Lut. 1329; *Bennington* v. *Taylor* (1700), 2 Lut. 1517; *Blakey* v. *Dinsdale* (1777), 2 Cowp. 661; Com. Dig. tit. Distress (A. 1); 1 Roll. Abr. 666. As to distress generally, see title DISTRESS, Vol. XI., pp. 115 *et seq.* For actions of trespass or trover founded on an unlawful or excessive distress for toll, see *Leight* v. *Pym*, *supra*; *Wigley* v. *Peachy* (1732), 2 Ld. Raym. 1589; *Norman* v. *Bell* (1831), 2 B. & Ad. 190; and title TRESPASS.

(*b*) See note (*c*), p. 50, *post*.

(*c*) Statute of Westminster I., (1275) 3 Edw. 1, c. 31; 2 Co. Inst. 221, 222; and see title CONSTITUTIONAL LAW, Vol. VI., p. 489.

(*d*) Statute of Westminster I., (1275) 3 Edw. 1, c. 31; 2 Co. Inst. 219. He is also liable to forty days' imprisonment (*ibid.*). It is said also that, apart from the statute, if excessive toll is taken, the franchise of toll (though not the market or fair) is forfeited (Com. Dig., tit. Market (I.)). As to the

SECT. 1. **Tolls.**

Liability to land tax and poor rate.

82. The franchise of toll is an incorporeal hereditament, and as such is assessable to the land tax (*e*); but inasmuch as tolls, in the strict sense of the term, unlike stallages (*f*), are profits, not of the soil, but of the market (*g*), payable in respect of the use of the market and not in respect of any user or occupation of the market-place, they cannot be taken into account in estimating the value of the market-place for the assessment to the poor rate (*h*), and this is equally the case whether they are granted by charter or payable by statute, and whether they are payable by the buyer upon sales in the market or upon the entry of goods into the market (*i*), and although they are taken by a corporation and applied to public purposes (*k*).

SECT. 2.—*Stalls and Stall-holders.*

Payments for consent to exclusive occupation.

83. No person is entitled as of right to occupy, to the exclusion of others, any portion of the soil for the purpose of exposing goods for sale in a market or fair, without the consent of the person in possession of the soil (*l*). Payments made for the enjoyment of such exclusive occupation are usually known as stallage, piccage, pennage, or rent. They are payable *ratione tenuræ*, and not by reason of any franchise, and no grant, prescription, nor statutory authority need be shown for taking them (*m*).

Stallage. Piccage. Pennage.

84. Stallage is the appropriate term for payment for the liberty of placing a stall on the soil or for standing room for cattle or goods within the market or fair (*n*). When the soil is broken the payment is often called piccage (*o*). Pennage is a sum payable for the liberty to erect pens (*o*). Piccage and pennage are, however, but names for particular varieties of stallage.

When stallage is payable.

85. Stallage is payable wherever there is any exclusive occupation of a particular portion of the soil by a person (*p*) or a group of

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recovery, as money had and received, of toll unlawfully taken, see *Waterhouse* v. *Keen* (1825), 4 B. & C. 200; and as to its recovery by action on the case, see Com. Dig., tits. Toll (H. 2) and Market (F. 1); see also *Wood* v. *Haukshead* (1602), Yelv. 13.

(*e*) Land Tax Act, 1797 (38 Geo. 3, c. 5), s. 4; Land Tax Perpetuation Act, 1798 (38 Geo. 3, c. 60); see *Vauxhall Bridge Co.* v. *Sawyer* (1851), 6 Exch. 504; *Charing Cross Bridge Co.* v. *Mitchell* (1855), 4 E. & B. 549; and title LAND TAX, Vol. XVIII., p. 309.

(*f*) As to which, see *infra*.

(*g*) As to income tax on such profits, see *Re Birmingham Corporation* (1875), 1 Tax Cas. 26; *A.-G.* v. *Scott* (1873), 28 L. T. 302.

(*h*) *Roberts* v. *Aylesbury Overseers* (1853), 1 E. & B. 423; *R.* v. *Bell* (1816), 5 M. & S. 221; so, too, market tolls are not a "tenement" under a local rating Act (*R.* v. *Mosley* (1823), 3 Dow. & Ry. (K. B.) 385); and see note (*k*), p. 40, *post*, and title RATES AND RATING.

(*i*) *R.* v. *Caswell* (1872), L. R. 7 Q. B. 328; *London Corporation* v. *St. Sepulchre, London, Overseers* (1871), L. R. 7 Q. B. 333, n.

(*k*) *Worcester Corporation* v. *St. Clements Overseers* (1858), 22 J. P. 319; *Brecon Markets Co.* v. *St. Mary's, Brecon* (1877), 36 L. T. 109.

(*l*) *Northampton Corporation* v. *Ward* (1745), 2 Stra. 1238.

(*m*) *Ibid.*; *R.* v. *Marsden* (1765), 3 Burr. 1812.

(*n*) *Northampton Corporation* v. *Ward*, *supra*.

(*o*) *R.* v. *Marsden*, *supra*.

(*p*) *Yarmouth Corporation* v. *Groom* (1862), 1 H. & C. 102.

persons (*q*), for example, if goods are pitched upon an appropriated portion of the soil (*r*), or a stand is taken up with a table or basket placed on the ground (*s*). But unless there is such exclusive occupation stallage is not payable (*t*). So none is payable for cattle driven into a market and not penned (*a*), or for merely resting baskets or goods on the ground temporarily (*b*). SECT. 2. Stalls and Stall-holders.

86. To recover stallage it is not necessary to show an express contract to pay an agreed sum. If there has been occupation of a portion of the soil with the licence of the owner a reasonable sum may be recovered in an action for use and occupation (*c*). Recovery of stallage.

The amount payable may be fixed by immemorial custom, and in such case the owner may by custom have the right to distrain for the amount so fixed (*d*). It may also by custom be payable in kind (*e*).

87. Though, apart from custom, no one has a right to erect a stall without the licence of the person in possession of the soil, and anyone so doing without licence is a trespasser (*f*), nevertheless a custom for a particular class of persons to erect and occupy stalls in a market or fair, paying a reasonable sum as stallage, is good (*g*). Custom to erect stalls.

88. The market owner cannot compel those attending the market to take stalls, and if he covers the market-place so completely with stalls that the public are obliged to use them, the taking of stallage in such circumstances is indictable as extortion (*h*). Extortion.

89. The occupier of a stall is at least a tenant at will, and if he occupies the same space of ground as a stall continuously for the Occupation as franchise qualification.

(*q*) See *Bedford (Duke)* v. *St. Paul, Covent Garden, Overseers* (1881), 51 L. J. (M. C.) 41

(*r*) *Ibid.*, *Bedford (Duke)* v. *Emmett* (1820), 3 B. & Ald. 366.

(*s*) *Norwich Corporation* v. *Swann* (1776), 2 Wm. Bl 1116; *Yarmouth Corporation* v. *Groom* (1862), 1 H. & C. 102

(*t*) *A.-G.* v. *Tynemouth Corporation* (1900), 17 T. L R. 77.

(*a*) *Swindon Central Market Co., Ltd* v. *Panting* (1872), 27 L. T. 578.

(*b*) *Townend* v. *Woodruff* (1850), 5 Exch. 506; *Sawyer* v. *Wilkinson* (1598), Cro Eliz. 627; *Wigley* v. *Peachy* (1732), 2 Ld Raym. 1589.

(*c*) *Taunton Market (Trustees)* v. *Kimberley* (1776), 2 Wm. Bl 1120; *Newport Corporation* v. *Saunders* (1832), 3 B. & Ad. 411. *Quære* whether an action for use and occupation will lie where the occupation has been without the licence of the owner of the soil; see *Phillips* v. *Homfray* (1883), 24 Ch. D. 439, C. A., *per* BOWEN, L.J., at p. 461.

(*d*) *Bennington* v. *Taylor* (1700), 2 Lut. 1517; see also *Bedford (Duke)* v. *Emmett, supra.*

(*e*) *Hickman's Case* (1601), 2 Roll. Abr. 123; and compare p. 35, *ante.*

(*f*) *Northampton Corporation* v. *Ward* (1745), 2 Stra. 1238; see titles REAL PROPERTY AND CHATTELS REAL; TRESPASS.

(*g*) *Tyson* v. *Smith* (1838), 9 Ad. & El. 406 (custom for victuallers to erect stalls in a fair); *Elwood* v. *Bullock* (1844), 6 Q. B. 383 (a similar custom); *Chafin* v. *Betsworth* (1684), 3 Lev. 190 (custom for tenants of a manor to erect stalls in market-place of manor); and, as to the general characteristics of such a custom, see title CUSTOM AND USAGES, Vol. X., pp. 221 *et seq.*

(*h*) *R* v. *Burdett* (1696), 1 Ld. Raym. 148; and, *semble*, it is a ground of forfeiture of the market or fair (2 Co. Inst. 221).

SECT. 2. Stalls and Stall-holders.

qualifying period, and the stall is of sufficient value, his occupation is a qualification for the borough occupation franchise (*i*).

Rateability of stallages.

90. Stallage, being a payment made to the occupier of the soil for the use of the soil, and not for the use of the incorporeal market, must be taken into account in estimating the yearly value of the soil for assessment to the poor rate (*k*).

Assessable to land tax.

91. Booths, stalls, or standings in fairs are rated to the land tax, which is payable yearly in one entire sum by the occupier of each booth, stall, or standing within seven days of the first proclamation of the fair, and in default is leviable by distress of the goods found therein. The tenant of a booth, stall, or standing is authorised to pay the tax and deduct the amount from the current rent payable therefor (*l*).

SECT. 3.—*Exemptions from Toll.*

Exemptions at common law.

92. The following persons are exempt from payment of toll in all markets and fairs, namely, the King and the Queen Consort (*m*); all ecclesiastical persons for their ecclesiastical goods and for goods bought by them for their sustenance, but not for merchandise (*n*); and lords of manors which are ancient demesne, and their tenants therein, in respect of sales by them of the produce of their tenements, and of purchases by them of goods to maintain their tenements or themselves or their households there (*o*), but not for merchandise (*p*).

(*i*) *Hall* v. *Metcalfe*, [1892] 1 Q. B. 208; but in *Lovell* v. *Callaghan*, [1894] 2 I. R. 346, a weekly tenant of a stall in a market-place, from which he was excluded at night, was held not to be qualified to vote as a burgess as being a person occupying a shop within the Municipal Corporations (Ireland) Act, 1840 (3 & 4 Vict. c. 108), s. 30; see title ELECTIONS, Vol. XII., pp 159, 185.

(*k*) *Percy* v. *Ashford Union* (1876), 34 L. T. 579. This is so if the payment is made in respect of any exclusive occupation of a portion of the soil, for however short a time (*R.* v. *Barnard Castle* (*Inhabitants*) (1863), 27 J. P. 534), and though the particular portion occupied is liable to be changed from time to time at the will of the market owner (*London Corporation* v. *Greenwich Union Assessment Committee* (1883), 48 L. T. 437), or if the payment is made by the name of toll for the sale of goods within definite portions of the market-place specifically appropriated to the sale of particular kinds of goods (*Bedford* (*Duke*) v. *St. Paul, Covent Garden, Overseers* (1881), 51 L. J. (M. C.) 41). It is immaterial that the payments are made under the name of "tolls" (*Roberts* v. *Aylesbury Overseers* (1853), 1 E. & B. 423), or of "market dues and charges" (*London Corporation* v. *Greenwich Union Assessment Committee*, *supra*). As to tolls properly so called, see p. 38, *ante*. The stall-holder whose position is liable to be moved at the will of the owner of the soil has not a rateable occupation (*Spear* v. *Bodmin Union Guardians* (1880), 49 L. J. (M. C.) 69). As to rating generally, see title RATES AND RATING.

(*l*) Land Tax Act, 1797 (38 Geo. 3, c. 5), ss. 125, 126; *Andrew* v. *Hancock* (1819), 1 Brod & Bing. 37; *Stubbs* v. *Parsons* (1820), 3 B. & Ald. 516; see titles LAND TAX, Vol XVIII., p. 319; LANDLORD AND TENANT, Vol. XVIII., p 477.

(*m*) Co. Litt. 133 b; 2 Co. Inst. 221; Com Dig., tit. Market (F. 1); see title CONSTITUTIONAL LAW, Vol. VI., pp. 366, 408.

(*n*) Fitz. Nat. Brev. 227 (F.); 2 Co. Inst. 3, 4; Com. Dig., tit. Ecclesiastical Persons (D.).

(*o*) *Savery* v. *Smith* (1686), 2 Lut. 1144; Fitz. Nat. Brev. 14, 228; 2 Co. Inst. 221, 654. As to ancient demesne, see title COPYHOLDS, Vol. VIII., pp. 67, 68.

(*p*) *Ward* v. *Knight* (1591), Cro. Eliz. 227.

SECT. 3. Exemptions from Toll.

93. The owner of a market is not bound to collect tolls impartially, and may remit the whole or any part thereof to whomsoever he pleases (*q*).

Right to remit.

94. The owner of a market or fair may grant to corporate bodies, capable of taking by grant, exemption for their members from toll or stallage (*r*), and such grants are binding on the grantor of the exemption and on all who derive title from him (*s*). A lost grant of exemption may be presumed from long user (*t*), and a lord of a manor may prescribe for exemption for the tenants of his manor (*a*).

Grants of exemption by owner.

95. The Crown may in certain cases grant exemption from toll (*b*).

Grants of exemption by Crown.

SECT. 4.—*Profits of Statutory Markets.*

96. When a market or fair is held under statutory authority there is a right to take such tolls as are authorised by the statute. The incorporation of the clauses of the Act of 1847 (*c*), with respect

Markets and Fairs Clauses Act, 1847.

(*q*) *Newcastle* (*Duke*) v. *Worksop Urban Council*, [1902] 2 Ch. 145; *Lancum* v. *Lovell* (1834), 6 C. & P. 437, *per* TINDAL, C.J., at p. 465. As to the power of the Commissioners of Woods to abandon tolls, see title CONSTITUTIONAL LAW, Vol. VII., p. 200.

(*r*) *Lockwood* v. *Wood* (1841), 6 Q. B. 31; *Tewkesbury Corporation* v. *Bricknell* (1809), 2 Taunt. 120. In *Woolwich Corporation* v. *Gibson* (1905), 92 L. T. 538, an unsuccessful attempt was made to set up by prescription a grant of exemption to trustees for the inhabitants of the parish in which the market was held.

(*s*) Including the Crown. If the toll afterwards comes into the hands of the Crown it can only be regranted subject to the exemptions (*Tewkesbury Corporation* v. *Bricknell, supra*). A regrant by the Crown of a forfeited market or fair (see p. 51, *post*) can only be made subject to the exemptions from toll which existed before forfeiture (*Tewkesbury Corporation* v. *Bricknell, supra*).

(*t*) *Ellis* v. *Bridgnorth Corporation* (1863), 15 C. B. (N. S.) 52.

(*a*) 2 Vin. Abr. 9, tit. Actions [Case] (N. c.) 8.

(*b*) See title CONSTITUTIONAL LAW, Vol. VI., p. 488. As to such a grant, see *Middleton* (*Viscount*) v. *Lambert* (1834), 1 Ad. & El. 401. An action lies at the suit of a corporation to which exemption has been granted for merely demanding toll from corporators entitled to take the benefit of the exemption (*London Corporation* v. *Lynn Regis Corporation* (1796), 1 Bos. & P. 487). The action was formerly by writ *De essendo quietum de theolonio* (*ibid.*). As to construction of a grant of exemption, see *Truro Corporation* v. *Reynalds* (1832), 1 Moo. & S. 272. The right of exemption as inhabitant or freeman or member of a municipal corporation (or wife, widow, son, or daughter of such person) from toll in markets or fairs wherein tolls are levied wholly or in part by or for the use or benefit of any borough (*i.e.*, a city or borough to which the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), ss. 6, 7, apply), or body corporate, is now nearly extinct, as it can only be claimed by a person who, on the 5th June, 1835, was admitted or entitled to be admitted a freeman, or was the wife, widow, son, or daughter of a freeman, or was bound an apprentice. The right of any person who claims exemption otherwise than as an inhabitant, freeman, or member of a municipal corporation, or as the widow or kin of such person, is not affected (Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 208, re-enacting in substance the Municipal Corporations Act, 1835 (5 & 6 Will. 4, c. 76), s. 2). As to the freedom of freemen from highway tolls, see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 65. As to freemen generally, see title LOCAL GOVERNMENT, Vol. XIX., pp. 321, 322.

(*c*) Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14).

SECT. 4. **Profits of Statutory Markets.**

to the stallages, rents, and tolls to be taken by the undertakers (*d*), does not in itself confer any right to take tolls. Those clauses only regulate the conditions subject to which the tolls (if any) authorised by the special Act, and stallages and rents, are payable (*e*), empower the undertakers to vary them from time to time within the limits authorised (*f*), provide for their recovery by distress (*g*) and for the settlement of disputes by a justice of the peace (*h*), and impose penalties for taking excessive toll (*i*) and for obstructing the toll-collector (*k*).

Markets under Public Health Acts.

97. In a market held in accordance with the provisions of the Public Health Act, 1875 (*l*), or the Public Health Act, 1908 (*m*), the market authority is empowered to take stallages, rents, and tolls in respect of the use by any person of the market (*n*). The tolls have to be approved by the Local Government Board (*o*), and the above-mentioned clauses (*p*) of the Act of 1847 (*q*) are made applicable by incorporation (*r*).

Markets under Diseases of Animals Act, 1894.

98. In markets authorised by the Diseases of Animals Act, 1894 (*s*), the local authority may charge for the use of a wharf or other place provided by them under that Act such sums as may be imposed by bye-laws approved by the Board of Agriculture and Fisheries (*t*).

(*d*) Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14), ss. 31—41.

(*e*) *Ibid*, ss. 31—35, 41. *Ibid*, s. 41, provides that a list of the stallages, rents, and tolls "payable under this and the special Act" must (as a condition of liability to pay) be exhibited in the market-place. It seems that this should be a list of the tolls actually in force at the time and not a list of the maximum tolls authorised (*Gregson* v *Potter* (1879), 4 Ex. D. 142). The special Act may impose tolls on the exposure for sale, or upon the sale, of goods anywhere in the district or town in which the market is held. As to the interpretation of such a provision, see *Philpott* v. *Allright* (1906), 94 L. T. 540; *Newton-in-Makerfield District Council* v. *Lyon* (1900), 81 L. T. 756. The Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14), s. 35, makes the tolls in respect of cattle brought to the market for sale payable as soon as the cattle in respect whereof they are demandable are brought into the market-place, and before they are put in to any pen or tied up, and imposes an additional toll if they are not removed within one hour after the close of the market.

(*f*) Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14), s. 36.

(*g*) *Ibid*, s. 38, under which there is no power of sale.

(*h*) *Ibid.*, s. 39.

(*i*) *Ibid.*, s. 37.

(*k*) *Ibid*, s. 40

(*l*) 38 & 39 Vict. c. 55; see p. 11, *ante*.

(*m*) 8 Edw. 7, c. 6.

(*n*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 166.

(*o*) *Ibid.*, s. 167.

(*p*) See note (*d*), *supra*.

(*q*) Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14).

(*r*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 167.

(*s*) 57 & 58 Vict. c. 57; see p. 12, *ante*.

(*t*) Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), s. 32. The Board may from time to time reduce the tolls if satisfied that they may be properly reduced (*ibid.*, s. 32 (7)). The clauses of the Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14), ss. 31—41 (see note (*d*), *supra*), with respect to stallages, rents, and tolls, are incorporated

Part IV.—Disturbance.

SECT. 1.—*In General.*

SECT. 1. In General.

99. Disturbance of a market or fair may consist in any unjustifiable interference with the owner's exclusive right to hold his market or fair and take the profits thereof. It is a tort in respect of which damages may be recovered, and the continuance of which may be restrained by injunction (*u*). Nature of disturbance.

Thus, an action for disturbance lies against one who on his own account collects toll in the market (*a*), or obstructs the toll-collector appointed by the owner (*b*), or who hinders persons (*c*) or tollable goods (*d*) from coming to the market, or causes a physical obstruction of the market-place whereby persons are excluded from a part thereof (*e*), or of the approaches to the market-place (*f*). By interfering with collection of toll and obstructing market-place.

100. An action for disturbance by evading payment of toll lies against one who designedly and with an intention to take the benefit of the market without paying toll sells outside a market (*g*). Proof of the design to evade payment of toll fails, however, if it is shown that there was at the time of the sale no room in the market (*h*), or that the market is ordinarily overcrowded and that the defendant had no notice that there was room on the particular occasion (*i*). Selling tollable commodities by sample in or near a market is not in itself a disturbance (*k*), but it is an actionable disturbance if it is By evading toll.

(Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), s. 32 (3)), and the charges authorised as above are to be deemed tolls authorised by the special Act (*ibid.*, s. 32 (4)).

(*u*) See *Dorchester Corporation* v. *Ensor* (1869), L. R. 4 Exch. 335; *Great Eastern Rail. Co.* v. *Goldsmid* (1884), 9 App. Cas. 927; *Wilcox* v. *Steel*, [1904] 1 Ch. 212, C. A.; and see titles INJUNCTION, Vol. XVII., pp. 206 *et seq.*, TORT. As to trespass in general, see title TRESPASS.

(*a*) *Oliver* v. *Dent* (1606), Cro. Jac. 122. Trespass *vi et armis* for erecting a toll booth and collecting toll and assaulting the servants of the owner and preventing them from collecting toll (*De Chaunce* v. *de Twenge* (1337), Y. B. 11 Edw. 3, Rolls Series, p 38); trespass *vi et armis* for taking toll in another's market (Fitz. Nat. Brev. 91 G).

(*b*) *Ibid.*

(*c*) *Denesham's* (*Abbot*) *Case* (1355), Y. B. 29 Edw. 3, fo. 18; *Gloucester Grammar School Case* (1410), Y. B. 11 Hen. 4, fo. 47, *per* SKREENE, Serjeant.

(*d*) *Turner* v. *Sterling* (1671), 2 Vent. 25, *per* WYLDE, B., at p. 26.

(*e*) *Thompson* v. *Gibson* (1841), 7 M. & W. 456.

(*f*) *Horner* v. *Whitechapel District Board of Works* (1885), 53 L. T. 842, C. A. As to further causes of action, *e.g.*, evading toll, see the text, *infra*; setting up a rival market, see p. 44, *post*.

(*g*) *Bridgland* v. *Shapter* (1839), 5 M. & W. 375; *Great Eastern Rail. Co.* v. *Goldsmid*, *supra*, *per* Lord BLACKBURN, at p. 960; S. C. (1883), 25 Ch. D. 511, C. A., *per* FRY, L.J., at p. 555.

(*h*) *Goldsmid* v. *Great Eastern Rail. Co.* (1883), 25 Ch. D. 511, 555, C. A.

(*i*) *Prince* v. *Lewis* (1826), 5 B. & C. 363.

(*k*) *Blakey* v. *Dinsdale* (1777), 2 Cowp. 661; *Tewkesbury Corporation* v. *Diston* (1808), 6 East, 438; *Brecon Corporation* v. *Edwards* (1862), 1 H. & C. 51.

SECT. 1. In General.

done with intent to evade payment of a toll which would be due if the bulk were brought into the market and there sold, and to get the benefit of the market without such payment (*l*).

Nature of action for disturbance.

101. An action for disturbance is a possessory action. The plaintiff must prove the existence of the franchise to hold a market or fair, and that he is in possession of the franchise (*m*) and actually holds the market or fair (*n*), or would do so if he were not prevented by the acts of disturbance (*o*).

SECT. 2.—*By Levying a Rival Market.*

Area of monopoly. Common law distance.

102. A franchise of market or fair carries with it a right to be protected from disturbance by a rival market or fair levied within a distance of seven miles (*p*), or more strictly six and two-third miles (*q*), of the place where the market or fair is held (*r*). Any other market or fair held within that distance may be a disturbance, but a market or fair held without that distance, though it may cause loss, cannot be an injury in law—it is at most *damnum sine injuriâ* (*s*).

When damage must be proved.

103. To sustain an action for levying a rival market or fair held within the common law distance of a lawfully-established market or fair, but not on the same day, actual damage by loss of tolls, stallage, or other profits of the market must be proved (*a*). But if the rival market or fair is held on the same day and within the common law distance, it is not necessary to prove actual damage (*b*). It seems that the mere infringement of the exclusive

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(*l*) *Moseley* v. *Pierson* (1790), 4 Term Rep. 104, *per* Lord KENYON, C.J., at p. 107; *Tewkesbury Corporation* v. *Bricknell* (1809), 2 Taunt. 120.

(*m*) *Dent* v. *Oliver* (1607), Cro. Jac. 122; *De Rutzen* (*Baron and Baroness*) v. *Lloyd* (1836), 5 Ad. & El. 456; *Yard* v. *Ford* (1670), 2 Wms. Saund. (1871 ed.) 500, and notes; *Fitzgerald* v. *Connors* (1871), 5 I. R. C. L. 191.

(*n*) *Dorchester Corporation* v. *Ensor* (1869), L. R. 4 Exch. 335.

(*o*) *Downshire* (*Marquis*) v. *O'Brien* (1887), 19 L. R. Ir. 380, 389.

(*p*) See the declaration in *Yard* v. *Ford*, *supra*.

(*q*) Bract., bk. iv., c. 46, fol. 235 b (Sir Travers Twiss' edition, Vol. III., p. 585); *Great Eastern Rail. Co.* v. *Goldsmid* (1884), 9 App. Cas 927, where Lord SELBORNE, L.C., at p. 936, speaks of the distance as "nearly seven miles."

(*r*) Or perhaps "of the town or district within which it may be held" (*Great Eastern Rail. Co.* v. *Goldsmid*, *supra*, *per* Lord SELBORNE, L.C., at p. 936, who says "the protection extends to a distance of nearly seven miles of the places in which they" (*i.e.*, the market rights) "might be exercised"); see also the declaration in *Yard* v. *Ford*, *supra*. But in answer to questions proposed by the House of Lords to the judges in the *Islington Market Bill* (1835), 3 Cl. & Fin. 513, H. L., in which this point was clearly involved, the judges say "within the common law distance of an old market."

(*s*) Bract., bk. iv., c. 46, fol. 235 b (Sir Travers Twiss' edition, Vol. III., p. 585); Britton, II., c. 32, s. 8, fol. 159; Fleta, IV., c. 28, s. 13.

(*a*) *Yard* v. *Ford*, *supra*; *Great Eastern Rail. Co.* v. *Goldsmid*, *supra*; and see the authorities cited in notes (*b*)—(*h*), *infra*. That loss of stallage is enough appears from *Cork Corporation* v. *Shinkwin* (1825), Sm. & Bat. 395.

(*b*) *Dorchester Corporation* v. *Ensor*, *supra*, *per curiam*, at p. 343; *Elwes* v. *Payne* (1879), 12 Ch. D. 468, C. A., *per* JESSEL, M.R., at p. 472; *Cork Corporation* v. *Shinkwin*, *supra*, *per curiam*, at p. 398. In *Ashby* v. *White* (1703), 2 Ld. Raym. 938 (1 Smith L. C., 11th ed., 240), POWELL, J.,

right of the owner of the franchise without justification is *per se* actionable, though there be no pecuniary damage; there is *injuria sine damno* (*c*).

104. To constitute a disturbance it is not necessary that the rival market should purport to be a franchise market (*d*) or that the defendant should have any intention of setting up a rival market (*e*). Any user of land which encourages and provides for a concourse of buyers and sellers whereby the public are provided with the means of selling their goods without bringing them to the market may amount to a disturbance (*f*), and it is enough to show that the defendant has actively participated in the levying of the rival market by providing land for it and participating in the profits (*g*), or that he has knowingly and wilfully contributed to the damage by selling his goods there instead of in the plaintiff's market (*h*).

What constitutes a rival market.

105. It is not ordinarily a disturbance for a person to sell his goods in the ordinary course of business in his own shop near the market-place and on market days (*i*); though by immemorial custom

Sales in shops.

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at p. 948, says that in such a case there is a possibility of damage, and this will support the action, but the reasoning of HOLT, C.J. (*ibid.*, at p. 955), which ultimately prevailed, seems to show that the infringement of the right may give a cause of action without a possibility of damage (see *Cork Corporation* v. *Shinkwin* (1825), Sm. & Bat. 395). The judges, in giving their opinion in the *Islington Market Bill* (1835), 3 Cl. & Fin. 513, 520, H. L., say that "the establishment of a new market to be holden at the same time within seven miles of an old market *primâ facie* is injurious to the old market and therefore void," and it is submitted that this is to the same effect. They use the phrase "*primâ facie*," not with reference to the burden of proof of damage, but in view of the possibility of justifying the setting up of a rival market authorised by grant in special circumstances (see p. 46, *post*). In *Wilcox* v. *Steel*, [1904] 1 Ch. 212, 218, C. A., however, the lords justices seem to take the view that in every case it is a question of fact, not of intendment of law, *i.e.*, a *primâ facie* presumption only. In *Cork Corporation* v. *Shinkwin*, *supra*, it was held in the King's Bench in Ireland that an action for disturbance would lie for a rival market held in the same place on the same day, even where the jury found no damage in fact, and it is submitted that this is right. The *dictum* in *Dorchester Corporation* v. *Ensor* (1869), L. R. 4 Exch. 335, is founded on a note to *Yard* v. *Ford* (1670), 2 Wms. Saund. (6th ed.) 172, 174, for which Fitz. Nat. Brev. 184 A, n. (b), Hale's edition, is cited. Hale states the rule emphatically and cites *Anon.* (1409), Y. B. 11 Hen 4, fo. 5, which seems to bear out the proposition in the text, *supra*. As to damages generally, see title DAMAGES, Vol. X., pp. 301 *et seq.*

(*c*) See note (*b*), p. 44, *ante*.

(*d*) *Yard* v. *Ford*, *supra*; *Mosley* v. *Chadwick* (1782), 3 Doug. (K. B.) 117; 7 B. & C. 47, n.

(*e*) *Wilcox* v. *Steel*, [1904] 1 Ch. 212, C. A.

(*f*) *Cork Corporation* v. *Shinkwin*, *supra* (user of land for stalls let out to dealers for selling marketable goods); *Dorchester Corporation* v. *Ensor*, *supra*; *Fearon* v. *Mitchell* (1872), L. R. 7 Q. B. 690; *London Corporation* v. *Low* (1879), 49 L. J. (Q. B.) 144; *Elwes* v. *Payne* (1879), 12 Ch. D. 468, C. A. (cases of holding public auction sales); *Downshire* (*Marquis*) v. *O'Brien* (1887), 19 L. R. Ir. 380; *Birmingham Corporation* v. *Foster* (1894), 70 L. T. 371; *Great Eastern Rail. Co.* v. *Goldsmid* (1884), 9 App. Cas. 927.

(*g*) *Dorchester Corporation* v. *Ensor*, *supra*.

(*h*) *Downshire* (*Marquis*) v. *O'Brien*, *supra*.

(*i*) *Macclesfield Corporation* v. *Chapman* (1843), 12 M. & W. 18;

SECT. 2. **By Levying a Rival Market.**

or prescription the owner of a market may have the right to prevent sales of marketable commodities, on market days, in shops in the town where the market is held (*k*). But even where such a custom exists a sale in a shop may be justified if the owner of the market neglects to provide sufficient accommodation (*l*).

Justification for holding rival market.

106. The holding of a rival market or fair within the common law distance, and whether on the same day or on other days, is justifiable if it is held: (1) with the consent or licence of the owner of the older franchise (*m*); (2) by statute (*n*); (3) by grant from the Crown made in those circumstances in which the Crown may lawfully grant a new market to be held within the common law distance of an older market (*o*).

Cases where there is no justification.

107. It is not, in general, a defence, that a rival market which is a disturbance of an older and lawfully established market is held by authority of a grant from the Crown, as in such a case the grant of the new market, even though it does not contain a proviso that it shall not be to the nuisance of another market, would itself be void, as being in derogation of the earlier grant (*p*).

Provided the market or fair is lawfully established and in fact held, it is no justification for levying a rival market that the plaintiff has been guilty of irregularities by extorting illegal tolls or unreasonable stallages (*q*), or by holding his market on illegal days (*r*), or by not providing sufficient accommodation for the public (*s*).

Abuse or neglect of the franchise is no excuse for setting up a rival market (*t*).

Manchester Corporation v. *Lyons* (1882), 22 Ch. D. 287, C. A. As to what is a "shop," see *Fearon* v. *Mitchell* (1872), L. R. 7 Q. B. 690; *Haynes* v. *Ford*, [1911] 2 Ch. 237, 248, C. A.; and p. 48, *post*.

(*k*) *Macclesfield Corporation* v. *Pedley* (1833), 4 B. & Ad. 397; *Devizes Corporation* v. *Clark* (1835), 3 Ad. & El. 506; *Penryn Corporation* v. *Best* (1878), 3 Ex. D. 292, C. A.

(*l*) *Mosley* v. *Walker* (1827), 7 B. & C. 40.

(*m*) Bract, bk. iv., c. 46, fol. 235 b. Such consent may be presumed from long acquiescence in the disturbance (*Holcroft* v. *Heel* (1799), 1 Bos. & P. 400, as explained in *Campbell* v. *Wilson* (1803), 3 East, 294, by LE BLANC, J., at p. 298; *Great Eastern Rail. Co.* v. *Goldsmid* (1884), 9 App. Cas. 927).

(*n*) *Islington Market Bill* (1835), 3 Cl. & Fin. 513, H. L.

(*o*) *Ibid.*; and see p. 7, *ante*.

(*p*) Opinions of the judges in the *Islington Market Bill*, *supra*, at p. 520. 2 Co. Inst. 406; Y. B. 22 Hen. 6, fol. 15 b; and see p. 7, *ante*.

(*q*) *Cork Corporation* v. *Shinkwin* (1825), Sm. & Bat. 395; *Midleton* (*Lord*) v. *Power* (1886), 19 L. R. Ir. 1.

(*r*) *Cork Corporation* v. *Shinkwin*, *supra*.

(*s*) *Ibid.*; *Great Eastern Rail. Co.* v. *Goldsmid*, *supra*. In the latter case it was also held that it was no defence that the Paving Acts had been infringed by the market owner. It was also pointed out that not providing sufficient accommodation may justify an individual in selling his goods outside the market (*Prince* v. *Lewis* (1826), 5 B. & C. 363), but cannot justify holding a rival market, though it may affect the *quantum* of damages in an action for disturbance.

(*t*) *Midleton* (*Lord*) v. *Power*, *supra*; *Islington Market Bill*, *supra*;

SECT. 3.—*Statutory Protection.*

SECT. 3. Statutory Protection.

108. A statutory market usually enjoys protection against certain sales outside the market, conferred by the terms of its special Act, or by the incorporation therewith of the Act of 1847 (*u*), s. 13.

Markets and Fairs Clauses Act, 1847, s. 13.

Where that clause is incorporated without variation (*a*), the market owner has the common law remedy by action for disturbance (*b*); and in addition it is an offence punishable by fine (*c*) on summary conviction for any person, other than a licensed hawker (*d*) or certificated pedlar (*e*), to sell or expose for sale in any place within the prescribed limits (*f*), except in his own dwelling

Effect of incorporation.

Great Eastern Rail. Co. v. *Goldsmid* (1884), 9 App. Cas. 927; *Peter* v. *Kendal* (1827), 6 B. & C. 703.

(*u*) Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14).

(*a*) In some cases the clause is incorporated with a variation, which modifies the effect of the provision as stated in the text. Some of these variations are referred to in notes (*b*), (*e*)—(*h*), *infra*

(*b*) See pp. 43 *et seq.*, *ante*; *Birmingham Corporation* v. *Foster* (1894), 70 L. T. 371. In *Abergavenny Improvement Commissioners* v. *Straker* (1889), 42 Ch. D. 83, it was held that the terms of a local Act excluded the common law remedy by action for disturbance.

(*c*) Not exceeding £2. If the Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14), s. 52, is incorporated, the fine is recoverable in accordance with the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), ss. 140—161; see title RAILWAYS AND CANALS. In the case of markets held under the Public Health Acts (see p. 11, *ante*), the penalty is recoverable under the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 316; see title PUBLIC HEALTH AND LOCAL ADMINISTRATION. The penalty cannot be condoned by subsequent payment of toll (*Carter* v. *Parkhouse* (1870), 34 J. P. 438), and is recoverable notwithstanding that the seller had previously on the same day bought the goods in the market and paid toll on them (*Black* v. *Sackett* (1869), 10 B. & S. 639).

(*d*) This exception applies even where the licensed hawker is selling articles which he may lawfully sell without a hawker's licence (*Llandudno Urban Council* v. *Hughes*, [1900] 1 Q. B. 472); and see p. 56, *post*.

(*e*) Pedlars Act, 1871 (34 & 35 Vict. c. 96), s. 6; and see pp 58 *et seq.*, *post*. A person who has a pedlar's certificate, but is trading, not as a pedlar, but as a hawker, is not within this exception (*Woolwich Local Board of Health* v. *Gardiner*, [1895] 2 Q. B. 497, where *Howard* v. *Lupton* (1875), L. R. 10 Q. B 598, was not followed). If a local Act, with which the Markets and Fairs Clauses Act, 1847 (10 & 11 Vict c 14), s. 13, is incorporated, prohibits sales of tollable articles in streets unless sold by a licensed hawker in "the lawful exercise of his calling," the prohibition extends to a licensed hawker who, by his omission to mark his packages, is contravening the Hawkers Act, 1888 (51 & 52 Vict. c. 33), s. 5 (*Hooper* v. *Kenshole* (1877), 2 Q. B. D. 127). If the local Act prohibits such sales without a licence from the undertakers, the prohibition extends to a hawker who is exempt from the necessity of having an excise licence under the Hawkers Act, 1888 (51 & 52 Vict. c. 33), but has no licence from the undertakers (*Openshaw* v. *Oakeley* (1889), 60 L. T. 929); but a licence from the undertakers for the sale of articles that are not tollable is not required by such a prohibition (*Loftos* v. *Gleave* (1890), 55 J. P. 149; *Loftos* v. *Higgins* (1890), 55 J. P. 151).

(*f*) *I.e.*, the limits prescribed for that purpose in the special Act; see the Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14), s 2. In the case of a market established under the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 166 (see p. 11, *ante*), the limits for

SECT. 3. **Statutory Protection.**

Exemptions: sales in shop or dwelling place.

What is an exposure for sale.

place or shop, any articles in respect of which tolls are by the special Act authorised to be taken in the market (*g*).

To come within the exception the place where the sale takes place must be either the seller's actual dwelling place or some part thereof or a real private shop, and the sales must not be conducted in such a way as to amount to holding a rival market (*h*).

To constitute an exposure for sale the goods must be exposed with a view to offering them for sale and not merely in course

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the purposes of the Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14), s. 13, are the limits of the council's district (*Spurling* v. *Bantoft*, [1891] 2 Q. B. 384). Where a local Act prohibited certain sales within the "town" of Rochdale, but did not define the limits of the town, it was held that the prohibition extended to sales in streets which, as the town from time to time grew in size, became new parts of it (*Collier* v. *Worth* (1876), 1 Ex. D. 464; *Killmister* v. *Fitton* (1885), 53 L. T. 959).

(*g*) In the case of markets under the Public Health Acts (see p. 11, *ante*), this must be read as tolls authorised by the Local Government Board to be taken in the market (see p. 42, *ante*). If the special Act only authorises stallages or rents to be taken the prohibition does not apply (*Caswell* v. *Cook* (1862), 11 C. B. (N. S.) 637); and if the special Act only authorises tolls to be levied on a cart containing an article, the selling of that article is not an offence (*Jenkins* v. *Thomas* (1911), 104 L. T. 74). For decisions under local Acts as to articles the sale whereof was thereby prohibited, see *Llandaff and Canton District Market Co.* v. *Lyndon* (1860), 8 C. B. (N. S.) 515 (a horse held to be an "article" within the meaning of a provision similar to the Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14), s. 13); *Shepherd* v. *Folland* (1884), 49 J. P. 165 (potatoes); *Morgan* v. *Kingdon* (1875), 39 J. P. 471 (gingerade); *Loftos* v. *Gleave* (1891), 55 J. P. 149 (bootlaces); *Loftos* v. *Higgins* (1891), 55 J. P. 151 (fish); *Quilligan* v. *Limerick Market Trustees* (1884), 14 L. R. Ir. 265 (milk); *Johnson* v. *Atkinson* (1909), 101 L. T. 637 (coal); *Wake* v. *Dyer* (1911), 104 L. T. 448 (sale by agent in excess of authority: no *mens rea* in the principal).

(*h*) It is in each case a question of fact whether the place is or is not a dwelling place or shop. A shed attached to a man's own dwelling-house may be part of his dwelling place (*Ashworth* v. *Heyworth* (1869), L. R. 4 Q. B. 316). A sale in a ship moored to the side of a canal, there being no evidence that the seller lived on board, was held not to be in a dwelling-house or shop attached thereto (*Wiltshire* v. *Baker* (1861), 11 C. B. (N. S.) 237; see also *Llandaff and Canton District Market Co.* v. *Lyndon*, *supra*, and *Perkins* v. *Arber* (1873), 37 J. P. 406). In considering whether a particular structure is a shop, elements to be taken into account are its permanency, its suitability for storing goods, whether it admits of persons coming inside, and the nature and duration of the tenancy of the person using it (*Pope* v. *Whalley* (1865), 6 B. & S. 303; *Ashworth* v. *Heyworth*, *supra*; *Hooper* v. *Kenshole* (1877), 2 Q. B. D. 127). A shop is properly a place not only for selling, but for storing, goods (*Pope* v. *Whalley*, *supra*; *Haynes* v. *Ford*, [1911] 2 Ch. 237, 248, C. A.). A building and yards where large sales by auction of cattle were held on market days were decided to be a rival market and not within the exception (*Fearon* v. *Mitchell* (1872), L. R. 7 Q. B. 690); and a sale yard for selling cattle is not a shop (*M'Hole* v. *Davies* (1875), 45 L. J. (M. C.) 30). But the mere fact that goods are sold by auction is not conclusive that the place is not a shop (*Wiltshire* v. *Willett* (1861), 11 C. B. (N. S.) 240). Nor is the place any the less a shop because goods are sold wholesale and partly on commission (*Haynes* v. *Ford*, *supra*). The terms of a local Act may have the effect of enlarging the exemptions contained in the Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14), s. 13 (*Rutherford* v. *Straker* (1887), 42 Ch. D. 85, n.). As to sale of goods generally, see title SALE OF GOODS.

of delivery to a regular customer in pursuance of a mutual course of dealing (*i*).

There is no sale within the prohibited area unless both the contract of sale and the delivery of the goods are made within the area (*k*).

Part V.—Forfeiture; Extinction; Abolition; Prohibition.

SECT. 1.—*Forfeiture and Ouster.*

Grounds of forfeiture.

109. A franchise of market or fair granted by the Crown is liable to forfeiture to the Crown for neglect or abuse (*l*), which may consist in: (1) non-user (*m*); or (2) continued failure by the owner to discharge his duty of providing accommodation for the holding of the market or fair (*n*); or (3) an unauthorised change of the market or fair day (*o*); or (4) the holding of a fair on additional days

(*i*) *White* v. *Yeovil Corporation* (1892), 61 L. J. (M. C.) 213. To the same effect are the following decisions on local Acts containing sections similar to the Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14), s. 13:—*Newton-in-Makerfield Urban Council* v. *Lyon* (1900), 69 L. J. (Q. B.) 230; *Philpott* v. *Allright* (1906), 94 L. T. 540; *Webber* v. *Adams* (1869), 5 I. R. C. L. 146, Ex. Ch. In *Luke* v. *Charles* (1861), 25 J. P. 148, it was held that under a provision in a local Act which imposed penalties for exposing tollable articles for sale a person was not liable to a penalty for exposing a stallion on view, although by the Act a toll was payable for exposing stallions on view in the market.

(*k*) *Stretch* v. *White* (1861), 25 J. P. 485 (goods delivered within the area in performance of a contract made elsewhere for general supply of goods by description); *Bourne* v. *Lowndes* (1858), 22 J. P. 354 (contract for sale of specific goods, made outside the area; delivery within). It seems that a sale is within the prohibition if the sale and delivery are both made within the area, even though the goods are not in the area at the time of the contract, but are subsequently brought into and delivered within the area in performance of the contract (*Exeter Corporation* v. *Heaman* (1877), 37 L. T. 534; *Torquay Market Co.* v. *Burridge* (1883), 48 J. P. 71). In Ireland, however, these last cases have not been followed, and it has been held that the prohibition only applies to sales when the bulk of the articles sold is substantially within the area at the time of the contract of sale (*Newtownards Town Commissioners* v. *Woods* (1877), 11 I. R. C. L. 506; *Londonderry Corporation* v. *M'Elhinney* (1875), 9 I. R. C. L. 61; *Gracey* v. *Banbridge Urban District Council*, [1905] 2 I. R. 209). If pursuant to a regular course of dealing goods are brought to a customer within the area and there sold to him (there being no prior binding contract), there is a sale within the area (*Jenkins* v. *Thomas* (1911), 104 L. T. 74, *per curiam*).

(*l*) 3 Cru. Dig., 4th ed., 268 (tit. XXVII., Franchises, s. 100); Com. Dig., tit. Market (I.); 15 Vin. Abr., tit. Market (F.); Bac. Abr., tit. Fairs and Markets (C.).

(*m*) *Leicester Forest Case* (1607), Cro. Jac. 155, *per* COKE, C.J.; Com. Dig., tit. Liberties (C 1.). But if a fair becomes unfrequented and is therefore to that extent discontinued, the right remains unimpaired (*Downshire (Marquis)* v. *O'Brien* (1887), 19 L. R. Ir. 380, *per* CHATTERTON, V.-C., at p. 389).

(*n*) *Islington Market Bill* (1835), 3 Cl. & Fin. 513, 510, H. L. (opinion of the judges); *Manchester Corporation* v. *Peverley* (1876), 22 Ch. D. 294, n., *per* LITTLE, V.-C.; and, as to the duty in this respect, see pp. 6, 20, *ante*.

(*o*) See p. 15, *ante*.

SECT. 1. **Forfeiture and Ouster.**

beyond those authorised (*p*); or (5) the taking of outrageous toll by, or by authority of, the owner of the market or fair (*q*). But neglect of the right to take toll is not a ground of forfeiture of the market or fair (*r*) or of the franchise of toll (*s*).

No forfeiture without process.

110. Neglect or abuse of a market or fair does not of itself destroy the franchise (*t*). The franchise is granted upon the implied condition that it be duly exercised, and if this condition be broken there is ground for forfeiture (*a*).

Process to enforce forfeiture.

111. The Crown may take advantage of the forfeiture by ousting the grantee upon an information in the nature of a *quo warranto* (*b*), or may seize the franchise after office found, and then either retain it till redeemed by fine, or grant it to another subject, or proceed by *scire facias* to have the grant repealed (*c*). But the Crown may waive

Waiver.

(*p*) Statute of Northampton (1328) 2 Edw. 3, c. 15; which makes the franchise of fair liable, after office found, to be seized into the King's hands, there to remain till the lord has made a fine to the King for the offence (15 Vin Abr., tit. Market (F.); Com. Dig. tit. Market (F); 2 Roll. Abr. 124, tit Market (F.), *Anon.* (1348), Y. B. 22 Ass. fol. 93, pl. 34, *per* BANKWEL, J.). But in the case of a market, if it be held on the proper day and also upon an additional day, the franchise is not liable to forfeiture, but the usurpation of the additional day may be suppressed by *quo warranto* (*ibid.*); *A.-G.* v. *Horner* (1884), 14 Q. B. D. 245, C. A.). As to unauthorised days, see, further, p. 15, *ante*. As to the effect of an improper removal of a market or fair, see p. 21, *ante*.

(*q*) Statute of Westminster I. (1275), 3 Edw. 1, c. 31; 2 Co. Inst. 219, 222; and see, further, p. 37, *ante*.

(*r*) *Newcastle* (*Duke*) v. *Worksop Urban Council*, [1902] 2 Ch. 145, *per* FARWELL, J., at p. 156.

(*s*) *Leicester Forest Case* (1607), Cro. Jac. 155, *per* COKE, C.J. According to 3 Com. Dig., 4th ed., 270, non-user of a franchise creates a presumption that it has been surrendered to the Crown. In *Newcastle* (*Duke*) v. *Worksop Urban Council*, *supra*, FARWELL, J., at pp. 157, 158, thought that there was great difficulty in presuming the extinction of "the subordinate franchise" of toll; that the franchise of toll, if surrendered or forfeited, would vest in the Crown; and that it was not easy to see how the franchise of fair could be in the lord and the franchise of toll in the Crown. But in *R.* v. *Maidenhead Corporation* (1620), Palm 76, 82, the court agreed that the toll, being neither incident nor subordinate to the market, could be forfeited and the market remain.

(*t*) *Peter* v. *Kendal* (1827), 6 B. & C. 703, *per* BAYLEY, J., at p. 710; *Great Eastern Rail. Co.* v. *Goldsmid* (1884), 9 App. Cas. 927, *per* Lord SELBORNE, L.C., at p. 946; and see title CROWN PRACTICE, Vol. X., p. 128. Nor does it justify the setting up of a rival market, see p. 46, *ante*.

(*a*) *London Corporation* v. *Vanacre* (1700), 12 Mod. Rep. 270, *per* HOLT, C.J.

(*b*) *Peter* v. *Kendal*, *supra*, *per* BAYLEY, J., at p. 710: "The proceeding by *quo warranto* supposes the party in actual, though not in legal, possession, and therefore judgment of ouster is necessary to dispossess him" (*ibid.* and see p. 51, *post*).

(*c*) 3 Bl. Com. 260; *Midleton* (*Lord*) v. *Power* (1886), 19 L. R. Ir. 1, *per* CHATTERTON, V.-C., at pp. 8—10; *Newcastle* (*Duke*) v. *Worksop Urban Council*, *supra*, *per* FARWELL, J., at p. 158; *Islington Market Bill*, *supra*; *Great Eastern Rail. Co.* v. *Goldsmid*, *supra*, *per* Lord FITZGERALD, at p. 965. *Scire facias* is the proper procedure for repeal of the grant. When the grant is liable to forfeiture for non-user or abuse, the King may seize upon office found (*i.e.*, upon the finding upon an inquisition made to the King's use before commissioners or the sheriff), and may

the forfeiture, as by accepting rent for a market held in fee farm (*d*); and no person other than the Crown can take advantage of the forfeiture (*e*).

Effect of forfeiture.

112. A market or fair is not extinguished by forfeiture; it continues to exist in the Crown until it is regranted or the original grant is repealed by *scire facias* (*f*).

Statutory markets.

113. Markets, fairs, and tolls which have been created by Act of Parliament are not liable to forfeiture to the Crown, and cannot be called in question by any process of *scire facias* (*g*); but, if the statutory rights be exceeded, the excess can be restrained by information at the suit of the Attorney-General (*h*).

Unauthorised markets.

114. When a market or fair is held without any title, judgment of ouster may be obtained by the Crown on an information in the nature of a *quo warranto* (*i*). In the Metropolitan Police District summary proceedings may be taken to have a fair declared unlawful (*k*).

afterwards proceed by *scire facias* to have the grant repealed. It seems, however, that in that case the effect of the repeal of the grant is not to abolish the market, but to regularise the seizure and vest the franchise in the King. Where *scire facias* is brought to repeal a grant on the ground that it is a nuisance to another market, or that the King has been otherwise deceived in his grant, it is not necessary that there should be an office found; the writ is founded on the charter. But in that case the King cannot seize till after the judgment in *scire facias*, and it seems that the effect of the judgment is to declare the grant void *ab initio*, so that the franchise itself is destroyed and does not continue to exist in the Crown (see *Butler's (Sir Oliver) Case* (1680), 2 Vent. 344; *R.* v. *Ayres* (1761), 10 Mod. Rep. 258, 353; *Anon* (1409), Y. B. 11 Hen. 4, fo 5). As to *scire facias*, see title CROWN PRACTICE, Vol. X., p. 35.

(*d*) *Midleton (Lord)* v. *Power* (1886), 19 L. R. Ir. 1.

(*e*) *Ibid.*; *Islington Market Bill* (1835), 3 Cl. & Fin. 513, H. L.

(*f*) Co. Inst. 222; *Heddy* v. *Wheelhouse* (1597), Cro. Eliz. 591; *Strata Mercella (Abbot) Case* (1591), 9 Co. Rep. 24 a, 25 b; *Peter* v. *Kendal*, (1827), 6 B. & C. 703, *per* BAYLEY, J., at p. 710. As to the effect of *scire facias*, see, however, note (*c*), p. 50, *ante*. As to the effect of a regrant upon exemptions from tolls, see note (*s*), p. 41, *ante*. As to the powers of the Commissioners of Woods to abandon the collection of tolls from markets or fairs belonging to the Crown, see title CONSTITUTIONAL LAW, Vol. VII., p. 200.

(*g*) See p. 8, *ante*.

(*h*) *A.-G.* v. *Tynemouth Corporation* (1900), 17 T. L. R. 77.

(*i*) *R.* v. *Anon.* (1475), Y. B. 15 Edw. 4, fo. 7; *R.* v. *Ponsonby* (1755), Say. 245; 3 Bl. Com. 262; *Peter* v. *Kendal*, *supra*, *per* BAYLEY, J., at p. 710. In *quo warranto* for forfeiture (see p. 50, *ante*) the proper judgment is that the franchise be seized by the King to be held till redeemed. If the ground of the *quo warranto* is that the market or fair is held without any title the judgment is for ouster. It must be shown that the defendant has actually held the market or fair and usurped a franchise by demanding toll or the like. It is not enough to show that he has promoted and encouraged the holding of a market (*R.* v. —— (1682), 2 Show. 201; *R.* v. *Marsden* (1765), 1 Wm. Bl. 579). It has been doubted whether an information can be brought except by the Attorney-General (*ibid.*). As to the practice, see title CROWN PRACTICE, Vol. X., pp. 128 *et seq.*

(*k*) Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), ss. 38—40. By summons the owner or occupier of land on which a fair is held may be

SECT. 2. SECT. 2. —*Extinction.*

Extinction.

Act of Parliament or new charter.

115. A franchise market or fair (*l*), or franchise tolls (*m*), may be extinguished by implication of an Act of Parliament which creates the like rights, or larger or different rights of the like nature or character, in favour of the grantee; and it has been laid down that if a man has franchises by prescription, and the King grants to him the same liberties by charter, he cannot afterwards claim them by prescription (*n*).

SECT. 3.—*Abolition.*

Order made on representation.

116. The Secretary of State for the Home Department (*o*) is empowered, with the consent in writing of the owner of a fair or of the tolls or dues payable in respect thereof, to order that a fair shall be abolished. The order can only be made upon a representation made to him either (1) by the council (*p*) of the county borough or county district in which the fair is held; or (2) in the county of London by the magistrates of the petty sessional district in which the fair is held; or (3) by the owner of the fair (*q*).

Procedure.

117. The procedure for obtaining and advertising an order of the Secretary of State for abolishing a fair is as follows:—

(1) Notice of the representation and of the time when the Secretary of State will take it into consideration must be published once in the *London Gazette* and in three successive weeks in some one and the same newspaper published in the county, city, or borough in which the fair is held, or if there be no newspaper therein, then in the newspaper of a county adjoining or near thereto (*r*).

Publication of order.

(2) As soon as the order has been made, notice of the making must be published in the *London Gazette* and in one newspaper published as aforesaid (*s*).

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called on to show his right or title to hold such fair, and upon his failure to do so a magistrate may declare the fair to be unlawful. As to the effect of notice of the declaration and other proceedings under this statute, see note (*e*), p. 16, *ante*.

(*l*) *Manchester Corporation* v. *Lyons* (1882), 22 Ch. D. 287, C. A.; *Manchester Corporation* v. *Peverley* (1876), 22 Ch. D. 294, n.

(*m*) *New Windsor Corporation* v. *Taylor*, [1899] A. C. 41.

(*n*) Com. Dig., tit. Prescription (G.), cited by A. L. SMITH, L.J., in *Taylor* v. *New Windsor Corporation*, [1898] 1 Q. B. 186, C. A., at p. 196; 3 Cru. Dig., 4th ed., 428 (tit. XXXI., Prescription, s. 40), citing Finch, bk. 1, c. 3, s. 23, who cites *Anon.* (1506), Y. B. 21 Hen. 7, fo. 5; but the decision in the Year Book, and *Goodson* v. *Duffield* (1612), Cro. Jac. 313, seem to be adverse to the above proposition. It is submitted that it is a question of construction, whether the grant supersedes or merely confirms the rights by prescription.

(*o*) See title CONSTITUTIONAL LAW, Vol. VII., p. 82.

(*p*) As to district councils, see title LOCAL GOVERNMENT, Vol. XIX., pp. 262 *et seq.*, 329 *et seq.*

(*q*) Fairs Act, 1871 (34 & 35 Vict. c. 12), as amended by the Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 27. "Owner" is defined (Fairs Act, 1871 (34 & 35 Vict. c. 12), s. 2) as meaning any person or persons or body of commissioners or body corporate entitled to hold any fair whether in respect of the ownership of any lands or tenements or under any charter, letters patent, or Act of Parliament, or otherwise howsoever. For form of representation by district council for abolition of a fair, see Encyclopædia of Forms and Precedents, Vol. VIII., p. 228.

(*r*) Fairs Act, 1871 (34 & 35 Vict. c. 12), s. 3.

(*s*) *Ibid*, s. 4.

When these conditions have been complied with the fair is abolished (*a*). SECT. 3. Abolition.

SECT. 4.—*Prohibition.*

118. The Board of Agriculture and Fisheries may by order prohibit the holding of markets or fairs for sale of animals (*b*). Orders prohibiting cattle markets.

Part VI.—Sale in Market Overt.

SECT. 1.—*Acquisition of Title by Buyer.*

119. Where goods, other than goods belonging to the Crown (*c*), are sold in market overt according to the usage of the market, the buyer acquires a good title to the goods, provided the following conditions be fulfilled (*d*):— Sale in market overt confers title.

(1) The place where the goods are sold must be a public and legally constituted market (*e*) or fair (*f*). Conditions to be fulfilled.

(2) The sale must be made in the usual market place or place for the fair, upon the lawful day, and during the usual hours for holding the market or fair, and not at night (*g*).

(3) The goods must be exposed for sale, and the whole transaction of sale and delivery must be begun and concluded, openly in the market or fair (*h*).

(4) The sale must be a real sale by a person of contractual capacity (*i*).

(5) The goods must be goods of a kind which is vendible in the market or fair and which the vendor is offering there ostensibly (*k*).

(6) If toll is payable upon the sale of the goods, it must be paid (*l*). But in toll free markets or fairs the property passes without payment of toll (*m*).

(*a*) Fairs Act, 1871 (34 & 35 Vict. c. 12), s. 4.

(*b*) See title ANIMALS, Vol. I., p. 423.

(*c*) 2 Co. Inst. 713; *Willion* v. *Berkley* (1561), 1 Plowd. 223, 243, 423; see also title CONSTITUTIONAL LAW, Vol. VI., p. 494. As to horses, see p. 31, *ante*, and p. 54, *post*.

(*d*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 22 (1), adopting the rule at common law. For a statement of that rule by Lord CAIRNS, L.C., see *Cundy* v. *Lindsay* (1878), 3 App. Cas. 459, 463, see also 2 Co. Inst. 713, 714. As to sale of goods generally, see title SALE OF GOODS.

(*e*) *Lee* v. *Bayes* (1856), 18 C. B. 599. A modern statutory market seems to be within the rule (*Ganly* v. *Ledwidge* (1876), 10 I. R. C. L. 33). But the defendant's counsel admitted the contrary in *Moyce* v. *Newington* (1878), 4 Q. B. D. 32.

(*f*) *Comyns* v. *Boyer* (1596), Cro. Eliz. 485; 2 Co. Inst. 713.

(*g*) 2 Co. Inst. 713.

(*h*) *Ibid.*; *Crane* v. *London Dock Co.* (1864), 5 B. & S. 313; *Hill* v. *Smith* (1812), 4 Taunt. 520, Ex. Ch., *per* MANSFIELD, C.J., at p. 533.

(*i*) 2 Co. Inst. 713.

(*k*) *Ibid.*; and see *Case of Market-overt* (1596), 5 Co. Rep. 83 b.

(*l*) 2 Co. Inst. 713. If non-payment of toll is relied upon as avoiding the sale, the burden of proving that toll was payable and not paid lies on the party who seeks to avoid the sale (*Comyns* v. *Boyer*, *supra*).

(*m*) *Comyns* v. *Boyer*, *supra*.

SECT. 1. Acquisition of Title by Buyer.

(7) The buyer must buy in good faith and without any notice of any defect or want of title on the part of the seller (*n*).

(8) In the case of a horse certain special formalities must be strictly observed (*o*).

Special rules applicable to horses.

120. Sales of horses are moreover partially excepted from the rule. If a stolen horse be sold in market overt within six months after the theft, the sale, though conducted with all the requisite formalities (*p*), does not take away the property of the owner from whom the horse was stolen, provided that a claim by him or his personal representative be made within the six months before a justice of the peace at the place where the horse happens to be found (*q*), and that within the next forty days the owner's title to the horse, and its theft from him within six months of the claim, be proved by two witnesses (*r*). The claimant may thereupon retake the horse as his own, but only upon paying or tendering to the person in possession of it the sum which that person proves before the justice that he paid for it without fraud or collusion (*r*).

Custom of City of London.

121. By the custom of the City of London (of which judicial notice is now taken (*s*)), that part of every shop (*t*) within the City (*u*) to which the public are admitted without special invitation (*a*) is market overt, between sunrise and sunset on all days except Sundays and holidays, for the sale by the shopkeeper of such goods as he professes to sell (*b*).

(*n*) 2 Co. Inst. 713; Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 22 (1).

(*o*) Stats. (1555) 2 & 3 Phil. & Mar. c. 7, s. 2; (1588-9) 31 Eliz. c. 12, s. 1; and see p. 31, *ante*. The buyer must rely for his title to the horse upon the common law (see note (*d*), p. 53, *ante*), as varied by these statutes, for by the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 22 (2), nothing in that section affects the law relating to the sale of horses. The burden of proof that the formalities have been complied with is on the party who alleges that the property has passed by the sale (*Moran* v. *Pitt* (1873), 42 L. J. (Q. B.) 47).

(*p*) See p. 31, *ante*, and the text, *supra*.

(*q*) If it is found in a "town or parish," the claim may be made before the "mayor or other head officer" there.

(*r*) Stat. (1588-9) 31 Eliz. c. 12, s. 3.

(*s*) *Case of Market-overt* (1596), 5 Co. Rep. 83 b; *Lyons* v. *De Pass* (1840) 11 Ad. & El. 326; see title CUSTOM AND USAGES, Vol. X., pp. 237, 238.

(*t*) But not a wharf (*Wilkinson* v. *King* (1809), 2 Camp. 335).

(*u*) The custom of London is confined to the City (*Anon.* (1701), 12 Mod. Rep. 521).

(*a*) *Hargreave* v. *Spink*, [1892] 1 Q. B. 25. But it is not necessary that the premises should be sufficiently open to the street for a person outside to see what passes within (*Lyons* v. *De Pass*, *supra*). In *Clayton* v. *Le Roy et Fils* (1911), 104 L. T. 419 (on appeal, 27 T. L. R. 479, C. A.), it was held that an auction room used for periodical sales of unredeemed pledges was not a shop within the custom.

(*b*) *Case of Market-overt*, *supra*, *Taylor* v. *Chambers* (1605), Cro. Jac. 68; 2 Bl. Com., 21st ed., 449. The custom was successfully pleaded in *Lantony* (*Prior*) v. —— (1472), Y. B. 12 Edw. 4, fos. 8, 9. It is fully discussed in *Hargreave* v. *Spink*, *supra*. In *Clifton* v. *Chancellor* (1600), Moore (K. B.), 624, a like custom was pleaded for sales in shops at Bristol. The custom does not extend to pawning (*Hartop* v. *Hoare* (1743), 1 Wils. 8).

SECT. 1. Acquisition of Title by Buyer.

122. Although a sale in market overt passes to the buyer the property in the goods, the seller is not thereby protected, and an action for conversion lies against one who wrongfully sells and delivers the goods of another in market overt (*c*).

Seller not protected in case of stolen goods.

SECT. 2.—*Revesting of Property on Thief's Conviction.*

Effect of conviction.

123. Where goods have been stolen and the offender is prosecuted to conviction, the property in the stolen goods revests in the person who was their owner, or in his personal representative, notwithstanding any intermediate dealing with them, whether by sale in market overt or otherwise (*d*).

Intermediate dealings

124. The title to stolen goods which an innocent buyer acquires by purchasing them in market overt (*e*) continues good until the conviction of the offender; and if, in the interval between his purchase and the conviction, the buyer parts with the goods, as by reselling them, he will not, upon the conviction, become answerable for them to the owner in whom the title thereupon revests (*f*). If the buyer incurs cost in keeping the goods before the conviction, he has no claim against the owner after the conviction for such cost (*g*).

Part VII.—Hawkers and Pedlars.

SECT. 1.—*Hawkers.*

Definition of hawker.

125. A hawker is a person who travels with a horse or other beast of burden selling goods from house to house (*h*). Unless

(*c*) *Peer* v *Humphrey* (1835), 2 Ad & El 495; *Delaney* v. *Wallis & Son* (1884), 14 L R Ir 31, C. A; and see title TROVER AND DETINUE.

(*d*) Sale of Goods Act, 1893 (56 & 57 Vict, c 71), s 24 (1), see title CRIMINAL LAW AND PROCEDURE, Vol IX, pp 686 *et seq* The Sale of Goods Act, 1893 (56 & 57 Vict c 71), s 24 (1), applies to horses as well as to other goods As to horses, see, further, p 54 As to orders for restitution, by which an owner may recover his goods, see title CRIMINAL LAW AND PROCEDURE, Vol IX, p 686

(*e*) See p 53, *ante*

(*f*) *Horwood* v. *Smith* (1788), 2 Term Rep 750; see title CRIMINAL LAW AND PROCEDURE, Vol IX, p 686

(*g*) *Walker* v. *Matthews* (1881), 8 Q B. D 109 (where a cow had been stolen and had calved before conviction of the thief, and the owner recovered the calf as well as the cow)

(*h*) A hawker is defined in the Hawkers Act, 1888 (51 & 52 Vict. c. 33), s 2, as "any person who travels with a horse or other beast bearing or drawing burden, and goes from place to place or to other men's houses carrying to sell or exposing for sale any goods, wares, or merchandise, or exposing samples or patterns of any goods, wares, or merchandise to be afterwards delivered, and includes any person who travels by any means of locomotion to any place in which he does not usually reside or carry on business, and there sells or exposes for sale any goods, wares, or merchandise in or at any house, shop, room, booth, stall, or other place whatever hired or used by him for that purpose" (see *Hudson* v. *Shooter* (1891), 55 J P. 325). Under a similar definition in the repealed stat (1810) 50 Geo 3, c. 41, merchandise was held to include raw material, such as timber (*R* v. *Pease* (1829), 8 L. J. (o. s.) (M. C) 87). The latter part of the definition

SECT. 1. Hawkers.

within one of certain exemptions (*i*), he is required to take out annually an excise licence (*j*), and any person who trades as a hawker without having, or without immediately producing upon demand, a current licence granted to him or his master is liable to fine and imprisonment (*k*).

Exemptions from need for licence.

126. The following are exempt from the necessity to take out a hawker's licence (*l*) :—(1) Any person selling or seeking orders for

above given adopts in effect the decisions on the repealed stat. (1810) 50 Geo. 3, c. 41, s. 6, in *R.* v. *Turner* (1821), 4 B. & Ald. 510, and *Dean* v. *King* (1821), 4 B. & Ald. 517. The definition includes a person who calls at houses in compliance with a request to call at intervals, or in pursuance of an arrangement made by a canvasser, and there sells without having previously received orders for specific quantities or specific goods (*O'Dea* v. *Crowhurst* (1899), 68 L. J. (Q. B.) 655; *Holland* v. *Hall* (1902), 86 L. T. 355). It has been held in Scotland that a corporation acting as a hawker requires a licence and may be convicted for selling without one (*Co-operative Drapery and Furnishing Co., Ltd.* v. *Bligh* (1902), 4 Fraser (Justiciary Cases), 97).

(*i*) See the text, *infra*.

(*j*) Hawkers Act, 1888 (51 & 52 Vict. c. 33), s. 3 (1), (2), repealing Customs and Inland Revenue Act, 1888 (51 & 52 Vict. c. 8), s. 9 (1). The licence duty is £2. The licence does not legalise trading in contravention of a local bye-law (*Simson* v. *Moss* (1831), 2 B. & Ad. 543), or the selling in the ordinary course of trade of any article composed wholly or in part of gold or silver without an excise licence to deal in plate (Revenue Act, 1867 (30 & 31 Vict. c. 90), s. 1, as amended by the Customs and Inland Revenue Act, 1888 (51 & 52 Vict. c. 8), s. 9 (2)); see title REVENUE.

(*k*) Hawkers Act, 1888 (51 & 52 Vict. c. 33), s. 6. A simple act of selling will not support a conviction (*R.* v. *Little* (1758), 1 Burr. 609), but proof of trading as a hawker on a single day will suffice (*Manson* v. *Hope* (1862), 2 B. & S. 498). An officer of Customs and Excise (see the Finance Act, 1908 (8 Edw. 7, c. 16), s. 4; Excise Transfer Order, 1909 (*London Gazette*, 16th February, 1909)) or police officer may arrest a person found committing an offence (Hawkers Act, 1888 (51 & 52 Vict. c. 33), s. 6 (3)). Fines are recoverable as penalties under the Excise Acts, and the provisions of those Acts relating to licences are applicable to hawkers' licences (*ibid.*, s. 7); see title REVENUE. Hawkers, whether licensed or not, and pedlars are protected from liability for street obstruction by selling in the streets in the Metropolis (see title METROPOLIS, pp. 389 *et seq.*, *post*), so long as they carry on their business in accordance with the police regulations (Metropolitan Streets Act Amendment Act, 1867 (31 & 32 Vict. c. 5)); see *Keep* v. *St. Mary's, Newington, Vestry*, and *Austin* v. *St. Mary's, Newington, Vestry*, [1894] 2 Q. B. 524, C. A.; *Baker* v. *Bradley* (1910), 103 L. T. 253; and title STREET AND AERIAL TRAFFIC. A hawker or pedlar cannot lawfully sell spirits, except on premises for which he is licensed (Spirits Act, 1880 (43 & 44 Vict. c. 24), s. 146; see title INTOXICATING LIQUORS, Vol. XVIII., p. 115), tobacco or snuff (Tobacco Act, 1842 (5 & 6 Vict. c. 93), s. 13; see title TRADE AND TRADE UNIONS), gunpowder (Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 30; see title EXPLOSIVES, Vol. XIV., p. 380), stamps (Stamp Duties Management Act, 1891 (54 & 55 Vict. c. 38), s. 6; see title REVENUE), or pirated copies of musical works (Musical (Summary Proceedings) Copyright Act, 1902 (2 Edw. 7, c. 15); Musical Copyright Act, 1906 (6 Edw. 7, c. 36); see title COPYRIGHT AND LITERARY PROPERTY, Vol. VIII., p. 171). If licensed to sell petroleum, he may hawk it subject to certain regulations (Petroleum (Hawkers) Act, 1881 (44 & 45 Vict. c. 67); see title PUBLIC HEALTH AND LOCAL ADMINISTRATION).

(*l*) Hawkers Act, 1888 (51 & 52 Vict. c. 33), s. 3 (3). As to the effect of these exemptions in a local Act prohibiting hawking without a licence, see note (*e*), p. 47, *ante*, and as to the exemption in the Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14), s. 13, see p. 47, *ante*.

goods, wares, or merchandise to or from persons who are dealers therein and who buy to sell again; (2) the real worker or maker (*m*) of any goods, wares, or merchandise, and his children, apprentices, and servants usually residing in the same house with him, selling or seeking orders for goods, wares, or merchandise made by such real worker or maker (*n*); (3) any person selling fish, fruit, victuals (*o*), or coal; (4) any person selling or exposing for sale goods, wares, or merchandise in any public mart, market, or fair legally established (*p*).

How licence granted.

127. A hawker's licence is not granted to any person, otherwise than by way of renewal of a licence for the year immediately preceding, except on the production of a certificate that such person is of a good character and is a proper person to be licensed as a hawker. The certificate must be signed by a clergyman or minister of the parish or place wherein such person resides and two householders of such parish or place, or by a justice for the county or place, or superintendent or inspector of police for the district, wherein the officer to whom application for the grant of a licence is made resides (*a*).

Use of words "licensed hawker."

128. Every hawker must keep his name and the words "licensed hawker" legibly written, painted, or printed on every box, package, and vehicle used for the carriage of his goods, and upon every room or shop in which his goods are sold, and upon every handbill or advertisement which he distributes or publishes (*b*). Any person not having a hawker's licence is liable to a fine if he uses the words "licensed hawker" or other words importing that he is a licensed hawker, or trades under colour of a licence granted to any person other than his master (*c*). A servant may travel with his master's certificate and trade for his benefit (*d*).

(*m*) A person buying books in sheets and making them up is not exempt as the maker (*Moore* v. *Edwards* (1819), 2 Chit. 213).

(*n*) This exemption extends to manufacturers on a large scale employing workmen on premises where they do not reside (*R.* v. *Faraday and Wood* (1830), 1 B. & Ad. 275, where the sale was in a public room by a servant who did not reside with the manufacturers; but one of the manufacturers, who was present, gave directions, noted the purchase, and received the money, and it was held that the sale was substantially by the master).

(*o*) Yeast or barm is included in the term "victuals," which includes "everything that constitutes an ingredient in the food of man and all articles which mixed with others constitute food" (*R.* v. *Hodgkinson* (1829), 10 B. & C. 74).

(*p*) A sale in a market *de facto*, held without any grant or statutory authority, is not within this exemption (*Benjamin* v. *Andrews* (1858), 5 C. B. (N. S.) 299).

(*a*) Hawkers Act, 1888 (51 & 52 Vict. c. 33), s. 4 (1). To forge or counterfeit a certificate for obtaining a licence, or knowingly to make use of a forged or counterfeited certificate or licence, is punishable by fine of £50, and a licence obtained on a forged or counterfeited certificate is void (*ibid.*, s. 4 (2)). As to arrest of offenders, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 302.

(*b*) Hawkers Act, 1888 (51 & 52 Vict. c. 53), s. 5 (1). The fine for contravention is £10 (*ibid.*, s. 5 (3)).

(*c*) *Ibid.*, s. 5 (4). The fine is £10 (*ibid.*). A hawker who lets, hires, or lends his licence is liable to a fine of £10 for every such offence (*ibid.*, s. 5 (2), (3)).

(*d*) *Ibid.*, s. 5 (2).

SECT. 2. **Pedlars.**

SECT. 2.—*Pedlars.*

Definition of pedlar.

129. A pedlar is a person who, without a horse or other beast of burden, travels and trades on foot selling or bartering goods or offering for sale his skill in handicraft from house to house (*e*).

Necessity for certificate.

No person, unless he comes within one of certain exemptions (*f*), may lawfully trade as a pedlar without a pedlar's certificate (*g*).

(*e*) A pedlar is defined in the Pedlars Act, 1871 (34 & 35 Vict. c. 96), s. 3, as "any hawker, pedlar, petty chapman, tinker, caster of metals, mender of chairs, or other person who, without any horse or other beast bearing or drawing burden, travels and trades on foot and goes from town to town or to other men's houses, carrying to sell or exposing for sale any goods, wares, or merchandise, or procuring orders for goods, wares, or merchandise immediately to be delivered, or selling or offering for sale his skill in handicraft." Bartering goods for goods is "selling" within this definition (*Druce* v. *Gabb* (1858), 6 W. R. 497). But, *semble*, persons who sell not in the way of trade but for charitable purposes do not require pedlars' certificates (*Gregg* v. *Smith* (1873), L. R. 8 Q. B. 302).

(*f*) See p. 59, *post*.

(*g*) Pedlars Act, 1871 (34 & 35 Vict. c. 96), s. 4; Pedlars Act, 1881 (44 & 45 Vict. c. 45), s. 2. To obtain a certificate application must be made to the chief police officer of the police district in which the applicant has resided for one month previous to his application. The officer must grant a certificate on being satisfied that the applicant is over seventeen years of age, of good character, and in good faith intends to carry on the trade of a pedlar (Pedlars Act, 1871 (34 & 35 Vict. c. 96), s. 5, regulation 1). The application must be in the form specified in the schedule to the Pedlars Act, 1871 (34 & 35 Vict. c. 96), s. 5, regulation 2, and must be delivered at the police office of the division or sub-division of the police district within which the applicant resides, and certificates when duly signed by the chief officer are issued at such office (*ibid.*, s. 9) after payment of a fee of 5*s*. (*ibid.*, s. 5, regulation 3). On delivery up of the old certificate, or on sufficient evidence of its loss, the chief officer may, at the expiration or during the currency of any year, grant a new certificate in the same manner as upon a first application (*ibid.*, s. 5, regulation 6). A Secretary of State in Great Britain, and the Lord Lieutenant in Ireland, may provide for the expiration of all pedlars' certificates at the same period of each year (*ibid.*). No such provision seems to have been made for Great Britain, but by the Order of the Lord Lieutenant (18th March, 1873) it is provided that in Ireland all certificates shall expire on 31st December in each year, and the fee for the certificate is apportioned. Upon any refusal to grant a certificate the applicant may appeal to a court of summary jurisdiction having jurisdiction in the place where the grant was refused. A certificate granted in pursuance of an order of the court has the same effect as if it had been originally granted by the chief officer of police (*ibid.*, s. 15). In each police district a register of certificates granted therein is kept. Entries in the register and copies of entries certified by the chief officer are evidence of the facts stated therein (*ibid.*, s. 8). A pedlar must produce and show his certificate on demand, and allow it to be read and a copy taken, by any justice of the peace or police constable, or by any person to whom he is offering his goods for sale, or by any person in whose private grounds or premises he may be carrying on his trade (*ibid.*, s. 17). Penalty for refusal, 5*s*. (*ibid.*). He must also submit to inspection by any constable or officer of police, who may demand to see it, any pack, box, bag, trunk, or case in which he carries his goods, wares, or merchandise (*ibid.*, s. 19). If he refuses or prevents inspection he is liable to a penalty of 20*s*. (*ibid.*), and may be arrested without warrant (*ibid.*, s. 18). Any court before which a pedlar is convicted of begging must deprive him of his certificate, and any court before which he is convicted of any other offence may do so (*ibid.*, s. 16); and a court of summary jurisdiction must deprive him of his certificate if on summons to show that he is in good faith carrying on the business of a pedlar he fails to appear,

Each certificate remains in force for one year from the date of issue (*h*), and authorises the person to whom it is granted to act as a pedlar within any part of the United Kingdom (*i*).

Exemptions from need for certificate.

130. Pedlars' certificates are not required by:—(1) Commercial travellers or other persons selling or seeking orders for goods, wares, or merchandise to or from persons who are dealers therein and who buy to sell again, or who are selling or seeking orders for books as agents authorised in writing by the publishers of such books; (2) sellers of vegetables, fish, fruit, or victuals; (3) persons selling or exposing for sale goods, wares, or merchandise in any public mart, market, or fair legally established (*k*).

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or on appearance fails to satisfy the court that he is so doing (*ibid.*). The penalty for acting as a pedlar without a certificate is a sum not exceeding 10*s.* for a first offence, and not exceeding £1 for each subsequent offence, recoverable on summary conviction (Pedlars Act, 1871 (34 & 35 Vict. c. 96), ss. 4, 20). A person acting as a pedlar who refuses to show his certificate or has none may be arrested without warrant (*ibid.*, s. 18). The following are other offences under the Pedlars Acts:—(i.) lending, transferring, or assigning a certificate (*ibid.*, s. 10); (ii.) borrowing or making use of a certificate granted to another person (*ibid.*, s. 11); (iii.) making a false representation with a view to obtaining a certificate; (iv.) forging or counterfeiting a certificate; (v.) aiding in making or procuring to be made a forged or counterfeited certificate; (vi.) travelling with, producing, or showing a forged or counterfeited certificate (*ibid.*, s. 12, as amended by the Pedlars Act, 1881 (44 & 45 Vict. c. 45)). Offences may be prosecuted before a court of summary jurisdiction (Pedlars Act, 1871 (34 & 35 Vict. c. 96), s. 20). As to enforcement of orders of courts of summary jurisdiction, see title MAGISTRATES, Vol. XIX., p. 602. The court may indorse on the certificate of any pedlar who is convicted a record of his conviction (Pedlars Act, 1871 (34 & 35 Vict. c. 96), s. 14). Penalties recovered in the Metropolitan Police District are to be applied in manner directed by the Metropolitan Police Acts (*ibid.*, s. 20); see titles MAGISTRATES, Vol. XIX., p. 576; POLICE. As to arrest of offender, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 302.

(*h*) Pedlars Act, 1871 (34 & 35 Vict. c. 96), s. 5, regulation 5; see, however, note (*g*), p. 58, *ante*.

(*i*) Pedlars Act, 1881 (44 & 45 Vict. c. 45), s. 2. A person is not exempt from the provisions of the Vagrancy Acts, 1824 (5 Geo. 4, c. 83), and 1838 (1 & 2 Vict. c. 38), by reason of his holding a pedlar's certificate or assisting or accompanying a certificated pedlar (Pedlars Act, 1871 (34 & 35 Vict. c. 96), s. 13); see titles MAGISTRATES, Vol. XIX., pp. 588, 635; POOR LAW. The provisions of the Pedlars Acts do not take away or diminish any of the powers vested in any local authority by any general or local Act (Pedlars Act, 1871 (34 & 35 Vict. c. 96), s. 24). As to the articles which under various statutes a pedlar cannot lawfully sell, see note (*k*), p. 56, *ante*; and as to selling in the streets of the metropolis, see titles POST OFFICE; STREET AND AERIAL TRAFFIC.

(*k*) Pedlars Act, 1871 (34 & 35 Vict. c. 96), s. 23; and upon these exemptions, see notes (*m*)—(*p*), p. 57, *ante*. As to the exemption of pedlars from the operation of the Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14), s. 13, see p. 47, *ante*.

MARQUESS.

See PEERAGES AND DIGNITIES.

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MARRIAGE SETTLEMENTS.

See BILLS OF SALE, HUSBAND AND WIFE; SETTLEMENTS.

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See HUSBAND AND WIFE; REAL PROPERTY AND CHATTELS REAL; SETTLEMENTS.

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Part I.—The Relation.

SECT. 1.—*Nature.*

What the relation imports.

131. Whether or not, in any given case, the relation of master and servant exists is a question of fact (*a*); but in all cases the

(*a*) See, *e q*, *Brady* v *Giles* (1835), 1 Mood & R 494; *Jones* v. *Scullard*, [1898] 2 Q B 565. It is equally so when the term "servant" occurs in

relation imports the existence of power in the employer not only to direct what work the servant is to do, but also the manner in which the work is to be done (*b*). A person may be the servant of another although a third party has the power of appointing or dismissing him (*c*) or of requiring his dismissal (*d*), or has powers of direction and control in regard to his work (*e*), or pays him his wages (*f*). A person may be a servant although remunerated otherwise than by wages (*g*), or although only employed at will (*h*); and the relation is not destroyed because the master works with the servant (*i*). A person may be a servant to different masters (*k*); and a contract for

Relation to third party.

Remuneration.

Employment

a statute, but without definition; see *Yewens* v. *Noakes* (1880), 6 Q. B. D. 530, C. A., *per* THESIGER, L.J., at p. 539; and, *e.g.*, *Machu* v. *London and South-Western Rail. Co.* (1848), 2 Exch. 415; *Doolan* v. *Midland Rail. Co.* (1877) 2 App. Cas. 792; *R.* v. *Stuart*, [1894] 1 Q. B. 310, C. C. R.; *Simmons* v. *Heath Laundry Co.*, [1910] 1 K. B. 543, C. A. See, further, title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 651, 652, note (*g*).

(*b*) *Sadler* v. *Henlock* (1855), 4 E. & B. 570, *per* CROMPTON, J., at p. 578; *Yewens* v. *Noakes*, *supra*, *per* BRAMWELL, L.J., at p. 532; *Simmons* v. *Heath Laundry Co.*, *supra*, *per* BUCKLEY, L.J., at p. 552. Other usual incidents of the relation are referred to in *Hedley* v. *Pinkney & Sons Steamship Co.*, [1892] 1 Q. B. 58, C. A., *per* Lord ESHER, M.R., at p. 62, where, in concluding that a captain of a ship was a servant of the owners, he pointed out that "he is appointed and paid by them; they can dismiss him; and he is subject to their orders." But the absence of these incidents (save as to the last-named) is not conclusive as showing that the person concerned is not a servant. In *Lucas* v. *Mason* (1875), L. R. 10 Exch. 251, it was held that there was no evidence of the relation of master and servant between the stewards of a meeting and its chairman; and in *Flood* v. *Jackson*, [1895] 2 Q. B. 21, C. A., that the district delegate of a trade union was not the servant of the union. See, further, *Blake* v. *Thirst* (1863), 32 L. J. (EX.) 188.

(*c*) *Stone* v. *Cartwright* (1795), 6 Term Rep. 411 (workman appointed by estate steward not his servant); *R.* v. *Hoseason* (1811), 14 East, 605 (farm bailiff not the employer of a labourer on the farm, although the contract of hiring made personally by the bailiff); *Hedley* v. *Pinkney & Sons Steamship Co.*, *supra*; *Bogg* v. *Pearse* (1851), 10 C. B. 534; *R.* v. *Glover* (1864), 33 L. J. (M. C.) 169, C. C. R. (county court bailiff not the servant of the high bailiff appointing him).

(*d*) *Reedie* v. *London and North Western Rail. Co.*, *Hobbit* v. *Same* (1849), 4 Exch. 244, *per* ROLFE, B., at p. 258.

(*e*) *Cameron* v. *Nystrom*, [1893] A. C. 308, 312, P. C., where it was pointed out that the right of the officers of a vessel to direct and control the stevedores' servants was not "in the least inconsistent with their being the servants of the stevedores and not the servants of the shipowner"; see, also, *Murray* v. *Currie* (1870), L. R. 6 C. P. 24, *per* WILLES, J., at p. 26, "The stevedores are not the servants of the owners of the ship"; and *Fitzpatrick* v. *Evans & Co.*, [1902] 1 K. B. 505, C. A., where it was held that the signature by a contractor's workman of the "record book" kept by the colliery owners did not create a contract of service between such owners and the contractor's workman.

(*f*) *Willett* v. *Boote* (1860), 30 L. J. (M. C.) 6.

(*g*) *R.* v. *Macdonald* (1861), 31 L. J. (M. C.) 67, C. C. R. (part payment by percentage on profits); *R.* v. *White* (1839) 8 C. & P. 742 (payment by gratuities); *Laugher* v. *Pointer* (1826), 5 B. & C. 547, *per* LITTLEDALE, J., at p. 555; *R.* v. *Negus* (1873), 42 L. J. (M. C.) 62, C. C. R.; see, further, p. 86, *post*.

(*h*) *R.* v. *Foulkes* (1875), 44 L. J. (M. C.) 65, C. C. R., *per* COCKBURN, C.J., at p. 66; *R.* v. *Christ's Parish in York* (*Churchwardens etc.*) (1824), 3 B. & C. 459.

(*i*) *Ashworth* v. *Stanwix* (1861), 3 E. & E. 701.

(*k*) *Jones* v. *Scullard*, [1898] 2 Q. B. 565, *per* Lord RUSSELL OF

SECT. 1. Nature.

exclusive personal service does not necessarily establish the relation of master and servant (*l*).

SECT. 2.—*Comparison with other Relations.*

Exclusive service.

Principal and agent.

132. If a person has only the right to direct another what work he is to do, the relation is that of principal and agent; but if he has the further right to direct how the work is to be done, the relation is not that of principal and agent, but master and servant (*m*).

Method of work.

Time employed.

A person who is subject to no directions as to the time he is to devote to the work of another is an agent and not a servant (*n*); but a person who is required to give a definite amount of his time thereto, although allowed to exercise his discretion as to the place and manner of his work, is a servant and not an agent (*o*).

Manner of remuneration.

The circumstance that a person is remunerated by commission rather than by a salary is not conclusive as showing him to be an agent and not a servant (*p*); and an agent may, in part, be remunerated by salary (*q*).

KILLOWEN, C.J., at p. 569, who pointed out, at p. 573, that *Rourke* v. *White Moss Colliery Co.* (1876), 2 C. P. D. 205, C. A., "makes it quite clear that a man may be the general servant of one person, and yet at the same time be the servant of another in relation to a particular matter, and it also shows that the important element, whereby to determine whether he is the servant of the one person or of the other in relation to the particular business on which he is engaged, is which of the two persons had the control of him in the conduct of that business"; see, also, *Donovan* v. *Laing, Wharton, and Down Construction Syndicate*, [1893] 1 Q. B. 629, C. A.; *Johnson* v. *Lindsay & Co.*, [1891] A. C. 371, *per* Lord HERSCHELL, at p. 377; *R.* v. *Batty* (1842), 2 Mood C. C. 257.

(*l*) *Bowen* v. *Hall* (1881), 6 Q. B. D. 333, C. A.

(*m*) *R.* v. *Walker* (1858), 27 L. J. (M. C.) 207, C. C. R., *per* BRAMWELL, B., at p. 208; *R.* v. *Bowers* (1866), L. R. 1 C. C. R. 41; *R.* v. *Marshall* (1870), 11 Cox, C. C. 490, C. C. R.; see title AGENCY, Vol. I., p. 147.

(*n*) *R.* v. *Walker, supra* (person engaged to get orders, no definite time being required to be given to the work, and payment being by commission); *R.* v. *Mayle* (1868), 11 Cox, C. C. 150 (person employed as "London agent"; no salary, and optional whether orders obtained or not); *R.* v. *Hall* (1875), 13 Cox, C. C. 49, C. C. R. (person employed to collect debts on commission, the amount of time and work given being in his discretion); *R.* v. *Negus* (1873), 12 Cox, C. C. 492, C. C. R. (person employed to get orders on commission, engaging not to do so for others, but not undertaking to devote any specific amount of time to the business); *R.* v. *Bowers, supra.*

(*o*) *R.* v. *May* (1861), 30 L. J. (M. C.) 81, C. C. R.; "a traveller is under orders to go here and there. Here the prisoner was under no control of the prosecutors. The position of clerk or servant implies control" (*ibid.*, *per* COCKBURN, C.J., at p. 83); *R.* v. *Turner* (1870), 11 Cox, C. C. 551 (commercial traveller); *R.* v. *Bailey* (1871), 12 Cox, C. C. 56, C. C. R. (traveller to give whole time to his employment, but allowed to get orders when and where he could); *Lamb* v. *Attenborough* (1862), 31 L. J. (Q. B.) 41 (where it was held that a clerk to a wine merchant, authorised to sign delivery notes for wine sold and to get the dock warrants for them, was not an agent entrusted with the possession of documents of title to goods within the stat. (1842) 5 & 6 Vict. c. 39, s. 1 (now repealed, see Factors Act, 1889 (52 & 53 Vict. c. 45); title AGENCY, Vol. I., p. 205), but was in the relation of servant to his employer).

(*p*) *R.* v. *Tite* (1861), 30 L. J. (M. C.) 142, C. C. R.

(*q*) *R.* v. *Walker, supra*, (remuneration for obtaining orders being commission and £1 a year salary).

SECT. 2. Comparison with other Relations.

133. Where a person hands over to another a chattel to be used by him in the way of his trade at his own discretion and subject to no control by the owner, the relation between the owner and such other person is that of bailor and bailee rather than master and servant (*r*). Thus a common carrier (*s*) and a drover (*t*) are, ordinarily, bailees rather than servants.

Bailor and bailee.

134. The relation between employer and contractor is not to be considered the same thing as the relation between master and servant. A contractor is to be regarded as a person carrying on an independent business (*a*).

Employer and contractor.

To distinguish between an independent contractor and a servant, the test is whether or not the employer retains the power, not only of directing what work is to be done, but also of controlling the manner of doing the work. If a person can be overlooked and

Contractor and servant distinguished

(*r*) *Venables* v. *Smith* (1877), 2 Q. B. D. 279; *Gates* v. *Bill* (*R.*) *& Son*, [1902] 2 K. B. 38, C. A. In the latter case the court agreed with the opinion of the majority of the judges in *Fowler* v. *Lock* (1872), L. R. 7 C. P. 272; *Fowler* v. *Lock* (1874), L. R. 10 C. P. 90; and see L. R. 9 C. P. 751, n., that the relation between the cab-proprietor and the cab-driver was, in normal cases, that of bailor and bailee; and see, generally, title BAILMENT, Vol. I, pp. 523 *et seq.* A statutory exception to this rule exists, however, by virtue of the London Hackney Carriages Act, 1843 (6 & 7 Vict. c. 86), under which, as between the cab-proprietor and the public, the relationship between proprietor and driver is deemed to be that of master and servant (*King* v. *London Improved Cab Co.* (1889), 23 Q. B. D. 281, C. A.; *Keen* v. *Henry*, [1894] 1 Q. B. 292, C. A. (where the view was expressed that *King* v. *Spurr* (1881), 8 Q. B. D. 104, had been overruled by *King* v. *London Improved Cab Co.*, *supra*); *Powles* v. *Hider* (1856), 6 E. & B. 207). In *Smith* v. *General Motor Cab Co., Ltd.*, [1911] A. C. 188, a finding of fact that the relation between the owner of a taxi-cab and the taxi-cab driver, to whom the cab was let out, was that of bailor and bailee, and not master and servant, was upheld. "In my opinion, *quoad* the cab, the contract was an ordinary contract of *locatio rei*. *Quoad* the public, the relation of the driver to the cab-owner was, in my opinion, one of agency" (*ibid*, *per* Lord SHAW OF DUNFERMLINE, at p. 192). As to the position of the masters of a ketch worked on the "sharing system," see *Boon* v. *Quance* (1909), 102 L. T. 443, C. A.

(*s*) *Randleson* v. *Murray* (1838), 8 Ad. & El. 109, *per* PATTESON, J., at p. 113; *R.* v. *Gibbs* (1855), 24 L. J. (M. C.) 62, C. C. R.; see *R.* v. *Hey* (1849), 1 Den. 602, C. C. R.; and see, generally, title CARRIERS, Vol. IV., pp. 1 *et seq.*

(*t*) *R.* v. *Goodbody* (1838), 8 C. & P. 665; *Milliqan* v. *Wedge* (1840), 12 Ad. & El. 737, *per* Lord DENMAN, C.J., at p. 740; *R.* v. *Hey*, *supra*.

(*a*) *Allen* v. *Hayward* (1845), 7 Q. B. 960, 975, where it was said that, on a careful reference to *Laugher* v. *Pointer* (1826), 5 B. & C. 547, in which the opinions delivered by ABBOTT, C.J., and LITTLEDALE, J., must be taken to lay down the correct law (*Randleson* v. *Murray* (1838), 8 Ad. & El. 109; *Quarman* v. *Burnett* (1840), 6 M. & W. 499; *Milligan* v. *Wedge* (1840), 12 Ad. & El. 737; *Rapson* v. *Cubitt* (1842), 9 M. & W. 710), "it seems perfectly clear that in an ordinary case the contractor to do works of this description is not to be considered as a servant, but a person carrying on an independent business." The work in question was the diversion of a creek, and the conditions those of an ordinary contract. In *Hardy* v. *Ryle* (1829), 9 B. & C. 603, where BAYLEY, J., pointed out, at p. 611, that "there is a very plain distinction between becoming the servant of an individual and contracting to do certain specific work," the court held that contracting to weave certain pieces of silk at agreed prices was not contracting to serve within the meaning of stat. (1823) 4 Geo. 4, c. 34 (repealed by the Conspiracy, and Protection of Property

SECT. 2. Comparison with other Relations.

directed in regard to the manner of doing his work, such person is not a contractor (*b*), and it makes no difference that his work is piecework (*c*). A sub-contractor is not the servant of the contractor employing him (*d*); yet, a person may occupy the position of sub-contractor and of servant to the same employer (*e*).

Sub-contractor.

Partnership.

Share of profits.

135. A contract for the remuneration of a servant of a person engaged in a business by a share of the profits of the business does not of itself make the servant a partner in the business (*f*). The receipt of a share of profits is *primâ facie* evidence of a partnership in the business if there are no other circumstances to be considered side by side with that fact (*g*), but where other circumstances exist the question of participating in profits must be regarded as only one of the several circumstances which must be considered together in order to determine whether or not a partnership exists (*h*). Where a salary is paid to a person by another in addition to a share of profits it is strong evidence that the relation between

Act, 1875 (38 & 39 Vict. c. 86), s. 17); see also *Braddell* v. *Baker* (1911), 104 L. T. 673; and *Bedford (Duke)* v. *London County Council* (1911), 104 L. T. 889. As to the liability for the act of an independent contractor, see p. 264, *post*.

(*b*) *Sadler* v. *Henlock* (1855), 4 E. & B. 570; *Dixon* v. *London Small Arms Co.* (1876), 1 App. Cas. 632. But the mere fact that the employer superintends the work, to the end that he may direct what work is to be done, does not constitute such control as to make the relation that of master and servant rather than employer and contractor (*Steel* v. *South-Eastern Rail. Co* (1855), 16 C. B. 550); see also *Hardaker* v. *Idle District Council*, [1896] 1 Q. B. 335, C. A., where it was held (RIGBY, L.J., dissenting) that the relation of master and servant did not exist between a district council and their contractor although the former had the right, under the contract, of fully superintending and supervising by its inspector the execution of the work and giving directions in relation thereto. As to the distinction between a "workman" within the meaning of the Truck Acts and a contractor, see title FACTORIES AND SHOPS, Vol. XIV., p. 517, and notes (*h*), (*i*), (*k*), *ibid.* As to the meaning of the term "workman" in the Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90), see p. 115, *post*, and in the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), see p. 147, *post*, and under the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), pp. 154 *et seq.*, *post*.

(*c*) *Sadler* v. *Henlock*, *supra*, *per* CROMPTON, J., at p. 141; *Blake* v. *Thirst* (1863), 32 L. J. (EX.) 188; *Wiggett* v. *Fox* (1856), 11 Exch. 832.

(*d*) *Rapson* v. *Cubitt* (1842), 9 M. & W. 710; *Overton* v. *Freeman* (1852), 11 C. B. 867, *per* MAULE, J., at p. 873.

(*e*) *Knight* v. *Fox* (1850), 5 Exch. 721.

(*f*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 2 (3) (b); as to partnership generally, see title PARTNERSHIP.

(*g*) *Davis* v. *Davis*, [1894] 1 Ch. 393.

(*h*) *Ross* v. *Parkyns* (1875), L. R. 20 Eq. 331, 335 ("It is now settled by the cases of *Cox* v. *Hickman* (1860), 8 H. L. Cas. 268; *Bullen* v. *Sharp* (1865), L. R. 1 C. P. 86, Ex. Ch.; and *Mollwo, March, & Co.* v. *Court of Wards* (1872), L. R. 4 P. C. 419, that although a right to participate in profits is a strong test of partnership, and there may be cases where upon a simple participation in profits there is a presumption, not of law, but of fact, that there is a partnership, yet whether the relation of partnership does or does not exist must depend upon the whole contract between the parties, and that circumstance is not conclusive"); *Badeley* v. *Consolidated Bank* (1888), 38 Ch. D. 238, C. A.; *Davis* v. *Davis*, *supra*, where NORTH, J., pointed out, at p. 399, that this is the rule of law which was laid down before the Partnership Act, 1890 (53 & 54 Vict. c. 39), "and which seems

the two is that of master and servant rather than that of partners (*i*).

SECT. 1. Comparison with other Relations

Tenant and servant.

136. Where it is necessary for the due performance of his duties that a person should occupy certain premises, or where he is required to occupy premises for the more satisfactory performance of his duties although such residence is not necessary for that purpose, such person occupies in the capacity of servant (*k*); but where a person is merely permitted to occupy premises, whether as a privilege (*l*), or by way of remuneration or part payment for his services (*m*), he occupies as tenant and not as servant (*n*). A person cannot be said to occupy as a servant a house which is not that of his master even though the master pays the rent (*o*). The circumstance that a person is allowed, as part of his remuneration, to carry on his own business in the premises he is required to occupy does not alter the character of his occupation into that of a tenant (*p*).

Occupation by the servant is occupation by the master (*q*), and a servant has neither estate nor interest in the premises he occupies in that capacity (*r*); but the relation of master and servant and of

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to me to be precisely what is intended by s. 2 (3) of the Act." See also *Mair* v. *Glennie* (1815), 4 M. & S. 240; *Harrington* v. *Churchward* (1860), 29 L. J. (CH.) 521; *R.* v. *Macdonald* (1861), 31 L. J. (M. C.) 67, C. C. R.; *R.* v. *Wortley* (1851), 21 L. J. (M. C.) 44, C. C. R.

(*i*) *Ross* v. *Parkyns* (1875), L. R. 20 Eq. 331, 336.

(*k*) *Dobson* v. *Jones* (1844), 5 Man. & G. 112 (where a surgeon was required to reside in the hospital so that he might be enabled the more readily to perform the services required of him); *Clarke* v. *St. Mary, Bury St. Edmund's, Overseers* (1856), 1 C. B. (N. S.) 23 (hall-keeper held to occupy a house adjoining the hall as a servant, whether it was necessary for him to reside or whether he was required to reside there); *R.* v. *Spurrell* (1865), L. R. 1 Q. B. 72; *Fox* v. *Dalby* (1874), L. R. 10 C. P. 285; see also *R.* v. *Cheshunt* (*Inhabitants*) (1818), 1 B. & Ald. 473, *per* Lord ELLENBOROUGH, C.J., at p. 476 (where a person was held to occupy as a servant as being "like the case of a coachman, who frequently occupies a room over the stables"); *R.* v. *Bardwell* (*Inhabitants*) (1823), 2 B. & C. 161; and see titles CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 669, note (*s*); LANDLORD AND TENANT, Vol. XVIII., p. 340.

(*l*) *Marsh* v. *Estcourt* (1889), 24 Q. B. D. 147; *Dover* v. *Prosser*, [1904] 1 K. B. 84.

(*m*) *Hughes* v. *Chatham Overseers* (1843), 5 Man. & G. 54; *Smith* v. *Seghill* (1875), L. R. 10 Q. B. 422; *R.* v. *Spurrell* (1865), L. R. 1 Q. B. 72; *Martin* v. *West Derby Assessment Committee* (1883), 11 Q. B. D. 145, C. A. (policeman held to be the tenant of his quarters, which were some distance from the police station); compare *Bent* v. *Roberts* (1877), 3 Ex. D. 66 (constable held to occupy as servant quarters which were structurally part of the police station).

(*n*) See title ELECTIONS, Vol. XII., pp. 168, 172.

(*o*) *R.* v. *Lynn* (1838), 8 Ad. & El. 379; *R.* v. *Bishopston* (*Inhabitants*) (1839), 9 Ad. & El. 824.

(*p*) *White* v. *Bayley* (1861), 10 C. B. (N. S.) 227.

(*q*) *Bertie* v. *Beaumont* (1812), 16 East, 33; *R.* v. *Bishopston* (*Inhabitants*), *supra*; *R.* v. *Spurrell*, *supra*; *Dobson* v. *Jones*, *supra*, where TINDAL, C.J., said, at p. 120, "the coachman who is placed in rooms of his master over the stable, the gardener who is put into the house in the garden, or the porter who occupies the lodge at the park gate, cannot be considered to occupy as tenants, but as servants merely, whose possession and occupation is strictly and properly that of their masters."

(*r*) *R.* v. *South Newton, Wilts* (*Inhabitants*) (1830), 10 B. & C. 838

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landlord and tenant may exist between the same parties (*s*), even though the servant occupies the premises of his master rent free as part remuneration for his services (*t*).

Part II.—Classes of Servants.

SECT. 1.—*Menial as Distinguished from other Servants.*

Characteristics of menial servants.

137. Menial servants, as well as those who are the subject of statutory definition (*u*), are to be distinguished from other servants. Menial servants are those who, being part of their master's residential establishment, are engaged on work of such a character that it brings them into the close personal proximity of the master, and is mainly concerned with his household (*a*). Whether or not a servant is a menial does not depend on whether or not he lives within the walls of the master's house (*b*); and a servant is not the less a menial because his remuneration appears to contemplate the continuance of his service for at least a year (*c*). The following are

- Residence.
- Remuneration.

Lake v. *Campbell* (1862), 5 L. T. 582, where it was pointed out, *per* WILLIAMS, J., at p. 584, that the servant "had no right to retain possession of the house after he had ceased to be in the defendant's service; therefore, after he had been requested to leave the house and remove his goods, he became a trespasser in not doing so, and the defendant had a right to remove the goods himself." As to trespass generally, see title TRESPASS.

(*s*) *Selsey* (*Lord*) v. *Rhoades* (1824), 2 Sim. & St. 41, *per* LEACH, V.-C., at p. 49; *Clarke* v. *St. Mary, Bury St. Edmund's, Overseers* (1856), 26 L. J. (C. P.) 12, *per* CRESSWELL, J., at p. 15.

(*t*) *Hughes* v. *Chatham Overseers* (1843), 5 Man. & G. 54, *per* TINDAL, C.J., at p. 78; *R.* v. *Spurrell* (1865), L. R. 1 Q. B. 72.

(*u*) See, *e.g.*, title FACTORIES AND SHOPS, Vol. XIV., p. 517, notes (*h*), (*i*), (*k*); Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), s. 8, and p. 147, *post*; Trade Disputes Act, 1906 (6 Edw. 7, c. 47), s. 5 (3); Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 13; and p. 154, *post*.

(*a*) *Nicoll* v. *Greaves* (1864), 17 C. B. (N. S.) 27; 33 L. J. (C. P.) 259, where ERLE, C.J., said, at p. 261: "It seems to me that the reason of the general rule in these cases is, that there are some contracts of service which bring the parties into close proximity with one another, and which, though such association may be valuable, renders it the interest of both that the contract should be capable of being determined before the end of the year"; *Pearce* v. *Lansdowne* (1893), 69 L. T. 318, where COLLINS, J., at p. 319, adopted the definition of menial servants contained in Roberts and Wallace, Employers' Liability, 3rd ed., 214 (Roberts and Wallace, Duty and Liability of Employers, 4th ed., 254), namely, "those persons whose main duty is to do actual bodily work as servants for the personal comfort, convenience, or luxury of the master, his family and his guests, and who for this purpose become part of the master's residential or *quasi*-residential establishment"; and also approved the view of LAWSON, J., in *Lawler* v. *Linden* (1876), 10 I. R. C. L. 188, that the derivation of the word "menial" is "from the Saxon word *meiny* or *mesnie*, which signifies a household or family."

(*b*) *Nowlan* v. *Ablett* (1835), 2 Cr. M. & R. 54; 4 L. J. (EX.) 155, where a head gardener, living in a house in his master's grounds, was held to be a menial servant. "A menial servant is one who lives *intra mœnia*. If this person did not live in the house, he lived within the curtilage" (*ibid.*, *per* Lord ABINGER, C.B., at p. 158); *Todd* v. *Kellage* (1852), 8 Exch. 151, where a governess, residing in the master's house, was held not to be a menial servant; see also *Nicoll* v. *Greaves*, *supra*; and see note (*k*), p. 71, *post*.

(*c*) *Johnson* v. *Blenkensopp* (1841), 6 Jur. 870.

menial servants:—a coachman or groom (*d*), a head gardener (*d*), a huntsman (*e*), and a potman (*f*). A governess is not a menial servant (*g*), nor is the housekeeper of an hotel (*h*), nor a steward (*i*), nor a laundress (*j*).

SECT. 1. **Menial as Distinguished from other Servants.**

138. Domestic servants are, apparently, not distinguishable from menial servants, except that they are employed about and sleep in their master's house (*k*).

Domestic servants.

SECT. 2.—*Apprentices.*

139. By a contract of apprenticeship a person is bound to another for the purpose of learning a trade or calling, the apprentice undertaking to serve the master for the purpose of being taught, and the master undertaking to teach the apprentice (*l*). Where teaching on the part of the master or learning on the part of the other is not the primary but only an incidental object, the contract is one of service rather than of apprenticeship (*m*).

Bound by contract.

(*d*) *Nowlan* v. *Ablett* (1835), 2 Cr. M. & R. 54, and *ibid.*, *per* ALDERSON, B., at p. 57.

(*e*) *Nicoll* v. *Greaves* (1864), 17 C. B. (N. S.) 27; see also *Johnson* v. *Blenkensopp* (1841), 5 Jur. 870, where a person employed to keep the gardens and pleasure grounds in good order, to assist in the stables, and, when required, at hay and corn harvest, and to make himself generally useful, was held to be a menial servant.

(*f*) *Pearce* v. *Lansdowne* (1893), 69 L. T. 316.

(*g*) See note (*b*), p. 70, *ante*.

(*h*) *Lawler* v. *Linden* (1876), 10 I. R. C. L. 188.

(*i*) *Forgan* v. *Burke* (1861), 12 I. C. L. R. 495; see also *R.* v. *Wortley* (1851), 21 L. J. (M. C.) 44, C. C. R.; *Masters* v. *Manby* (1757), 1 Burr. 401; *Savoy Hotel Co.* v. *London County Council*, [1900] 1 Q. B. 665.

(*j*) *Cochrane* v. *Ogilby*, [1903] 1 I. R. 525.

(*k*) *Toms* v. *Hammond* (1733), Barnes, 370; *Ogle* v. *Morgan* (1852), 1 De G. M. & G. 359; *Vaughan* v. *Booth* (1852), 16 Jur. 808. "Menial servants; so called from being *intra mœnia*, or domestics" (1 Bl. Com. 425).

(*l*) *R.* v. *Laindon* (*Inhabitants*) (1799), 8 Term Rep. 379; *Clapham Parish* v. *St. Pancras Parish* (1860), 29 L. J. (M. C.) 141, *per* BLACKBURN, J., at p. 145: "I can see no reason for saying that the kind of trade is restricted to manual occupations, or when the trade is carried on for the purposes of commerce"; and accordingly the case of an articled clerk (see title SOLICITORS) was included in the term "apprentice" for the purposes of a poor law settlement under the Poor Law Relief Act, 1691 (3 Will. & M. c. 11), s. 8 [Statutes Revised, s. 7]; *R.* v. *Edingale* (*Inhabitants*) (1830), 10 B. & C. 739; *R.* v. *Wooldale* (*Inhabitants*) (1844), 6 Q. B. 549. As to apprenticeship constituting a qualification for the freedom of a borough, see titles ELECTIONS, Vol. XII., pp. 178, 179; LOCAL GOVERNMENT, Vol. XIX., p. 322.

(*m*) *R.* v. *Crediton* (*Inhabitants*) (1831), 2 B. & Ad. 493. Whether the contract is one of apprenticeship or of service depends on the intention of the parties as gathered from the whole agreement, so that a contract in which the words "to learn the business of a carpenter" were used was held to be one of apprenticeship (*R.* v. *Laindon* (*Inhabitants*), *supra*; see also *R.* v. *Great Wishford* (*Inhabitants*) (1835), 4 Ad. & El. 216). In *Horan* v. *Hayhoe*, [1904] 1 K. B. 288, where the question was whether an employee was a "male servant" within the Revenue Act, 1869 (32 & 33 Vict. c. 14), s. 18, the court concluded that the contract was one which was not necessary for the mere hiring of a groom, but was one the real object of which was that the employee in question should be taught to be a riding groom; compare *R.* v. *Burbach* (*Inhabitants*) (1813), 1 M. & S. 370 (where it was held that an allowance by a servant out of his earnings for teaching by his master was not enough to make his contract

SECT. 2. Apprentices.

Provided that the right of receiving instruction exists, a contract does not become one of service because, to some extent, the person to whom it refers does the kind of work that is done by a servant (*n*), or because he receives pecuniary remuneration for his work (*o*). The payment of a premium is strong, though not conclusive, evidence that a contract of apprenticeship rather than of service was contemplated (*p*).

Part III.—Creation of the Relation.

SECT. 1.—*Capacity of Parties.*

Capacity.

140. Any person of ordinary contractual capacity (*q*) is competent to enter into a contract of hiring and service either as employer or employed; and the contract may be to serve during life (*r*). But a person who is already serving under a contract of service is disabled from binding himself to serve a second master without his first master's consent (*s*).

Infant's contract binding if on the whole beneficial.

141. An infant's contract to serve will be binding if, on the whole, it is for his benefit (*t*); and whether it is for his benefit is a question of fact (*a*). A contract to receive wages in return for labour will be regarded as *primâ facie* for the infant's benefit if the wages are a fair compensation for his services (*b*), as also will a contract of apprenticeship (*c*); and a contract of either

one of apprenticeship); *R.* v. *Little Bolton* (*Inhabitants*) (1783), Cald. Mag. Cas. 367; *R.* v. *Shinfield* (*Inhabitants*) (1811), 14 East, 541; *R.* v. *Northowram* (*Inhabitants*) (1846), 9 Q. B. 24; and see settlement cases cited in title POOR LAW.

(*n*) *R.* v. *Crediton* (*Inhabitants*) (1831), 2 B. & Ad. 493, *per* TAUNTON, J., at pp. 497, 498; *Horan* v. *Hayhoe*, [1904] 1 K. B. 288, *per* Lord ALVERSTONE, C.J., at p. 291, and *per* KENNEDY, J., at p. 291.

(*o*) *R.* v. *Bilborough* (*Inhabitants*) (1817), 1 B. & Ald. 115; *R.* v. *Crediton* (*Inhabitants*), *supra*.

(*p*) *R.* v. *St. Margaret's, King's Lynn* (*Inhabitants*) (1826), 6 B. & C. 97, *per* BAYLEY, J., at p. 99; *R.* v. *Rainham* (*Inhabitants*) (1801), 1 East, 531 and compare *James* v. *Krauth* (1910), 26 T. L. R. 240.

(*q*) See title CONTRACT, Vol. VII., p. 341.

(*r*) *Wallis* v. *Day* (1837), 2 M. & W. 273.

(*s*) *R.* v. *Norton* (*Inhabitants*) (1808), 9 East, 206.

(*t*) *Wood* v. *Fenwick* (1842), 10 M. & W. 195, *per* ALDERSON, B., at p. 204; *Stephens* v. *Dudbridge Ironworks Co.*, [1904] 2 K. B. 225, C. A. See also title INFANTS AND CHILDREN, Vol. XVII., pp. 70—73. An infant may enter into a contract of service with his father (*R.* v. *Chilleseford* (*Inhabitants*) (1825), 4 B. & C. 94). See also *Gilbert* v. *Schwenck* (1845), 14 M. & W. 488, as to the position of an infant as servant to his mother; and see, further, title INFANTS AND CHILDREN, Vol. XVII., pp. 56, 68, 69, 70, note (*n*).

(*a*) *De Francesco* v. *Barnum* (1890), 45 Ch. D. 430, C. A., *per* FRY, L.J., at p. 439; *Flower* v. *London and North Western Rail. Co.*, [1894] 2 Q. B. 65, C. A.

(*b*) *Wood* v. *Fenwick*, *supra*, *per* ALDERSON, B., at p. 204; *Leslie* v. *Fitzpatrick* (1877), 3 Q. B. D. 229; *De Francesco* v. *Barnum*, *supra*, at p. 439; *Clements* v. *London and North Western Rail. Co.*, [1894] 2 Q. B. 482, C. A.

(*c*) *R.* v. *Arundel* (*Inhabitants*) (1816), 5 M. & S. 257; *Walter* v. *Everard*, [1891] 2 Q. B. 369, C. A., *per* FRY, L.J., at p. 375: "Lord COKE

kind may, on the whole, be beneficial, and, as such, binding, although it includes some stipulations which, taken alone, are not for the infant's benefit (*d*). So a covenant to serve not only the master, but also his executors and administrators, in the same business (*e*), or a covenant enabling the master to discontinue the payment of wages when the business is at a standstill through causes beyond such master's control (*f*), does not render an apprenticeship agreement so disadvantageous to the infant as to be unenforceable. A contract of service may be supported which contains stipulations for its termination by the master after notice, on the happening of certain events within his control, for the infant is then able to seek employment elsewhere (*g*). But where a stipulation is of such a nature as to make the whole contract an unfair one from the infant's point of view, it will not be enforced against him, as where in a contract of service the infant agrees to serve during a certain period, the right, however, being reserved to

What is a beneficial contract.

Unenforceable contracts.

[Co. Litt. 172 a] says that 'an infant may bind himself for his good teaching or instruction, whereby he may profit himself afterwards.' I think that 'teaching or instruction,' though it includes instruction in a trade, is not necessarily confined to that"; *Clements* v. *London and North Western Rail. Co.*, [1894] 2 Q. B. 482, C. A., *per* KAY, L.J., at p. 491. Although seven years was mentioned in *R.* v. *Saltern* (1784), 1 Bott's Poor Laws by Const, 613, as the age which an apprentice should have attained in order to be bound, there appears to be no rule at common law on the subject. By the Chimney Sweepers and Chimneys Regulation Act, 1840 (3 & 4 Vict. c. 85), s. 3, however, an indenture of apprenticeship to a chimney sweep is void in respect of a child under sixteen; see *R.* v. *Hipswell (Inhabitants)* (1828), 8 B. & C. 466. As to the lower age limit of parish apprentices, see title POOR LAW; and see, further, note (*m*), p. 80, *post*, and, as to apprentices to the sea service and sea fishing service, see p. 80, *post*. As to the form of apprenticeship contracts, see p. 79, *post*.

(*d*) *Leslie* v. *Fitzpatrick* (1877), 3 Q. B. D. 229, where, speaking of provisions in a contract of service, LUSH, J., said, at p. 232: "If such provisions were at the time common to labour contracts, or were in the then condition of trade such as the master was reasonably justified in imposing as a just measure of protection to himself, and if the wages were a fair compensation for the services of the youth, the contract is binding, inasmuch as it was beneficial to him by securing to him permanent employment and the means of maintaining himself"; but compare *Mealin* v. *Morris* (1884), 12 Q. B. D. 352, *per* Lord COLERIDGE, C.J., at p. 355. In *De Francesco* v. *Barnum* (1890), 45 Ch. D. 430, C. A., FRY, L.J., at p. 439, said of contracts of apprenticeship and labour: "It is not because you can lay your hand on a particular stipulation which you may say is against the infant's benefit, that therefore the whole contract is not for the infant's benefit." See also *Evans* v. *Ware*, [1892] 3 Ch. 502; *Corn* v. *Matthews*, [1893] 1 Q. B. 310, C. A., *per* Lord ESHER, M.R., at p. 314; *Clements* v. *London and North Western Rail. Co.*, *supra*; *Young* v. *Hoffmann Manufacturing Co., Ltd.*, [1907] 2 K. B. 646, C. A., *per* COZENS-HARDY, M.R., at pp. 650, 651.

(*e*) *Cooper* v. *Simmons* (1862), 7 H. & N. 707.

(*f*) *Green* v. *Thompson*, [1899] 2 Q. B. 1; and see *Corn* v. *Matthews*, *supra*, *per* LINDLEY, L.J., at p. 316 (the apprentice in question was not precluded by the deed from seeking employment elsewhere during the stoppage).

(*g*) *Leslie* v. *Fitzpatrick*, *supra* (where the infant had agreed to serve for five years); see also *Wood* v. *Fenwick* (1842), 10 M. & W. 195 (where, apparently, an infant's contract was regarded as beneficial, although it provided for fines and for a reference of disputes to arbitration).

SECT. 1. Capacity of Parties.

the master to stop work and discontinue wages at his pleasure (*h*), or in a contract of apprenticeship where similar powers are reserved to the master upon the occurrence of certain events within such master's control (*i*), the infant in each case remaining bound (*k*), or where the wages are unreasonably low and inadequate for the services agreed to be given (*l*). If the contract contains covenants which are invalid in any case, as being, for instance, in restraint of trade, and beyond what is reasonably necessary for the protection of the promisee, but the contract is one which, on the whole, is for the infant's benefit, the invalid covenants may be disregarded and the operative parts of the contract enforced (*m*).

Married women.

142. Subject to the limitation that she can only bind herself by contract on her own account to the extent of her separate estate, a married woman is competent to enter into a contract of hiring and service (*n*), and when she is cohabiting with her husband and managing his house and establishment, there is a presumption that she has his implied authority to enter into contracts as his agent in respect of such things as may be necessary for the household (*o*), including servants reasonably suitable for their station in life (*p*).

(*h*) *R.* v. *Lord* (1848), 12 Q. B. 757.

(*i*) *Meakin* v. *Morris* (1884), 12 Q. B. D. 352; *Corn* v. *Matthews*, [1893] 1 Q. B. 310, C. A. In each case the apprenticeship deed contained a provision that the master should not be liable to pay wages to the apprentice so long as the business should or might be interrupted or impeded by any turn-out, the apprentice being at liberty to seek work elsewhere during the turn-out, after which, however, he was required to return to his master. In *Corn* v. *Matthews*, *supra*, LINDLEY, L.J., regarded it as an important fact that a turn-out included a lock-out as well as a strike.

(*k*) There is a clear distinction between the case of *Leslie* v. *Fitzpatrick* (1877), 3 Q. B. D. 229, and the cases of *Meakin* v. *Morris*, *supra*, and *Corn* v. *Matthews*, *supra*, as was pointed out in the latter case by SMITH, L.J., at p. 316, namely, that in *Leslie* v. *Fitzpatrick*, *supra*, the stipulation was that the master might terminate the contract, while in *Meakin* v. *Morris*, *supra*, and *Corn* v. *Matthews*, *supra*, that was not so, but the apprentice was to continue bound to serve, and was not to receive wages during the stoppage, while the difficulty of obtaining temporary work elsewhere rendered the liberty to take such work an illusory benefit.

(*l*) *Leslie* v. *Fitzpatrick*, *supra*, at p. 232; see also *De Francesco* v. *Barnum* (1890), 45 Ch. D. 430, 442, C. A., where various provisions were held "to throw an inordinate power into the hands of the master without any correlative obligation on the part of the master."

(*m*) *Bromley* v. *Smith*, [1909] 2 K. B. 235 (where an infant was held bound by a restrictive covenant in his contract of service that he should not, after the expiration of his service, solicit customers whom he would not know but for that service, but a further restriction, held to be invalid as being in excess of what was necessary for the protection of the master's trade, was regarded as omitted from the contract, which, as a whole, was held beneficial and therefore binding). In *Gadd* v. *Thompson*, [1911] 1 K. B. 304, a contract was enforced which bound the infant not to compete within ten years after his period of service within a radius of ten miles; see also *Leng (Sir W. C.) & Co., Ltd.* v. *Andrews*, [1909] 1 Ch. 763, C. A.; *Evans* v. *Ware*, [1892] 3 Ch. 502. See, further, titles INFANTS AND CHILDREN, Vol. XVII., p. 73; INJUNCTION, Vol. XVII., p. 143.

(*n*) See title HUSBAND AND WIFE, Vol. XVI., pp. 411 *et seq.*, and, as to wages earned by a married woman, see *ibid.*, p. 348.

(*o*) See *ibid.*, pp. 420 *et seq.*

(*p*) *Bazeley* v. *Forder* (1868), L. R. 3 Q. B. 559, *per* BLACKBURN, J., at p. 563; see *White* v. *Cuyler* (1794), 1 Esp. 200.

143. A lunatic is bound by his contract of hiring and service unless it is shown that his insanity was known to the other party to the contract at the time when it was entered into (*a*). Lunatics.

144. A partner has implied authority to enter into a contract of hiring and service for the benefit of the partnership (*b*); and the servant of a partnership is the servant of each member thereof (*c*). Partners.

145. A corporation may take apprentices and enter into apprenticeship contracts (*d*). Corporations.

SECT. 2.—*Form of Contract creating the Relation.*

SUB-SECT. 1.—*Hiring and Service.*

146. A contract of hiring and service may be inferred from conduct which goes to show that such a contract was intended although never expressed (*e*), as when there has in fact been service of the kind usually performed by servants (*f*). But the presumption of such a contract is open to rebuttal (*g*), as by showing that the relation between the parties concerned was on a charitable footing (*h*), or that the parties were relations (*i*). Contract may be inferred.

(*a*) *Baxter* v. *Portsmouth* (*Earl*) (1826), 5 B. & C. 170; and see title LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., p. 397. As to contracts with drunkards, see title CONTRACT, Vol. VII., p. 342.

(*b*) *Beckham* v. *Drake* (1841), 9 M. & W. 79; Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 5; and see title PARTNERSHIP.

(*c*) *R.* v. *Leech* (1821), 3 Stark. 70; and see *Donaldson* v. *Williamson* (1833), 1 Cr. & M. 345.

(*d*) *Burnley Equitable Co-operative and Industrial Society, Ltd.* v. *Casson*, [1891] 1 Q. B. 75; see title CORPORATIONS, Vol. VIII., p. 379, note (*a*). For form of apprenticeship agreement with corporation, see Encyclopædia of Forms and Precedents, Vol. II., p. 42.

(*e*) As to the principles on which contracts may be implied, see *Thorn* v. *London Corporation* (1875), L. R. 10 Exch. 112, Ex. Ch., *per* BRETT, J., at p. 123; *Churchward* v. *R.* (1865), L. R. 1 Q. B. 173, *per* COCKBURN, C.J., at pp. 195, 196; *Hamlyn & Co.* v. *Wood & Co.*, [1891] 2 Q. B. 488, C. A.; and title CONTRACT, Vol. VII., pp. 512, 513. As to implied contracts for the payment of wages in return for services, see p. 82, *post*; see also note (*b*), p. 77, *post*; compare *Fitzpatrick* v. *Evans & Co.*, [1902] 1 K. B. 505, C. A.

(*f*) *R.* v. *Lyth* (*Inhabitants*) (1793), 5 Term Rep. 327; *R.* v. *Long Whatton* (*Inhabitants*) (1793), 5 Term Rep. 447; *R.* v. *Hales* (*Inhabitants*) (1794), 5 Term Rep. 668 (a hiring for a year being presumed in each case); *R.* v. *Pendleton* (*Inhabitants*) (1812), 15 East, 449 (where it was held proper to presume a hiring for a year from a service of four years); *Browning* v. *Great Central Mining Co. of Devon* (1860), 5 H. & N. 856 (where it was held that an appointment to a position had been made on it being shown that, no formal mode of appointment or election being necessary, a sufficient number of directors had done "an act which, being communicated to the plaintiff, led him to understand that he was manager of the mine").

(*g*) *R.* v. *Pendleton* (*Inhabitants*), *supra*, *per* Lord ELLENBOROUGH, C.J., at pp. 453, 454; *Bradshaw* v. *Hayward* (1842), Car. & M. 591 (where it was held that, in order to negative a contract of service, the defendant could go into evidence to show that the plaintiff had cohabited with him, that being a circumstance tending to show upon what terms she remained in the defendant's house).

(*h*) *R.* v. *Lyth* (*Inhabitants*), *supra*, *per* Lord KENYON, C.J., at pp. 328, 329; *R.* v. *Weyhill* (*Inhabitants*) (1759), 1 Wm. Bl. 206; *R.* v. *Stokesley* (*Inhabitants*) (1796), 6 Term Rep. 757.

(*i*) *Gregory-Stoke* v. *Pitminster* (1726), 2 Bott's Poor Laws by Const, 183, "There must be an actual contract when the servant is under no obligation

SECT. 2. **Form of Contract creating the Relation.**

When contract may be oral.

When contract must be in writing.

147. A contract of hiring and service for a period of a year or less may be oral, save where such a contract must be under seal (*k*), and in the cases of contracts for sea service, which are subject to various stringent statutory regulations (*l*).

148. An agreement to serve for a longer period than a year (*m*), or for a year from a date which is future to that on which the agreement is made (*n*), must, in order to be enforceable, be in writing; but, apparently, an agreement to serve for a year from the day following the date of the agreement need not be in writing (*o*).

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to stay"; *R.* v. *Sow* (*Inhabitants*) (1817), 1 B. & Ald. 178, *per* BAYLEY, J., at p. 181: "Where the parties are not related, it may fairly be presumed from a continuation in the service that the terms on which they continue are the same as during the preceding year. But when the relation of father and child subsists, the ground for that presumption fails"; *R.* v. *St. Mary, Guildford* (1784), 2 Bott's Poor Laws by Const, 187.

(*k*) See pp. 77, 78, *post*, and title CONTRACT, Vol. VII., pp. 361, 365.

(*l*) See titles FISHERIES, Vol. XIV., p. 630; SHIPPING AND NAVIGATION; and the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 113—124. For form of agreement of apprenticeship to sea service, see Encyclopædia of Forms and Precedents, Vol. II., pp. 49, 51; and to the fishing service, *ibid.*, p. 53.

(*m*) See title CONTRACT, Vol. VII., pp. 365, 366. As to what constitutes a sufficient writing, see *ibid*, pp. 367—377. As to the admissibility of evidence to vary a written contract of hiring and service, see *ibid.*, p. 524, note (*c*).

(*n*) See *ibid*, p. 365; *Banks* v. *Crossland* (1874), L. R. 10 Q. B. 97 (agreement dated 11th November for one year's service from the following 23rd November).

(*o*) *Cawthorne* v. *Cordrey* (1863), 13 C. B. (N. S.) 406, *per* BYLES and WILLES, JJ., at p. 407, in regard to which BRETT, L.J., said in *Britain* v. *Rossiter* (1879), 11 Q. B. D. 123, C. A., at p. 125: "There was, however, a *dictum* of WILLES, J., which seems to be supported by the opinion of BYLES, J.; these are great authorities; and that *dictum* seems to have been that if a contract is made on a day, say Monday, for a service for a year to commence on the following day, say a Tuesday, the service is to be performed within 365 days from the making of the contract, but that inasmuch as the law takes no notice of part of a day, and the contract was made in the middle of the Monday, the service to be performed within 365 days after that, the law did not count that half-day of the Monday, and therefore the contract was to be performed within 365 days after it was made, and that was within a year." In *Dollar* v. *Parkington* (1901), 84 L. T. 470, DARLING, J., felt bound by *Bracegirdle* v. *Heald* (1818), 1 B. & Ald. 722 (*per* Lord ELLENBOROUGH, C.J.: "If we were to hold that a case which extended one minute beyond the time pointed out by the statute did not fall within its prohibition I do not see where we should stop"); regarding that as a decision as against the *dicta* in *Cawthorne* v. *Cordrey*, *supra*. But in *Smith* v. *Gold Coast and Ashanti Explorers, Ltd*, [1903] 1 K. B. 285, 538, C. A., Lord ALVERSTONE, C.J., held, at p. 288, that *Cawthorne* v. *Cordrey*, *supra*, and *Britain* v. *Rossiter*, *supra*, "show that a contract for a year's service to commence on the day next after the day on which the contract was made is not an agreement which is not to be performed within the space of one year from the making thereof," and therefore need not be in writing. As to other cases not within the rule which makes writing necessary, see title CONTRACT, Vol. VII., pp. 365, 366. The rule applies though the agreement is liable to be determined within the year by notice or upon some other given event (*Dobson* v. *Collis* (1856), 1 H. & N. 81). With reference to *Davey* v. *Shannon* (1879), 4 Ex. D. 81, it was said in *McGregor* v. *McGregor* (1888), 21 Q. B. D. 424, C. A., by Lord ESHER, M.R., at pp. 428, 429, that "HAWKINS, J., seems in that case to have thought that an agreement is within the statute although performance may take place within the year, if at the time when the agree

SECT. 2. Form of Contract creating the Relation.

Writing is, however, not rendered unnecessary as regards a contract which, although on one side it could be performed within the year, is, as regards the other side, not to be performed within the year and where it is not the intention of the parties that it should be performed within the year (*p*).

If a contract of hiring and service, required to be in writing, has been wholly performed, but the relation of master and servant is continued under an implied contract (*q*) arising by reason of such continuance of service, such contract is enforceable though not in writing (*a*). No such enforceable contract will, however, be implied in respect of services rendered under a contract which is subsisting, but which is unenforceable because not in writing (*b*).

Corporations.

149. As a general rule (*c*), a corporation is bound by its contract

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ment was entered into the parties contemplated that it could or might have to be performed beyond the year. I confess that notion startled me. I think the true doctrine on the subject is that which was laid down in *Souch* v. *Strawbridge* (1846), 2 C. B. 808, by TINDAL, C.J., at pp. 814, 815, where he said: 'It (the statute) speaks of "an agreement that is not to be performed within the space of one year from the making thereof," pointing to contracts the complete performance of which is of necessity extended beyond the space of a year'"; and see *Reeve* v. *Jennings*, [1910] 2 K. B. 522

(*p*) *Reeve* v. *Jennings*, *supra*, where a verbal agreement provided that the employment should be terminable by a week's notice on either side, and that the servant should not within thirty-six months after leaving the service carry on a similar business within a certain area. The latter provision was clearly incapable of performance within a year; while there was no apparent intention that the service should be completed in a year, although the provision as to notice made it possible. The case was therefore held to be within the Statute of Frauds (29 Car 2, c 3), s. 4. In *Hanau* v. *Ehrlich* (1911), 105 L. T. 320, C A., a verbal agreement to serve for two years, subject to six months' notice on either side at any time during that period, was held to be within the statute.

(*q*) As to the nature and meaning of implied contracts generally, see title CONTRACT, Vol. VII., pp. 334, 463.

(*a*) *Collis* v. *Botthamley* (1858), 7 W. R. 87, *per* POLLOCK, C B., "the existing contract was that the employment and service should continue subject to determination by three months' notice, and there was no necessity that it should be in writing"; for the facts of the case, see title CONTRACT, Vol. VII., p. 366, note (*a*); compare pp. 81, 92, *post*.

(*b*) *Snelling* v. *Huntingfield* (*Lord*) (1834), 1 Cr. M. & R. 20, where B. entered A.'s service for a year on 24th July, under a contract of 20th July, which was unenforceable because not signed. "Then if there were a contract in fact upon the 20th, although by the Statute of Frauds no action can be brought upon it, how can another contract be implied? It is not like the case of a demand for services rendered" (*ibid.*, *per* Lord LYNDHURST, C.B., at p. 25); *Britain* v. *Rossiter* (1879), 11 Q. B. D. 123, C. A., where, on a Saturday, a contract of service was entered into for one year from the following Monday, which was unenforceable because only verbal. It was contended, but unsuccessfully, that, as there had been actual service for some months, another contract ought to be implied on the Monday. "It is a proposition which cannot be disputed that no new contract can be implied from acts done under an express contract which is still subsisting; all that can be said is that no one can be charged upon the original contract because it is not in writing" (*ibid.*, *per* BRETT, L.J., at p. 127). As to the application of the equitable doctrine of part performance, see title CONTRACT, Vol. VII., p. 380; see also titles EQUITY, Vol. XIII., p. 65: SPECIFIC PERFORMANCE.

(*c*) The rule may be displaced by custom (*Thetford's* (*Mayor*) *Case* (1703), 3 Salk. 103, according to which the City of London made an attorney

SECT. 2. Form of Contract creating the Relation.

only when the contract is under seal (*d*). But when the contract is in respect of the doing of acts of frequent recurrence or of an insignificant character, as the retainer of an inferior servant (*e*), the affixing of the seal is not indispensable; and a corporation will be bound in respect of an appointment not under seal when an officer or agent is required for the performance of acts of urgent necessity (*f*). The appointment of persons who are officers rather than mere servants, as a solicitor (*g*), a clerk to a workhouse master (*h*), or a medical officer (*i*), is not within the exception, and must be under seal (*k*).

Local authorities.

150. Contracts of urban authorities (*l*) must be in writing and sealed in cases where the value or amount of the contract exceeds £50 (*m*) as ascertained at the time of entering into it (*n*). If, at the time of entering into a contract of employment with such an authority, it is not known how long the employment will last, nor whether the remuneration will exceed £50, remuneration, even if it is in excess of that sum, is recoverable on a contract which is merely verbal (*n*).

Contracts exempt from stamp duty.

151. An agreement or memorandum for the hire of any labourer, artificer, manufacturer, or menial servant is exempt from the stamp duty of sixpence imposed on agreements or memoranda of agreements under hand only (*o*); and bonds, contracts, and

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every year without seal; see title CORPORATIONS, Vol. VIII., p. 381, note (*h*)), or by statute (see *ibid.*, p. 382). As to the necessity for a seal in the case of trading companies, see titles COMPANIES, Vol. V., p. 300; CORPORATIONS, Vol. VIII., p. 383.

(*d*) *R.* v. *Cumberland Justices* (1847), 17 L. J. (Q. B.) 102, *per* WIGHTMAN, J.; *Austin* v. *Bethnal Green Guardians* (1874), L. R. 9 C. P. 91, *per* COLERIDGE, C.J., at p. 94; and see title CORPORATIONS, Vol. VIII., pp. 380—386.

(*e*) Com. Dig., tit. Franchise (F. 13); *Church* v. *Imperial Gas Light and Coke Co.* (1838), 6 Ad. & El. 846, *per* DENMAN, C.J., at p. 861; *Ludlow Corporation* v. *Charlton* (1840), 6 M. & W. 815; see title CORPORATIONS, Vol. VIII., p. 383.

(*f*) *Arnold* v. *Poole Corporation* (1842), 4 Man. & G. 860, *per* TINDAL, C.J., at p. 877.

(*g*) *Arnold* v. *Poole Corporation, supra*; *Sutton* v. *Spectacle Makers Co.* (1864), 10 L. T. 411; compare *Faviell* v. *Eastern Counties Rail. Co.* (1848), 2 Exch. 344; see also title CORPORATIONS, Vol. VIII., p. 382.

(*h*) *Austin* v. *Bethnal Green Guardians, supra.*

(*i*) *Dyte* v. *St. Pancras Guardians* (1872), 27 L. T. 342.

(*k*) See title CORPORATIONS, Vol. VIII., p. 382.

(*l*) See title LOCAL GOVERNMENT, Vol. XIX., p. 268; see also title CORPORATIONS, Vol. VIII., pp. 379, 386.

(*m*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 174.

(*n*) *Eaton* v. *Basker* (1881), 7 Q. B. D. 529, C. A. (agreement by doctor with corporation to attend fever patients at a certain rate per tent per day).

(*o*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 1, and Sched. I.; and see titles CONTRACT, Vol. VII., pp. 529—541; REVENUE. A man engaged to take charge of glebe lands and to occupy a cottage as bailiff, his payment being partly a share of profits, has been held to be a "labourer" within the exemption (*R.* v. *Wortley* (1851), 21 L. J. (M. C.) 44, C. C. R.) "I see no reason for confining the meaning of the word 'labourer' to a mere hedger and ditcher" (*ibid.*, *per* Lord CAMPBELL, C.J., at p. 46). A fireman and stoker on a steamship is also exempt as a "labourer" (*Wilson* v. *Zulueta* (1849), 14 Q. B. 405); see also *Cornforth* v. *Danube and Black Sea Rail. Co.* (1860) 2 F. & F. 197. The overseer in a printing office is an

agreements entered into in the United Kingdom, for or relating to the services, in any of His Majesty's colonies or possessions abroad, of any person as an artificer, clerk, domestic servant, handicraftsman, mechanic, gardener, servant in husbandry, or labourer are exempt from all stamp duties (*p*).

SUB-SECT. 2.—*Apprenticeship.*

152. A contract of apprenticeship, if not in writing, is unenforceable unless, in a particular case, it is otherwise provided by statute (*q*). Usually the contract is effected by deed (*a*). Form.

An apprentice cannot be bound without his own consent (*b*); and consent without execution of the instrument is insufficient (*c*). The father or other guardian (*d*) of an infant apprentice, though not a necessary party to the contract (*e*), usually covenants that the apprentice will perform his part of the agreement (*f*). It is not essential that the master should execute the instrument of apprenticeship (*g*); but if the master has in fact executed one part of an indenture of apprenticeship, it is evidence against him that Parties.

"artificer" within the exemption (*Bishop* v. *Letts* (1858) 1 F. & F. 401); but an agreement for the hire of a clerk is not within the exemption (*Dakin* v. *Watson* (1841), 2 Craw. & D. 224). For forms of agreements for work, see Encyclopædia of Forms and Precedents, Vol. XIII., pp. 125—154.

(*p*) Stamp Act, 1891 (54 & 55 Vict. c. 39), Sched. I. For form of agreement with miner for service abroad, see Encyclopædia of Forms and Precedents, Vol. XIII., p 87.

(*q*) *See Kirkby* v. *Taylor*, [1910] 1 K. B. 529, and the authorities there cited. Furthermore, an apprenticeship contract being in practice a contract which is not to be performed within a year, the Statute of Frauds (29 Car. 2, c. 3), s. 4, will generally operate to make writing necessary; see hereon title CONTRACT, Vol. VII., p. 365.

(*a*) See title INFANTS AND CHILDREN, Vol. XVII., p. 70. By stat. (1563) 5 Eliz. c. 4, s. 25 (repealed by the Conspiracy, and Protection of Property Act, 1875 (38 & 39 Vict. c. 86), s. 17), an indenture was necessary in the case of apprentices to husbandry; and it was held in numerous cases that a poor law settlement could only be conferred by apprenticeship when the apprenticeship agreement was under seal (see, *e.g.*, *R.* v. *Kingsweare* (*Inhabitants*) (1776), Burr. S. C. 839; *R.* v. *Margram* (*Inhabitants*) (1793), 5 Term Rep. 153, and *Kirkby* v. *Taylor*, *supra*, *per* Lord ALVERSTONE, C.J., at p. 534); as to poor law settlement, see title POOR LAW. By the Apprentices Act, 1814 (54 Geo. 3, c. 96), s. 2, it was enacted that it should be lawful to take apprentices otherwise than in accordance with stat. (1563) 5 Eliz. c. 4, and that indentures, deeds, and agreements in writing entered into for the purpose of apprenticeship, which would be otherwise valid and effectual, should be valid and effectual in law. For precedents of apprenticeship indentures, see Encyclopædia of Forms and Precedents, Vol. II., pp. 30—70. As to the circumstances in which the existence of a deed of apprenticeship has been presumed, see *R.* v. *St. Mary-le-bone* (*Inhabitants*) (1824), 4 Dow. & Ry. (K. B.) 475; *R.* v. *Fordingbridge* (*Inhabitants*) (1858), E. B. & E. 678.

(*b*) *R.* v. *Arnesby* (*Inhabitants*) (1820), 3 B. & Ald. 584; and see, further, title INFANTS AND CHILDREN, Vol. XVII., p. 70.

(*c*) *R.* v. *Ripon* (*Inhabitants*) (1808), 9 East, 293

(*d*) As to guardians, see title INFANTS AND CHILDREN, Vol. XVII., pp. 121 *et seq.*

(*e*) *R.* v. *Arundel* (*Inhabitants*) (1816), 5 M. & S. 257; and see p. 72, *ante*.

(*f*) See note (*n*), p. 80, *post*, and note (*a*), p. 103, *post*.

(*g*) *R.* v. *St. Peter's-on-the-Hill* (1741), 2 Bott's Poor Laws by Const, 367; *R.* v. *Fleet* (1777), 2 Bott's Poor Laws by Const, 371.

SECT. 2. Form of Cont act creating the Relation.

the apprentice has executed the other part (*h*). Technical words are not necessary to constitute the relation (*i*).

In the City of London indentures of apprenticeship should, in observance of custom, be enrolled (*k*).

Enrolment.

153. A board of guardians may bind poor children as apprentices (*l*), and such apprenticeship is effected by indenture (*m*). In the absence of statutory authority to the contrary, a parish apprentice cannot be bound without his consent as manifested in the execution by him of the indenture (*n*).

Apprentices to boards of guardians.

Apprentices to the sea service

154. Apprenticeship to the sea service (*o*), the sea-fishing service (*p*), or the pilot service (*q*), is subject in each case to various regulations.

Stamp duty.

155. A stamp duty of 2*s.* 6*d.* is payable on instruments of apprenticeship (*r*), but the following instruments are exempt, namely:—(1) Instruments relating to any poor child apprenticed by or at the sole charge of any parish or township, or of any public charity,

(*h*) *Burleigh* v. *Stibbs* (1703), 5 Term Rep. 465.

(*i*) *R.* v. *Rainham* (*Inhabitants*) (1801), 1 East, 531; so it is not essential that the word "apprentice" should be used (*R.* v. *Laindon* (*Inhabitants*) (1799), 8 Term Rep. 379).

(*k*) *Code* v. *Holmes* (1623), Palm. 361.

(*l*) By the Poor Relief Act, 1601 (43 Eliz. c. 2), s. 3, powers in regard to the apprenticeship of poor children were given to churchwardens and overseers. By the Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101), s. 12, those powers were transferred to the boards of guardians; see title POOR LAW.

(*m*) See the Poor Relief Act, 1601 (43 Eliz. c. 2), ss. 3, 5. By the Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101), s. 12, the Poor Law Commissioners (now the Local Government Board) are empowered to prescribe by order the terms and conditions to be inserted in the indentures of parish apprentices and other matters relating thereto. The General Consolidated Order, dated 24th July, 1847 (Stat. R. & O. Rev., Vol. X., Poor, England, pp. 74 *et seq.*), contains detailed provisions as to the conditions (including age) of such apprenticeship and the manner in which it is to be effected, and arts. 67—69 thereof prescribe the manner in which the indenture is to be executed and its contents. These rules (except such as relate to the signature of the instrument by the apprentice) are directory only, and non-compliance therewith does not make the indenture void (*R.* v. *St. Mary Magdalen, Bermondsey* (*Inhabitants*) (1853), 2 E. & B. 809). For form of agreement of apprenticeship, see Encyclopædia of Forms and Precedents, Vol. II., p. 60.

(*n*) General Consolidated Order, 1847, *supra*, art. 67, by which the guardians and the proposed master are also required to execute the indenture, and, unless dispensed with under *ibid.*, art. 57, the parent; see also *R.* v. *Arnesby* (*Inhabitants*) (1820), 3 B. & Ald. 584; *St. Nicholas, Rochester* (*Churchwardens etc.*) v. *St. Botolph, Without Bishopsgate* (*Churchwardens etc.*) (1862), 31 L. J. (M. C.) 258; compare *R.* v. *St. Nicholas in Nottingham* (1788), 2 Bott's Poor Laws by Const, 373; and compare p. 104, *post*.

(*o*) See title SHIPPING AND NAVIGATION, and Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 108. As to forms, see note (*l*), p. 76, *ante*.

(*p*) See title FISHERIES, Vol. XIV., p. 630, and Merchant Shipping Act, 1894 (57 & 58 Vict. c. 69), s. 395. As to forms, see note (*l*), p. 76, *ante*.

(*q*) See title SHIPPING AND NAVIGATION, and Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 582.

(*r*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 1, and Sched. I. Instruments of apprenticeship within the meaning of that Act include "every writing relating to the service or tuition of any apprentice, clerk, or servant placed with any master to learn any profession, trade, or employment (except articles of clerkship to a solicitor or law agent or writer to the signet)" (*ibid.*, s. 25); and see title SOLICITORS.

or pursuant to any Act for the regulation of parish apprentices (*s*); (2) instruments of apprenticeship in Ireland, where the value of the premium or consideration does not exceed £10 (*s*); (3) instruments of apprenticeship entered into in the United Kingdom for or relating to service in any of His Majesty's colonies or possessions abroad (*s*); (4) indentures of apprenticeship to the sea service (*t*) and the sea fishing service (*a*).

SECT. 2. Form of Contract creating the Relation.

SUB-SECT. 3.—*Parol Evidence and Written Contracts.*

156. Where the terms of a written contract of service are precise, parol evidence is not admissible to show that such terms were varied by verbal stipulations either at the time of the contract or subsequently thereto (*b*), but parol evidence is admissible to prove a custom in regard to the terms of service which, not being repugnant to nor excluded by the contract, is so general that the contract must be taken to have reference thereto (*c*), or, when the contract is silent as to the capacity in which the servant was engaged, to supplement it by proving what that capacity was (*d*).

Admissibility.

Proof of custom.

SECT. 3.—*Consideration.*

SUB-SECT. 1.—*In General.*

157. In the absence of consideration there can be no binding contract of service (*e*). The adequacy of any particular consideration is not a matter into which the court will inquire (*f*).

Absence.

Adequacy.

No servant who assists in a transaction based on an immoral consideration can recover any remuneration in respect thereof (*g*); nor will any contract of service be enforced which is based on a consideration which is illegal (*h*).

Immorality.

Illegality.

(*s*) Stamp Act, 1891 (54 & 55 Vict. c. 39), Sched. I.

(*t*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 108.

(*a*) *Ibid.*, s. 395.

(*b*) *Giraud* v. *Richmond* (1846), 2 C. B. 835; *Evans* v. *Roe* (1872), L. R. 7 C. P 138; and see title CONTRACT, Vol. VII, p. 523.

(*c*) *R.* v. *Stoke upon Trent (Inhabitants)* (1843), 5 Q. B. 303 (where there was a written contract of service, and parol evidence was admitted to prove a custom that the workmen in question were entitled to certain holidays); and see *Devonald* v. *Rosser & Sons*, [1906] 2 K. B. 728, C. A., *per* Lord ALVERSTONE, C.J., at p. 741; and title CUSTOM AND USAGES, Vol. X., pp. 252 *et seq*

(*d*) *Mumford* v. *Gething* (1859), 7 C. B. (N. S.) 305; *Price* v. *Mouat* (1862), 11 C. B. (N. S.) 508.

(*e*) *Lees* v. *Whitcomb* (1828), 5 Bing. 34 (where a written agreement to remain with A. B. two years for the purpose of learning the business of dressmaking was held not to be binding because no consideration, as, for example, that A. B. should teach, was disclosed); *Sykes* v. *Dixon* (1839), 9 Ad. & El. 693 (where the contention that a promise to pay for the services referred to in a contract, the operation of which was "entirely on one side," might be implied, was not allowed); *Hulse* v. *Hulse* (1856), 17 C. B. 711 (future services). See, further, title CONTRACT, Vol. VII., p. 383.

(*f*) *Hitchcock* v. *Coker* (1837), 6 Ad. & El. 438; *Pilkington* v. *Scott* (1846), 15 M. & W. 657; *Middleton* v. *Brown* (1878), 47 L. J. (CH.) 411, C. A.

(*g*) *Poplett* v. *Stockdale* (1825), 2 C. & P. 198, *per* BEST, C.J., at p. 200.

(*h*) *Davies* v. *Makuna* (1885), 29 Ch. D. 596, C. A. (where the agreement in question was entered into by a qualified medical practitioner to serve an

Consideration.

Contract essential.

158. Wages (*i*) or other remuneration for services can only be recovered when it can be shown that there is a contract that payment or other consideration shall be given (*k*). Such a contract may be either express or implied (*l*). The mere fact that a person has rendered certain services does not entitle him to payment therefor (*m*); nor does the mere fact that a person continues his services after the expiration of a special contract of service give rise to an implied contract that he shall be paid for such continuation of service (*n*). But where, no formal mode of appointment

Particular services.

unqualified practising medical man as assistant. FRY, L.J., said, however, at p. 607, that if it had been the case of "a medical profession carried on entirely by means of duly qualified assistants" he would have been "far from saying that the agreement might not be valid"); *Kearney* v. *Whitehaven Colliery Co.*, [1893] 1 Q. B. 700, C. A. (where A. L. SMITH, L.J., laid it down, at p. 714, that "the rule is that if the consideration is tainted with illegality, either in whole or in part, all the promises depending on that consideration must fail; but if the consideration be not tainted with illegality, either wholly or in part, then if one of the several promises depending upon it be illegal in itself and the others legal, the legal promises stand, and may be enforced." Accordingly, while there was one promise, relating to deductions, which was illegal and unenforceable, yet the promises, on the one hand to employ and pay wages, and on the other to serve and not to leave without fourteen days' notice, were good).

(*i*) For provisions as to the wages of seamen, see title SHIPPING AND NAVIGATION; as to the attachment and alienation of wages, see title EXECUTION, Vol. XIV., p. 94; as to assignment of wages, see title CHOSES IN ACTION, Vol. IV., p. 400; as to compensation for work done and payments on *quantum meruit*, see title WORK AND LABOUR.

(*k*) *Davies* v. *Davies* (1839), 9 C. & P. 87; *Reeve* v. *Reeve* (1858), 1 F. & F. 280, *per* MARTIN, B., "an action cannot be maintained for remuneration merely because it may appear to be reasonable"; *Foord* v. *Morley* (1859), 1 F. & F. 496; *R.* v. *Thames Ditton* (*Inhabitants*) (1785), 4 Doug. (K. B.) 300; *Alfred* v. *Fitzjames* (*Marquis*) (1799), 3 Esp. 3; see *Bradshaw* v. *Hayward* (1842), Car. & M. 591, cited in note (*q*), p. 75, *ante*. In *Harper* v. *Linthorpe Dinsdale Smelting Co., Ltd.* (1909), 101 L. T. 608, a workman brought an action for damages against his employers for loss of time incurred through being kept waiting for his wages. It was held that he could not succeed, for no custom was proved nor was there evidence of an implied contract by the master to pay the workman for waiting for his wages.

(*l*) *Davies* v. *Davies*, *supra*; *Higgins* v. *Hopkins* (1848), 3 Exch. 163, *per* PARKE, B., at p. 166: "If he does work on the order of another, under such circumstances as that it must be presumed that he looks to be paid as a matter of right by him, then a contract would be implied with that person"; *Reeve* v. *Reeve*, *supra*; *Roberts* v. *Smith* (1859), 4 H. & N. 315, *per* MARTIN, B., at p. 321: "It is by no means a matter of law that a person shall be paid for his services, it is a matter of contract. No doubt there is a variety of labour from which there arises an irresistible inference that the person who has done it is to be paid, but that is a sort of labour that is always done for money, and in such cases a jury would presume a contract on the ordinary terms, unless evidence was given to the contrary."

(*m*) *Hulse* v. *Hulse* (1856), 17 C. B. 711; *Reeve* v. *Reeve*, *supra*.

(*n*) *Lamburn* v. *Cruden* (1841), 2 Man. & G. 253, where a servant was engaged at a yearly salary payable quarterly. A month after the termination of one of the years of service he tendered his resignation, which, after another month, was accepted. Nothing was said about remuneration for the time since the termination of the last year's service. It was held that the law implied no engagement to pay for services performed since

being provided, a person is led by employers to believe that he has been appointed to a particular post, and he acts in that position, it is for the employer to show that such services were not to be remunerated (*o*). Where it is agreed that it shall be left to the employer to determine whether or not remuneration is to be given for any particular services, and he decides against any such payment, no remuneration is recoverable (*p*); but when a contract of service, which leaves the question of remuneration to the employer, is capable of being construed as an agreement to pay a reasonable sum for the services in question, the servant is entitled to something in the way of payment (*q*).

Question of payment left to employer.

159. Additional remuneration can only be recovered when it is the subject of a distinct agreement (*r*). A promise to pay extra remuneration for services which are within the scope of the servant's duty as defined by his subsisting contract of service is void for want of consideration (*s*), and it makes no difference that such extra remuneration is claimed under a custom (*t*). But a promise to pay extra remuneration is founded on good consideration, and will be enforced, when the servant is no longer bound by the original contract by reason of the risk having become greater

Additional remuneration

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that year, but that it was proper to leave it to the jury to say whether the parties had agreed that such services should be remunerated. The principle especially applies when the parties are relatives, as in *R.* v. *Sow* (*Inhabitants*) (1817), 1 B. & Ald. 178 (see note (*z*), p. 75, *ante*); compare *Mansfield* (*Earl*) v. *Scott* (1833), 1 Cl. & Fin. 319, H. L.

(*o*) *Browning* v. *Great Central Mining Co. of Devon* (1860), 5 H. & N. 856.

(*p*) *Taylor* v. *Brewer* (1813), 1 M. & S. 290 (where the servant did work under a resolution of a committee that any services to be rendered by him should "be taken into consideration and such remuneration be made as should be deemed right"); *Roberts* v. *Smith* (1859), 4 H. & N. 315 (where the servant agreed that if a certain company were not formed he would accept any remuneration the employers should think him deserving of and their means afforded).

(*q*) *Bryant* v. *Flight* (1839), 5 M. & W. 114 (where the servant accepted a situation on the terms that the amount of the payment he was to receive he would leave entirely to the employer, and a majority of the court concluded that a contract to pay something was to be inferred, although PARKE, B., was unable to distinguish the case from *Taylor* v. *Brewer*, *supra*). In *Roberts* v. *Smith*, *supra* (where it was left to the master to pay what he should deem right as compensation for the labour done), MARTIN, B., at p. 321, preferred *Taylor* v. *Brewer*, *supra*, to *Bryant* v. *Flight*, *supra*, but BRAMWELL, B., at p. 319, said that in *Bryant* v. *Flight*, *supra*, the contract was capable of being construed as for payment on a *quantum meruit*. As to these cases, see also *Loftus* v. *Roberts* (1902), 18 T. L. R. 532, C. A., *per* VAUGHAN WILLIAMS, L.J., at p. 534; see, further, *Rawlings* v. *Chandler* (1854), 9 Exch. 687; *Bird* v. *M'Gaheg* (1849), 2 Car. & Kir. 707; *Owen* v. *Bowen* (1829), 4 C. & P. 93; and title WORK AND LABOUR.

(*r*) *Bell* v. *Drummond* (1791), Peake, 63 [45]; *Carter* v. *Hall* (1818), 2 Stark 361. As to gratuities, see p. 86, *post*.

(*s*) See cases as to wages cited in title CONTRACT, Vol. VII. p. 385, note (*q*). The rule applies when a master of a vessel promises to divide deserters' wages among the rest of the crew (*Stilk* v. *Meyrick* (1809), 6 Esp. 129; *The Araminta* (1854), 18 Jur. 793). In the latter case it was further held that the payment in question was illegal and that the amount could be deducted from the wages of the crew by the owners; and see title SHIPPING AND NAVIGATION.

(*t*) *Elsworth* v. *Woolmore* (1803), 5 Esp. 84,

SECT. 3. Consideration.

than that within the contemplation of that contract (*a*), or because the nature of the service has been entirely changed (*b*).

Where performance of duty is condition precedent.

160. When the contract of service is an entire contract (*c*), providing for payment on the completion of a definite period of service (*d*), or of a definite piece of work (*e*), it is a condition precedent to the recovery of any salary or wages in respect thereof that the service or duty shall be completely performed, unless the employer so alters the contract as to entitle the servant to regard it at an end, in which case the whole sum payable under the contract becomes due (*f*), or unless there is a custom that the servant is entitled to wages in proportion to the time actually served (*g*). But when the contract, though in respect of work terminating at a particular time, is to be construed as providing that remuneration shall accrue due and become vested at stated periods, such remuneration constitutes a debt recoverable at the end of each such period of service (*h*).

Temporary absence of servant through illness.

161. A servant is entitled to his wages or salary during absence through temporary illness, provided that the contract of service

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(*a*) *Hartley* v. *Ponsonby* (1857), 7 E. & B. 872 (where part of the crew deserted at a foreign port, and, as found by a jury, it was unreasonable and dangerous to proceed with the reduced crew. The captain promised extra pay to the remaining seamen if they would take the ship to the next port. It was held that the promise was enforceable, as the crew were not bound under their existing articles to proceed on a voyage which was dangerous to life).

(*b*) *Harris* v. *Carter* (1854), 3 E. & B. 559, *per* Lord CAMPBELL, at p. 561 (where it was mentioned that an entire change of voyage would justify a new contract in place of the original articles).

(*c*) For the distinction between entire and divisible contracts, see title CONTRACT, Vol. VII., p. 522.

(*d*) *Plymouth (Countess)* v. *Throgmorton* (1688), 3 Mod. Rep. 153 (where, the contract being for service for a year, salary for three quarters was not recoverable); *Lilley* v. *Elwin* (1848), 11 Q. B. 742; so, too, where a contract provided for a salary for a week, no portion became due until the end of the week (*Mapleson* v. *Sears* (1911), 28 T. L. R. 30).

(*e*) *Cutter* v. *Powell* (1795), 6 Term Rep. 320; 2 Smith, L. C., 11th ed., 1 (where, a seaman having died during the voyage, no wages were held payable for the time actually served, the contract providing for payment "provided he proceeds, continues and does his duty . . . from hence to the port of Liverpool"). But as to the wages of a seaman dying on a voyage, see now the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), and title SHIPPING AND NAVIGATION.

(*f*) *O'Neil* v. *Armstrong, Mitchell & Co.*, [1895] 2 Q. B. 418, C. A. (where a seaman engaged to serve on a vessel which was to be taken to Japan. It was held that an outbreak of war during the voyage so altered the risks of the voyage as to entitle the seaman to leave the ship and claim the sum due for the whole voyage).

(*g*) As to the case of a general hiring, see p. 92, *post*, and *Cutter* v. *Powell*, *supra* (where LAWRENCE, J., at 6 Term Rep. 326, said that if the plaintiff in that case had been able to prove a usage that persons in the position of mate of a vessel were entitled to wages in proportion to the time they served, he might have recovered something according to such usage).

(*h*) *Taylor* v. *Laird* (1856), 1 H. & N. 266 (where the plaintiff accepted command of a vessel at "fixed pay of £50 per month" and commission on the proceeds, and, having abandoned the contract before completion, was held entitled to salary for as many months as he had served); *Button* v. *Thompson* (1869), L. R. 4 C. P. 330 (which, however, according to *Saunders* v. *Whittle* (1876), 33 L. T. 816, *per* CLEASBY, B., "merely decided upon a peculiar contract, that a servant was entitled to wages earned

remains in existence during that time, and that he is ready and willing to carry out his duties save for the incapacity produced by the illness (*i*); and this is so even though the illness be caused by the servant's own misconduct, provided such misconduct occurred before the contract of service was entered into and that he did not know, when entering into the contract, that the illness would eventuate (*j*). But the illness of the servant may so go to the root of the consideration as to justify the master in rescinding the contract (*k*).

Voluntary absence of servant without due notice.

162. If a servant voluntarily leaves his service without proper notice he cannot recover any wages for work done during the broken period of his hiring; for his wages only become due at the end of each period of hiring (*l*). The same rule applies in the case of a servant summarily dismissed for good cause (*m*); but when, as appears by all the circumstances of the case, wages are earned daily (*n*) and become due as earned, the servant is entitled to be paid

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during the month before that in which he absented himself. It is no authority that he would have been entitled to his current wages").

(*i*) *Cuckson* v. *Stones* (1858), 1 E. & E. 248; *Warren* v. *Whittingham* (1902), 18 T. L. R. 508; *Inglis* v. *East-India Co.* (1851), 18 L. T. (o. s.) 93; see also *R.* v. *Islip* (*Inhabitants*) (1721), 1 Stra. 423; *Re Closson, Ex parte Harris* (1845), De G. 165; compare *Poussard* v. *Spiers* (1876), 1 Q. B. D. 410; *Bettini* v. *Gye* (1876), 1 Q. B. D. 183. As to the payment during illness of wages covenanted for in an indenture of apprenticeship, see *Patten* v. *Wood* (1887), 51 J. P. 549. The expression "absence through illness" in a contract includes absence reasonably caused by the illness, and so covers a period of convalescence; see *Davies* v. *Ebbw Vale Urban District Council* (1911), 75 J. P. (Journal) 340. As to how far absence caused by pregnancy is absence caused by illness, see *ibid.*, *per* CHANNELL, J. As to the right to wages during a period of illness, sick pay having been received during the period from a fund, to which fund the employers subscribed, see *Niblett* v. *Midland Rail. Co.* (1907), 96 L. T. 462.

(*j*) *K*—— v. *Raschen* (1878), 38 L. T. 38.

(*k*) *Poussard* v. *Spiers*, *supra*; see also *Loates* v. *Maple* (1903), 88 L. T. 288.

(*l*) *Walsh* v. *Walley* (1874), L. R. 9 Q. B. 367 (where a weaver was employed on piecework, his wages being ascertained each Thursday and paid each Saturday. He left on a Friday without notice. There being a finding of fact that he was a weekly servant, and it being part of the contract that "persons leaving without notice will forfeit all wages due," he was held to have forfeited the sum earned during the week ending on the preceding Thursday as well as that earned between that time and his leaving); *Saunders* v. *Whittle* (1876), 33 L. T. 816 (where a painter, engaged by the week at so much per hour, left his employment during a week, and was held to have no claim to the wages he would have received at the end of the week); *Gregson* v. *Watson* (1876), 34 L. T. 143 (where a factory worker, paid each Saturday for work actually done during the week up to the preceding Wednesday, and held to be on a weekly hiring, was held not entitled to recover for a broken week during which he left without notice); see *ibid.*, *per* CLEASBY, B., at p. 145; *Warburton* v. *Heyworth* (1880), 6 Q. B. D. 1, C. A., *per* BRETT, L.J., at p. 7; *Huttman* v. *Boulnois* (1826), 2 C. & P. 510; and see *George* v. *Davies*, [1911] 2 K. B. 445 (a servant who had wrongfully left her employment held entitled to recover the month's wages which had already accrued due to her); compare *Taylor* v. *Carr and Porter* (1861), 4 L. T. 414.

(*m*) *Turner* v. *Robinson* (1833), 5 B. & Ad. 789; *Ridgway* v. *Hungerford Market Co.* (1835), 3 Ad. & El. 171; *Searle* v. *Ridley* (1873), 28 L. T. 411; *Boston Deep Sea Fishing and Ice Co.* v. *Ansell* (1888), 39 Ch. D. 339, C. A. As to summary dismissal generally, see p. 98, *post*.

(*n*) As to the effect of stipulations for payment on the duration of the contract, see p. 93, *post*.

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the amount actually earned even though he has left without proper notice (*o*) or is properly dismissed (*p*).

Computation of wages of pieceworkers.

163. In every textile factory, and in certain other factories, particulars must be given to pieceworkers to enable them to compute the wages payable to them (*q*). When piecework in silk goods is given out to a weaver, the manufacturer or his agent must, in the absence of a written agreement dispensing therewith, deliver, with the work, a ticket containing particulars signed by the manufacturer or his agent as to the work, date of engagement, and price (*r*); and when any manufacturer of hosiery or his agent gives out to a workman material to be wrought, he is at the same time to give the workman a signed ticket containing particulars of the agreement between them (*s*).

SUB-SECT. 3.—*Remuneration other than Wages.*

Gratuities.

164. The opportunity of earning a gratuity at the end of the period of service may be good as part of the consideration of the contract (*t*); and a person may be none the less a servant by reason of the fact that his remuneration takes the form wholly of gratuities from his master's customers (*a*).

Livery.

165. A yearly servant who is provided with a livery on entering the service as part of his remuneration has no property in such livery until he has served a year (*b*).

SUB-SECT. 4.—*Provision of Work.*

Obligation of master.

166. An obligation on the part of the master to provide employment may be good consideration for the servant's promise of service (*c*). Whether or not such an obligation exists depends on the circumstances of each case (*d*); but it may be

Express or implied.

(*o*) *Warburton* v. *Heyworth* (1880), 6 Q. B. D. 1, C. A.; *Parkin* v. *South Hetton Coal Co.* (1907), 98 L. T. 162, C. A.; and see *Taylor* v. *Carr* (1861), 30 L. J. (M. C.) 201; and compare *George* v. *Davies*, [1911] 2 K. B. 445.

(*p*) *Parkin* v. *South Hetton Coal Co.*, *supra*. As to the wages of seamen, see title SHIPPING AND NAVIGATION.

(*q*) See title FACTORIES AND SHOPS, Vol. XIV., p. 512; Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 116.

(*r*) Silk Weavers Act, 1845 (8 & 9 Vict. c. 128). As to what such ticket must contain, see *Seddon* v. *Cocker* (1861), 25 J. P. 196.

(*s*) Hosiery Act, 1845 (8 & 9 Vict. c. 77), s. 1.

(*t*) *Parker* v. *Ibbetson* (1858), 4 C. B. (N. S.) 346; *Lake* v. *Campbell* (1862), 5 L. T. 582. As to the expectation of a legacy as the consideration for service, see *Maddison* v. *Alderson* (1883), 8 App. Cas. 467.

(*a*) *Laugher* v. *Pointer* (1826), 5 B. & C. 547 (where the servant in question was a driver supplied by a jobmaster. It was pointed out (*ibid*, *per* LITTLEDALE, J., at p. 555), that servants in inns and hotels were similarly situated); see also *Penn* v. *Spiers and Pond, Ltd.*, [1908] 1 K. B. 766, C. A.

(*b*) *Crocker* v. *Molyneux* (1828), 3 C. & P. 470.

(*c*) *Pilkington* v. *Scott* (1846), 15 M. & W. 657; *Re Bailey* (1854), 3 E. & B. 607, *per* Lord CAMPBELL, C.J., at p. 618; *Gravely* v *Barnard* (1874), L. R. 18 Eq. 518; *Thomas* v. *Vivian* (1873), 37 J. P. 228; *Cook* v. *Sherwood* (1863), 11 W. R. 595.

(*d*) *R.* v. *Welch* (1853), 2 E. & B. 357 *per* Lord CAMPBELL, C.J., at p. 362; *Pilkington* v. *Scott*, *supra*, *per* ALDERSON, B., at p. 660: "The workman agrees to serve them during the seven years on certain terms, and they agree to pay him certain wages, and a moiety thereof during any depression of trade, with liberty to them to employ any other person in the event of his being sick or lame. Then they are to have the option of dismissing him from

implied (*e*), as where the contract would, in the absence of an obligation to provide an opportunity of earning wages, be so one-sided as to be unreasonable from the servant's point of view (*f*), or where the wages are to be paid in the form of commission (*g*), or where the opportunity of acting in the capacity indicated in the contract of service is of primary importance to the person employed (*h*). But where a written agreement, which appears on the face of it to include all the terms agreed to by the parties, provides only for the payment of wages or salary at certain times, no implied obligation to find work for the servant will be added (*i*), and he is not entitled to damages for not being given employment (*k*), although, if he

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their service, on giving a month's wages or a month's notice. All these provisions being taken together, it appears to me that the agreement points clearly to an undertaking on the part of the masters to employ the workman for the seven years, subject to the notice"; *Hartley* v. *Cummings* (1846), 2 Car. & Kir. 433; *Williamson* v. *Taylor* (1843), 5 Q. B. 175; compare *Whittle* v. *Frankland* (1862), 2 B. & S. 49, *per* CROMPTON, J., at p. 58. The use of the words "engage and employ" in the contract do not of themselves impose on the master an obligation to provide continuous employment (*Turner* v. *Sawdon & Co.*, [1901] 2 K. B. 653, C. A.).

(*e*) *Gravely* v. *Barnard* (1874), L. R. 18 Eq. 518.

(*f*) *Devonald* v. *Rosser & Sons*, [1906] 2 K. B. 728, C. A. (where a tinplate rollerman was employed at piecework rates, subject to a condition (*inter alia*) that "No person regularly employed shall quit or be discharged from these works without giving or receiving twenty-eight days' notice in writing." The servant brought an action to recover damages for breach of an implied agreement to provide him with work for the six weeks intervening between the shutting down of the works and the expiration of the twenty-eight days' notice subsequently given. It was held that he could recover, the employers' contention that they were under no obligation to provide work, but that he continued bound to them, although earning no wages, until the expiry of the notice, being rejected as unreasonable). *R.* v. *Welch* (1853), 2 E. & B. 357, and *Whittle* v. *Frankland*, *supra*, were approved in *Devonald* v. *Rosser & Sons*, *supra*.

(*g*) *Turner* v. *Goldsmith*, [1891] 1 Q. B. 544, C. A.; and see *Turner* v. *Sawdon & Co.*, [1901] 2 K. B. 653, C. A., *per* A. L. SMITH, M.R., at p. 656, and VAUGHAN WILLIAMS, L.J., at p. 659, and cases cited in title CONTRACT, Vol. VII., p. 513, note (*c*).

(*h*) *Fechter* v. *Montgomery* (1863), 33 Beav. 22 (referred to by SHIRLEY, L.J., in *Turner* v. *Sawdon & Co.*, *supra*, at p. 659, as showing how "in the case of an actor who accepts an engagement, it may be an important consideration with him to have an opportunity of displaying his abilities before the public, and it may be that there is an implied obligation on the part of the master to afford such an opportunity"); *Bunning* v. *Lyric Theatre, Ltd.* (1894), 71 L. T. 396 (referred to in *Turner* v. *Sawdon & Co.*, *supra*, by VAUGHAN WILLIAMS, L.J., at p. 659, as a case where "there is a good deal in the terms of the contract to shew that the opportunity of appearing as musical director was one of the considerations which the servant bargained that he should have from the master"); see also *De Francesco* v. *Barnum* (1890), 63 L. T. 514.

(*i*) *Williamson* v. *Taylor* (1844), 5 Q. B. 175; *Aspdin* v. *Austin* (1844), 5 Q. B. 671; *Dunn* v. *Sayles* (1844), 5 Q. B. 685; and as to the true bearing of these cases, see *Emmens* v. *Elderton* (1853), 4 H. L. Cas. 624, *per* CROMPTON, J., at p. 647; *per* TALFOURD, J., at p. 650, and *per* PARKE, B., at p. 669; *Devonald* v. *Rosser & Sons*, *supra*, *per* FARWELL, L.J., at p. 745; *Lagerwall* v. *Wilkinson, Henderson, and Clarke, Ltd.* (1899), 80 L. T. 55; and see title CONTRACT, Vol. VII., pp. 513, 514, and cases cited *ibid.*, notes (*c*), (*d*).

(*k*) *Turner* v. *Sawdon & Co.*, *supra* (where the plaintiff's contention was that, being a salesman, if he were not given employment he would

SECT. 3. Consideration.

remains ready to perform his services during the period covered by his contract, he is entitled to the agreed wages (*l*).

Condition as to continuance of business.

Where there is a clear contractual obligation to provide employment during a certain period, no condition will be implied making the fulfilment of the contract dependent upon the continued existence of the place of business as distinguished from the business itself; but if the employer's power to carry on business is destroyed by *vis major* his obligation to provide work ceases (*m*).

SECT. 4.—*Restrictions on Freedom of Contract.*

SUB-SECT. 1.—*Covenants in Restraint of Trade.*

General rule.

167. Contracts of service are no exception to the rule that covenants in restraint of trade (*n*), in order to be valid, must show valuable consideration (*o*), and must be reasonable in the sense that the restraint must be no more than is necessary for the protection of the person in whose favour it is imposed (*p*). In determining whether or not a restraint is reasonable (*q*) regard must be had to the nature of the occupation for which the servant is employed (*r*), and to all the circumstances of the case (*s*).

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become less efficient in his business; but the court refused to read the contract so as to "convert the retainer at fixed wages into a contract to keep the servant in the service of his employer in such a manner as to enable the former to become *au fait* at his work" (*ibid.*, *per* A. L. SMITH, M.R., at p. 657).

(*l*) *Aspdin* v. *Austin* (1844), 5 Q. B. 671; and see *Emmens* v. *Elderton* (1853), 4 H. I. Cas. 624, *per* TALFOURD, J., at p. 650.

(*m*) *Turner* v. *Goldsmith*, [1891] 1 Q. B. 544, C. A.; and see cases cited in title CONTRACT, Vol. VII., p. 430, notes (*i*), (*j*).

(*n*) See, generally, title TRADE AND TRADE UNIONS. Such distinction as exists was pointed out in *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.*, [1894] A. C. 535, *per* Lord MACNAGHTEN, at pp. 566, 567, "To a certain extent, different considerations must apply in cases of apprenticeship and cases of that sort, on the one hand, and cases of the sale of a business or dissolution of partnership on the other . . . there is obviously more freedom of contract between buyer and seller than between master and servant or between an employer and a person seeking employment."

(*o*) *Mitchell* v. *Reynolds* (1711), 1 P. Wms. 181; 1 Smith, L. C., 11th ed., 406; *Ward* v. *Byrne* (1839), 5 M. & W. 548, *per* Lord ABINGER, C.B., at p. 559. The smallest consideration is sufficient (*Gravely* v. *Barnard* (1874), L. R. 18 Eq. 518).

(*p*) *Hitchcock* v. *Coker* (1837), 6 Ad. & El. 438, *per* TINDAL, C.J., at p. 454; *Baines* v. *Geary* (1887), 35 Ch. D. 154, *per* NORTH, J., at p. 156; *Mills* v. *Dunham*, [1891] 1 Ch. 576, C. A., *per* LOPES, L.J., at p. 587; *Dowden and Pook, Ltd.* v. *Pook*, [1904] 1 K. B. 45, C. A., *per* MATHEW, L.J., at p. 53.

(*q*) The question is for the judge, not the jury (*Dowden and Pook, Ltd.* v. *Pook*, *supra*).

(*r*) "A man whose business is a corn miller's business, and who requires to protect that, cannot, if he has also a furniture business, require the covenantee, who enters into his service as an employee in the corn business, to enter into covenants restricting him from entering into competition with him in the furniture business also" (*Leetham (Henry) & Sons, Ltd.* v. *Johnstone-White*, [1907] 1 Ch. 322, C. A., *per* FARWELL, L.J., at p. 327; see, further, *Ehrman* v. *Bartholomew*, [1898] 1 Ch. 671).

(*s*) *Proctor* v. *Sargent* (1840), 2 Man. & G. 20, *per* TINDAL, C.J., at p. 33; *Mills* v. *Dunham*, [1891] 1 Ch. 576, C. A., *per* LOPES, L.J., at p. 587: "The tendency in later cases has certainly been to allow a restriction in

A restraining covenant is not unreasonable because, being unlimited in point of time, it is co-extensive with the servant's life, and is not limited to the life of the employer or the time he should carry on business (*t*); nor is such a covenant unreasonable merely because it is unlimited as to area (*a*), or even as to both

point of space which formerly would have been thought unreasonable, manifestly because of the improved means of communication. A radius of 150 or even 200 miles has not been held too much in some cases. For the same reason I think a restriction applying to the entire kingdom may in other cases be requisite and justifiable" (*Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.*, [1894] A. C. 535, *per* Lord HERSCHELL, L.C., at p. 549); see *Stuart and Simpson* v. *Halstead* (1911), 55 Sol. Jo. 598 (restraint too wide). The following restraints have been held good:—assistant surgeon not to practise, on leaving employment, for fourteen years within ten miles of place where employer lived (*Davis* v. *Mason* (1793), 5 Term Rep. 118); servant engaged by innkeeper, not to carry on that business, during service or within twenty-four months after quitting, within five miles of master's place of business (*Proctor* v. *Sargent* (1840), 2 Man. & G. 20); resident clerk of solicitor not for twenty-one years, after leaving, to reside in the town or within twenty-one miles of it, or carry on business of the same description during the same time within the same area (*Dendy* v. *Henderson* (1855), 11 Exch. 194); person already in the service appointed traveller liable to penalty if, on leaving, he travelled for any other house in the same trade on any part of his particular journey (*Mumford* v. *Gething* (1859), 7 C. B. (N. S.) 305); clerk and traveller for wine and spirit merchant not to carry on same business, or any branch thereof, within fifty miles, after leaving, without the employer's consent (*Parsons* v. *Cotterill* (1887), 56 L. T. 839); tailor's cutter, upon leaving, not to carry on business of tailor, within ten miles of employer's place of business, within three years (*Nicoll* v. *Beere* (1885), 53 L. T. 659); compare *Hooper and Ashby* v. *Willis* (1906), 94 L. T. 624, C. A. (area covered by restraint wider than reasonably necessary). As to the construction of restraining covenants, see, *e. g.*, *Moenich* v. *Fenestre* (1892), 61 L. J. (CH.) 737, C. A.; *Gophir Diamond Co* v. *Wood*, [1902] 1 Ch. 950; *Woodbridge & Sons* v. *Bellamy*, [1911] 1 Ch. 326, C. A.; *Freeman* v. *Fox* (1911), 55 Sol. Jo. 650; *Lovell and Christmas, Ltd.* v. *Wall* (1911), 104 L. T. 85, C. A.; *Ramoneur Co., Ltd.* v. *Bruey* (1911), 104 L. T. 809.

(*t*) *Hitchcock* v. *Coker* (1837), 6 Ad. & El. 438; *Chesman* v. *Nainby* (1727), 2 Stra. 739; *Jacoby* v. *Whitmore* (1883), 49 L. T. 335, C. A.; *Haynes* v. *Doman*, [1899] 2 Ch. 13, C. A.; *Hood and Moore's Stores, Ltd.* v. *Jones* (1899), 81 L. T. 169.

(*a*) Since *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.*, *supra*, the view of the law expressed by WICKENS, V.-C., in *Allsopp* v. *Wheatcroft* (1872), L. R. 15 Eq. 59, at p. 64, that "it has generally been considered in the later as well as in the earlier cases that a covenant not to carry on a lawful trade, unlimited as to space, is on the face of it void," must no longer be regarded as the true view; and *Ward* v. *Byrne* (1839), 5 M. & W. 548, is overruled, so far as it is an authority for that proposition. But a covenant which prohibits a person from carrying on a particular business in any part of the world may still, from the special circumstances of the case, be more than is reasonably necessary, and therefore invalid, as in *Dowden and Pook, Ltd.* v. *Pook*, [1904] 1 K. B. 45, C. A. (a case of a cider business substantially carried on in the particular locality in which the defendant was employed as manager), in which MATHEW, L.J., at p. 53, said, "I think it is impossible to hold that, for the protection of that business, it was necessary that the defendant should be restrained for the term of five years from carrying on the business described in the agreement in any part of the world"; see also *Lamson Pneumatic Tube Co.* v. *Phillips* (1904), 91 L. T. 363, C. A.; *Barr* v. *Craven* (1903), 89 L. T. 574, C. A.; *Robinson (William) & Co., Ltd.* v. *Heuer*, [1898] 2 Ch. 451, C. A.

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time and area (*b*); and a covenant to serve another for life in the same trade is not void as a covenant in restraint of trade (*c*).

Agreements partly valid.

168. If an agreement in restraint of trade is partly valid and partly invalid, and the part that is good is separable from the part that is bad, the invalid part may be rejected and the agreement enforced so far as it is good (*d*). But if a covenant is framed so that the part that is good is dependent on the part that is bad, and is inseparable therefrom, the whole is invalid (*e*).

SUB-SECT. 2.—*Sunday Observance.*

Contract made on Sunday.

169. A contract of hire and service for a year entered into on a Sunday is valid notwithstanding the Sunday Observance Act, 1677 (*f*), inasmuch as it is an act which is not done in the course of the employer's ordinary business or calling.

SUB-SECT. 3.—*Place of Payment of Wages.*

Licensed premises.

170. No wages may be paid to any labourer, servant in husbandry, journeyman, artificer, handicraftsman, or person otherwise engaged in manual labour, whether under or over twenty-one years of age (*g*), at or within any public-house, beer-shop, or place for the sale of any spirits, wine, cider, or other spirituous or fermented liquor, or any office, garden, or place belonging thereto, or occupied therewith, unless paid by the resident owner or

(*b*) *Mills* v. *Dunham*, [1891] 1 Ch. 576, C. A.

(*c*) *Wallis* v. *Day* (1837), 2 M. & W. 273. Much less is a covenant, binding a person to serve for seven years, invalid; see *Pilkington* v. *Scott* (1846), 15 M. & W. 657; *Hartley* v. *Cummings* (1847), 5 C. B. 247.

(*d*) *Mallan* v. *May* (1843), 11 M. & W. 653 (agreement of assistant to dentist not to practise in London or in any of the towns or places in England or Scotland, where the employer had been practising during the service, good as to London, bad as to the rest); *Nicholls* v. *Stretton* (1847), 10 Q. B. 346; *Baines* v. *Geary* (1887), 35 Ch. D. 154; *Dubowski & Sons* v. *Goldstein*, [1896] 1 Q. B. 478, C. A. (customers during the period of service severed from those who might become customers after determination of service, and restraint enforced as to dealing with the former); *Robinson (William) & Co., Ltd.* v. *Heuer*, [1898] 2 Ch. 451, C. A. (stipulation not to do business in goods sold by employers valid, and separated from stipulation not to engage in any other business); *Rogers* v. *Maddocks*, [1892] 3 Ch. 346, C. A.; *Bromley* v. *Smith*, [1909] 2 K. B. 235 (restraint enforced as to one kind of business but not as to another); see also *Davies, Turner & Co.* v. *Lowen* (1891), 64 L. T. 655; *Underwood (E.) & Son, Ltd.* v. *Barker*, [1899] 1 Ch. 300, C. A.

(*e*) *Baker* v. *Hedgcock* (1888), 39 Ch. D. 520; *Perls* v. *Saalfeld*, [1892] 2 Ch. 149, C. A., *per* KAY, L.J., at p. 157; *Leng (Sir W. C.) & Co., Ltd.* v. *Andrews*, [1909] 1 Ch. 763, C. A. As to covenants in restraint of trade entered into by infants, see note (*m*), p. 74, *ante*.

(*f*) 29 Car 2, c. 7, s. 1; *R.* v. *Whitnash* (*Inhabitants*) (1827), 7 B. & C. 596 (contract between a farmer and a labourer).

(*g*) Payment of Wages in Public Houses Prohibition Act, 1883 (46 & 47 Vict. c. 31), s. 2. The Act does not apply to domestic nor menial servants (*ibid.*), and as to persons engaged in mines, see title MINES, MINERALS, AND QUARRIES, p. 597, *post*. The definition of "workman" in the Payment of Wages in Public Houses Prohibition Act, 1883 (46 & 47 Vict. c. 31), is that of the Truck Acts; see title FACTORIES AND SHOPS, Vol. XIV., pp. 516, 517.

occupier himself to persons *bonâ fide* employed by him (*h*). For contravention of this provision the guilty party may be fined (*i*).

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SUB-SECT. 4.—*Deduction and Set-off.*

171. In the case of children, young persons, or women within the scope of the Factory and Workshop Acts (*k*), no forfeiture on the ground of absence or leaving work may be deducted from or set off against any claim for wages or other sum due for work done before such absence or leaving work, except to the amount of any damage sustained by the employer by reason of such absence or leaving work (*l*); but this provision can only apply when, according to the contract of service, wages or some other sums have actually become due (*m*).

Deduction on account of absence or leaving work.

Where, under the contract of service, forfeiture or deduction of wages is provided for as the penalty of absence or breach of rules (*n*), the servant should be heard before the forfeiture or deduction is effected (*o*).

172. Payments on behalf of an infant servant for things which are not necessaries cannot be deducted from the servant's wages (*p*).

Infant's wages.

(*h*) Payment of Wages in Public Houses Prohibition Act, 1883 (46 & 47 Vict. c. 31), s. 3. As to licensed premises, see title INTOXICATING LIQUORS, Vol XVIII., p. 8.

(*i*) See the Payment of Wages in Public Houses Prohibition Act, 1883 (46 & 47 Vict. c. 31), ss. 3, 4

(*k*) See title FACTORIES AND SHOPS, Vol. XIV., p. 445. Men are not thus protected from forfeiture; see *Warburton* v. *Heyworth* (1880), 6 Q. B. D. 1, C. A., *per* BRETT, L.J., at p. 8

(*l*) Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90), s. 11. In other cases the county court or a court of summary jurisdiction is empowered in disputes between employer and workman to adjust and set off claims on either side (*ibid.*, s. 3); see, further, p. 115, *post*, titles COUNTY COURTS, Vol. VIII., pp. 646, 647; SET-OFF AND COUNTERCLAIM. Deductions from wages are further controlled by the Truck Acts (see title FACTORIES AND SHOPS, Vol XIV., p. 520 *et seq.*); the Hosiery Manufacture (Wages) Act, 1874 (37 & 38 Vict. c. 48) (see title FACTORIES AND SHOPS, Vol XIV., p. 524); and the Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 12 (see title MINES, MINERALS, AND QUARRIES, p. 597, *post*).

(*m*) *Gregson* v. *Watson* (1876), 34 L. T. 143; *Warburton* v. *Heyworth*, *supra* (where a woman weaver recovered wages under the above provision, although she left without notice, as her hiring was daily and not weekly). "If the hiring was a weekly hiring for weekly wages, then as no wages would be due until the end of the week, if the appellant left before the end of the week, I am clearly of opinion that this would not be within s. 11 of the Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90), but would be a case in which the appellant was claiming for a sum which was never due at all" (*Warburton* v. *Heyworth*, *per* BRETT, L.J., at pp. 7, 8).

(*n*) See, *e.g.*, *Tomlinson* v. *Ashworth* (1885), 50 J. P. 164; compare *Taylor* v. *Carr and Porter* (1861), 4 L. T. 414; see also *Le Loir* v. *Bristow* (1815), 4 Camp. 134; but compare note (*l*), *supra*; *Sharp* v. *Hainsworth* (1862), 3 B. & S. 139.

(*o*) *Armstrong* v. *South London Tramways Co.* (1890), 64 L. T. 96, C. A., where *London Tramways Co.* v. *Bailey* (1877), 3 Q. B. D. 217, was held not binding.

(*p*) *Hedgley* v. *Holt* (1829), 4 C. & P. 104.

Part IV.—Duration and Termination of the Contract.

r. 1.

SECT. 1.—*Duration.*

Duration.

General hiring.

173. If a contract of hiring and service is a general hiring, that is to say, without limitation of time, there is a presumption that the hiring is for a year (*q*), whether the contract is oral or in writing (*r*). This presumption exists not only when the original contract was a general hiring, but also when, at the expiration of a contract for a definite period of service, the service is continued under a second contract which is indefinite as to time (*s*).

A contract may remain a hiring for a year, even though it be subject to a provision giving either party liberty to determine it at the end of a less period than a year (*t*).

The presumption of a yearly hiring is capable of rebuttal (*a*), and it is necessary to consider the circumstances of each case (*b*).

Yearly remuneration.

174. In the case of a servant in husbandry, service for a year is strong evidence of a hiring for a year (*c*), as is the circumstance, in the case of servants generally, that the remuneration is a sum

(*q*) "If a man retaine a servant generally without expressing any time the law shall construe it to be for one yeare, for that retainer is according to law" (Co. Litt. 42 b); the principle upon which the rule is based has been stated to be "natural equity, that the servant shall serve, and the master maintain him, throughout all the revolutions of the respective seasons, as well when there is work to be done as when there is not" (1 Bl. Com. 425); *R.* v. *St. Peter's in Dorchester* (*Inhabitants*) (1763), Burr. S. C. 513; *R.* v. *Elstack* (1785), 2 Bott's Poor Laws by Const, 203; *R.* v. *Worfield* (*Inhabitants*) (1794), 5 Term Rep. 506; *Huttman* v. *Boulnois* (1826), 2 C. & P. 510, *per* ABBOTT, C.J., at pp. 511, 512: "The doctrine that a general hiring is a hiring for a year, is not confined to servants in husbandry, but extends also to domestic and other servants"; *R.* v. *St. Andrew in Pershore* (1828), 8 B. & C. 670; *Beeston* v. *Collyer* (1827), 4 Bing. 309; *Fawcett* v. *Cash* (1834), 5 B. & Ad. 904, *per* DENMAN, C.J., at p. 907; *Bayley* v. *Rimmell* (1836), 1 M. & W. 506, *per* PARKE, B., at p. 507.

(*r*) *Beeston* v. *Collyer*, *supra*.

(*s*) *R.* v. *Macclesfield* (*Inhabitants*) (1789), 3 Term Rep. 76; *R.* v. *Hales* (*Inhabitants*) (1794), 5 Term Rep. 668; *R.* v. *Long Whatton* (*Inhabitants*) (1793), 5 Term Rep. 447; see *Beeston* v. *Collyer*, *supra*.

(*t*) *R.* v. *Atherton* (*Inhabitants*) (1742), Burr. S. C. 203; *R.* v. *Byker* (*Inhabitants*) (1823), 2 B. & C. 114; *R.* v. *Sandhurst* (*Inhabitants*) (1827), 7 B. & C. 557.

(*a*) *R.* v. *St. Peter's in Dorchester* (*Inhabitants*), *supra*; *R.* v. *Dedham* (*Inhabitants*) (1769), Burr. S. C. 653; *R.* v. *Elstack*, *supra*; *Baxter* v. *Nurse* (1844), 6 Man. & G. 935; *Fairman* v. *Oakford* (1860), 5 H. & N. 635.

(*b*) See, *e.g.*, *R.* v. *St. Peter's in Dorchester* (*Inhabitants*), *supra*; *Bayley* v. *Rimmell*, *supra*; *Brown* v. *Symons* (1860), 8 C. B. (N. S.) 208; *Baxter* v. *Nurse* (1844), 6 Man. & G. 935, *per* TINDAL, C.J., at p. 938.

(*c*) *R.* v. *Lyth* (*Inhabitants*) (1793), 5 Term Rep. 327; *Lilley* v. *Elwin* (1848), 11 Q. B. 742.

payable at the end of a year (*d*), or is a certain sum per annum simply (*e*).

Monthly or weekly remuneration.

175. The circumstance that the remuneration is paid at intervals of less than a year (*f*), as monthly (*g*) or weekly (*h*), does not of itself destroy the presumption of a hiring for a year, for it may simply indicate the mode of payment (*i*). On the other hand, it does not follow that a servant is a weekly or monthly rather than a daily servant simply because he has agreed to work from week to week or month to month and to be paid for his work at weekly or longer intervals (*j*). If, however, the reservation of wages at so much a week, or other period less than a year, is the only circumstance from which the duration of the contract of service can be collected, it is to be presumed that the service is to be weekly, or for such other less period than a year, as the case may be (*k*); but a provision for a month's notice rebuts the presumption of a weekly hiring, and a contract of service for weekly wages which is terminable by a month's notice is presumably a hiring which is unlimited in duration, and therefore a hiring for a year (*l*).

Rebuttal of annual hiring.

176. A contract for service at the will of the master or for so long a time as he shall want the servant (*m*), or which enables the servant to leave at any time (*n*), is evidence rebutting the presumption of a yearly hiring; and when the contract is to serve until a

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(*d*) *Emmens* v. *Elderton* (1853), 4 H. L Cas. 624.

(*e*) *Foxall* v. *International Land Credit Co.* (1867), 16 L. T. 637.

(*f*) *R.* v. *Atherton* (*Inhabitants*) (1742), Burr. S. C. 203; *R.* v. *King's Norton* (*Inhabitants*) (1740), Burr S C 152

(*g*) *Beeston* v. *Collyer* (1827), 4 Bing 309; *Fawcett* v. *Cash* (1834), 5 B. & Ad. 904; *Davis* v. *Marshall* (1861), 4 L T. 216

(*h*) *R.* v. *Seaton and Beer* (*Inhabitants*) (1784), Cald. Mag Cas 440; *R.* v. *Newton Toney* (*Inhabitants*) (1788), 2 Term Rep. 453, *per* BULLER, J., at p. 455; *R.* v. *Birdbrooke* (*Inhabitants*) (1791), 4 Term Rep. 245; see also *Stiff* v. *Cassell* (1856), 2 Jur. (N. S.) 348.

(*i*) *Levy* v. *Electrical Wonder Co.* (1893), 9 T. L. R. 495; see *Stiff* v. *Cassell*, *supra*

(*j*) *Warburton* v. *Heyworth* (1880), 6 Q B. D. 1, C. A. (held to be a case of a contract to work from week to week, but not for a weekly hiring at weekly wages); *Parkin* v. *South Hetton Coal Co.* (1907), 98 L. T. 162, C A. (held to be a case where wages were earned from day to day, although not payable until the end of each fortnight, and where the hiring was not a fortnightly but a daily hiring).

(*k*) *R.* v. *Newton Toney* (*Inhabitants*), *supra*, *R.* v. *Odiham* (*Inhabitants*) (1788), 2 Term Rep. 622; *R.* v. *Pucklechurch* (*Inhabitants*) (1804), 5 East, 382; *R.* v. *Mitcham* (*Inhabitants*) (1810), 12 East, 351; *R.* v. *Dodderhill, in Wych, otherwise Droitwich* (*Inhabitants*) (1814), 3 M. & S. 243; *R.* v. *Warminster* (*Inhabitants*) (1826), 6 B. & C. 77; *R.* v. *Rolvenden* (*Inhabitants*) (1828), 1 Man. & Ry. (K. B.) 689; *R.* v. *Ardington* (*Inhabitants*) (1834), 1 Ad. & El. 260; see *Robertson* v. *Jenner* (1867), 15 L. T. 514; *Evans* v. *Roe* (1872), L. R. 7 C. P. 138.

(*l*) *R.* v. *Hampreston* (*Inhabitants*) (1793), 5 Term Rep. 205; *R.* v. *Great Yarmouth* (*Inhabitants*) (1816), 5 M. & S. 114; *R.* v. *St. Andrew in Pershore* (1828), 8 B. & C. 679.

(*m*) *R.* v. *Elstack* (1785), 2 Bott's Poor Laws by Const, 203; compare *Down* v. *Pinto* (1854), 9 Exch. 327.

(*n*) *R.* v. *Christ's Parish in York* (*Churchwardens etc.*) (1824), 3 B & C. 459.

SECT. 1. Duration.

particular piece of work is done, it is not a contract for a year (*o*). There is no implication of a hiring for a definite period in a contract to pay a commercial traveller by commission (*p*).

Public servants.

177. Public servants hold their office during the pleasure of the Crown (*q*).

SECT. 2.—*Termination of Hiring and Service.*

SUB-SECT. 1.—*In General.*

General principles.

178. In accordance with the general rules relating to contracts, a contract of hiring and service may be discharged by performance (*r*), by mutual agreement (*s*), or by impossibility of performance (*t*);

Death of party.

and the death of either the master (*a*) or the servant (*b*).

SUB-SECT. 2.—*Dissolution of Partnership.*

Death of partners.

179. When a dissolution of partnership occurs through the death of one of the partners (*c*) a contract of service with the firm is thereby terminated (*d*), unless the contract had no relation to personal considerations connected with the deceased partner (*e*).

Retirement of partner.

180. A dissolution of partnership by retirement, during the course of a period of service entered upon by agreement between the partnership and a servant, operates, apparently, as a wrongful dismissal of the servant (*f*); but the acceptance of service with the

(*o*) *R.* v. *Woolhurst (Inhabitants)* (1818), 1 B. & Ald. 325.

(*p*) *Nayler* v. *Yearsley* (1860), 2 F. & F. 41.

(*q*) *Dunn* v *R.*, [1896] 1 Q. B. 116, C. A.; see *Shenton* v. *Smith*, [1895] A. C. 229, P. C.; title CONSTITUTIONAL LAW, Vol. VII., p. 22.

(*r*) See title CONTRACT, Vol. VII., p. 410.

(*s*) See *ibid.*, p. 421.

(*t*) See *ibid.*, p. 426.

(*a*) *Farrow* v. *Wilson* (1869), L. R. 4 C. P. 744.

(*b*) *Ibid.*, *per* WILLS, J., at p. 746; *Stubbs* v. *Holywell Rail. Co.* (1867), L. R. 2 Exch. 311, *per* KELLY, C.B., at p. 313; see also *Hyde* v. *Windsor (Dean and Canons)* (1597), Cro. Eliz. 552; and see titles CONTRACT, Vol. VII., p. 431; EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 225, 305.

(*c*) See the Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 33; title PARTNERSHIP.

(*d*) *Tasker* v. *Shepherd* (1861), 6 H. & N. 575 (where the decision was upon the ground that the parties had contracted with reference to the then existing partnership, so that employment was subject to the survival of all the parties); *Hoey* v. *MacLwan and Auld* (1867), 5 Macph. (Ct. of Sess.) 814 (which was accepted in *Brace* v. *Calder*, [1895] 2 Q. B. 253, C. A., as authority for the proposition here under consideration).

(*e*) *Phillips* v. *Alhambra Palace Co.*, [1901] 1 K. B. 59 (where the plaintiff had no knowledge of the persons constituting the partnership, and it was accordingly held that the contract was not of such a personal nature in regard to the partnership as to be terminated by the death of one of the partners).

(*f*) *Brace* v. *Calder*, *supra* (where, two members of a partnership of four having retired, a servant whose period of service with the original partnership had not expired was held entitled to sue for wrongful dismissal (Lord ESHER, M.R., dissenting) As, however, the surviving partners offered to continue the employment, only nominal damages were awarded). In *Hobson* v. *Cowley* (1858), 27 L. J. (EX.) 205, the question was left open; compare *Dobbin* v. *Foster* (1844), 1 Car. & Kir. 323.

continuing partners as members of a new firm is evidence that the servant has agreed to exonerate the old firm (*g*).

181. A member of a partnership has no power to dismiss a servant of the partnership against the will of the other partners (*h*). Dismissal by one of several partners

SUB-SECT 3.—*Bankruptcy and Winding up*

182. The bankruptcy of the master does not operate as a dissolution of the contracts of hiring and service between himself and those in his employ (*i*) Bankruptcy of master

A servant who is an undischarged bankrupt may bring an action for wrongful dismissal in respect of his discharge, after the commencement of the bankruptcy, from employment entered upon by him before bankruptcy (*j*), and will be entitled to any damages that may be awarded unless the trustee in his bankruptcy claims such damages for the benefit of the estate (*k*). Bankruptcy of servant

183 An order for the compulsory winding up of a company (*l*), even if only with a view to reconstruction (*m*), operates as notice to the servants of the company of the termination of their contracts of service in cases where the business of the company is discontinued after the making of the order (*n*) Winding up

SUB-SECT 4.—*Repudiation by Employer*

184. If employers have been guilty of the wrongful dismissal of a servant, the latter is entitled not only to sue for damages for breach Repudiation

(*g*) *Hobson* v *Couley* (1858), 27 L J (EX) 205

(*h*) *Donaldson* v *Williams* (1833), 1 Cr & M 345

(*i*) *Thomas* v *Williams* (1834), 1 Ad & El 685 (where the master's bankruptcy was held to be no answer to an action for wages)

(*j*) *Bailey* v *Thurston & Co., Ltd* [1903] 1 K B 137, C A, *per* COLLINS, M R, at pp 141 142 "So far as the contract for personal service was *in futuro* and still unperformed, it seems to me to be clear upon consideration of *Beckham* v *Drake* (1849) 2 H L Cas 579, that an action for breach of contract would not belong to the class of actions which the trustee could claim the right to bring as assignee of the property of the bankrupt There is a well known principle in regard to rights accruing to the bankrupt after the bankruptcy and in respect of his personal services that though the bankrupt is the proper person to sue in such a case, the trustee may intervene and take the proceeds of the action except in so far as they are necessary for the bankrupt's maintenance", and see, further, title BANKRUPTCY AND INSOLVENCY, Vol II, pp 133—139 As to the position where the breach has occurred before bankruptcy, see *ibid*, pp 138 139

(*k*) *Cohen* v *Mitchell* (1890), 25 Q B D 262 267

(*l*) *Chapman's Case* (1866), L R 1 Eq 346 the applicant (a clerk in the company's employ) was "entitled to prove for his salary on the footing of having had notice of discharge on the day the order was made" (*ibid*, *per* Lord ROMILLY, M R, at p 347), and see title COMPANIES, Vol V, pp 243, 420 509 A resolution for a voluntary winding up does not operate as a discharge of servants (*Midland Counties District Bank* v. *Attwood*, [1905] 1 Ch 357)

(*m*) *MacDowall's Case* (1886) 32 Ch D 366

(*n*) *Reid* v *Explosives Co* (1887), 19 Q B D 264, C A The appointment of a receiver and manager in a debenture holders' action has the same effect (*ibid*) Such a discharge operates as a wrongful dismissal (*ibid*), but in that case the plaintiff, who was, under the agreement, entitled to six months' notice, "was employed for six months after the appointment of the manager at the same salary as before,

SECT. 2. Termination of Hiring and Service.

of the contract of service (*a*), but also to regard the whole contract as repudiated by the employers and himself as no longer bound by any of its provisions (*b*).

SUB-SECT. 5.—*Notice.*

Formation of hiring for a year.

185. A general hiring which operates as a hiring for a year (*c*) can only be terminated with the current year (*d*), unless there is a stipulation to the contrary (*e*), or a custom is established

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and he is not therefore entitled to recover in this action if in fact the appointment of the manager operated to discharge him. I think it did so" (*Reid* v. *Explosives Co.* (1887), 19 Q. B. D. 264, C. A., *per* LOPES, L.J., at p. 269). It was further pointed out (*ibid.*, *per* Lord ESHER, M.R., at p. 267), that "the fact of a mortgagee taking possession of the business of the mortgagor would be equivalent to a dismissal of the servants, and as this would occur by the default of the mortgagor, it would be a wrongful dismissal and would give a right of action"; and see *Measures Brothers, Ltd.* v. *Measures*, [1910] 2 Ch. 248, C. A., *per* KENNEDY, L.J., at p. 261, where the position of a director of a company was regarded as similar to that of the servants of the company in *Reid* v. *Explosives Co.* (1887), 19 Q. B. D. 264, C. A.; see also *Re Patent Floor Cloth Co., Dean and Gilbert's Claim* (1872), 41 L. J. (CH.) 476; and as to damages for wrongful dismissal, see pp. 109 *et seq.*, *post*. As to the effect of a resolution for voluntary winding up, or the continuance of the business after an order for compulsory winding up, see title COMPANIES, Vol. V., pp. 243, 244, 420, note (*l*), 509, note (*f*), 578; and note (*l*), p. 95, *ante*.

(*a*) See p. 109, *post*.

(*b*) *General Billposting Co., Ltd* v. *Atkinson*, [1909] A. C. 118; *Measures Brothers, Ltd.* v. *Measures*, *supra*; see also *Stirling* v. *Maitland* (1864), 5 B. & S. 840; and as to implied terms in agreements, title CONTRACT, Vol. VII., pp. 512, 513.

(*c*) See p. 92, *ante*.

(*d*) *Beeston* v. *Collyer* (1827), 4 Bing. 309; *Williams* v. *Byrne* (1837), 7 Ad. & El. 177; *Fozall* v. *International Land Credit Co.* (1867), 16 L. T. 637; *Buckingham* v. *Surrey and Hants Canal Co.* (1882), 46 L. T. 885.

(*e*) In *Butterfield* v. *Marler* (1851), 3 Car. & Kir. 163, it was held that an agreement to pay quarterly did not itself prevent dismissal on other than quarter days. In *Down* v. *Pinto* (1854), 9 Exch. 327, it was held that a stipulation that the servant should "remain with me for at least three years at my option" did not enable the master to put an end to the service at his will, but was a yearly hiring with an option in the master to require service for three years. In *Ryan* v. *Jenkinson* (1855), 25 L. J. (Q. B.) 11, a schoolmaster's contract of service provided that the appointment should be "for one year . . . and to be liable to be terminated by either party giving three months' notice." It was held that there was nothing requiring the notice to terminate at the end of a year. In *Brown* v. *Symons* (1860), 8 C. B. (N. S.) 208, an agreement with a traveller provided that it should be binding for twelve months certain and continue until three months' notice be given by either side. It was held a contract for a year certain only, and to be terminable at the end of the first year by three months' previous notice; compare *Langton* v. *Carleton* (1873), L. R. 9 Exch. 57, where an agreement with a traveller was "for twelve months certain, after which time either party should be at liberty to terminate the agreement by giving to the other a three months' notice," and it was held that the agreement could be terminated at the end of the first year without notice at all, and then to continue until ended by three months' notice. In *Green* v. *Wright* (1876), 1 C. P. D. 591, a provision that "should the owners require the captain to leave the ship abroad, his wages to cease on the day he is required to give up the command," was held not to justify the captain's dismissal without reasonable notice. The provision in *Re African Association Ltd. and Allen*, [1910] 1 K. B. 396, that "the employers may at any time hereafter, at their absolute discretion, terminate this engagement at any earlier date than

enabling the parties to determine the contract at some other date by notice (*f*), or there is good ground for summarily ending the relation of master and servant (*g*).

Notice in domestic service.

186. There is a custom in domestic service (*h*) that a general hiring may be terminated at any time by a month's notice or payment of a month's wages (*i*), not including board wages (*k*). Of this custom the courts will take judicial notice (*l*). There is also a custom that the service may be terminated at the end of the first month by notice given at or before the end of the first fortnight (*m*).

Reasonable notice in absence of custom.

187. If no custom (*n*) nor stipulation as to notice exists, and if the contract of service is not one which can be regarded as a yearly hiring (*o*), the service is terminable by reasonable notice (*p*).

that specified if they may desire to do so," did not justify dismissal without reasonable notice, there being no express or implied provision enabling the employers to dismiss the servant summarily. See also *Moor* v. *Brown & Co., Ltd* (1911), 131 L. T. Jo. 467; *Stevenson* v. *North British Rail. Co.* (1905), 7 F. (Ct. of Sess.) 1106; *Storey* v. *Fulham Steel Works Co.* (1907), 24 T. L. R. 89, C. A. As to the conditions of the termination of service under particular instruments or statutory provisions, see *Hayman* v. *Rugby School (Governors)* (1874), L. R. 18 Eq. 28; *Pottle* v. *Sharp* (1896), 65 L. J. (CH.) 908, C. A.; *Wright* v. *Zetland (Marquis)*, [1908] 1 K. B. 63, C. A. (all cases relating to schoolmasters); *Latter* v. *Littlehampton Urban District Council* (1909), 101 L. T. 172, C. A. (ferrymen). As to reasonable notice, see note (*p*), *infra*. As to dismissal without notice, see p. 98, *post*.

(*f*) See title CUSTOM AND USAGES, Vol. X., pp. 288, 289, and the text, *infra*.

(*g*) See p. 98, *post*.

(*h*) As to the definition of this term, see p. 71, *ante*.

(*i*) *Beeston* v. *Collyer* (1827), 4 Bing. 309, *per* GASELEE, J., at p. 313; *Fawcett* v. *Cash* (1834), 5 B. & Ad. 904, *per* LITTLEDALE, J., at p. 908; *Broxham* v. *Wagstaffe* (1841), 5 Jur. 845; *Nicoll* v. *Greaves* (1864), 17 C. B. (N. S.) 27; *Moult* v. *Halliday*, [1898] 1 Q. B. 125, *per* CHANNELL, J., at p. 129; and see title CUSTOM AND USAGES, Vol. X., p. 288.

(*k*) *Gordon* v. *Potter* (1859), 1 F. & F. 644.

(*l*) *George* v. *Davies*, [1911] 2 K. B. 445.

(*m*) It was held in *Moult* v. *Halliday*, *supra*, that the courts will not take judicial notice of this custom. In *George* v. *Davies*, *supra*, however, decided thirteen years later, the court held that a county court judge was right in taking judicial notice of this custom; and BRAY, J., said (*ibid.*, at p. 448): "When this custom is continually being put forward and proved by evidence, a time must come when a judge may say that he no longer requires it to be proved, but that he will take judicial notice of it."

(*n*) Whether or not a custom as to notice exists in fact is a question for the jury (*Baxter* v. *Nurse* (1844), 6 Man. & G. 935; *Lowe* v. *Walter* (1892), 8 T. L. R. 358).

(*o*) See p. 92, *ante*.

(*p*) Periods of reasonable notice to which persons in various employments have been found entitled are the following:—Newspaper editor, six months (*Fox-Bourne* v. *Vernon & Co., Ltd.* (1894), 10 T. L. R. 647); or by custom twelve months (*Brennan* v. *Gilbart-Smith* (1892), 8 T. L. R. 284); sub-editor of newspaper, six months (*Chamberlain* v. *Bennett* (1892), 8 T. L. R. 234); foreign correspondent to the *Times*, six months (*Lowe* v. *Walter* (1892), 8 T. L. R. 358); commercial traveller, three months (*Metzner* v. *Bolton* (1854), 9 Exch. 518; *Grundon* v. *Master & Co.* (1885), 1 T. L. R. 205; *Turner* v. *Mason* (1845), 14 M. & W. 112; *Brown* v. *Symons* (1860), 8 C. B. (N. S.) 208); clerks in superior positions, three months (*Fairman* v. *Oakford* (1860), 5 H. & N. 635, *per* POLLOCK, C.B., at p. 636; *Foxall* v. *International Land Credit Co.* (1867), 16 L. T. 637; *Gandell* v. *Pontigny*

SECT. 2. **Termination of Hiring and Service.**

188. Servants of the Crown may be dismissed at any time (*q*).

SUB-SECT. 6.—*Dismissal without Notice.*

Crown servants.

189. The mere concealment at the time of the making of a contract of service of a material fact, not amounting to fraud, does not avoid the contract, and the employer is therefore not justified in terminating such a contract on discovering a fact which the servant was under no duty to disclose (*r*).

Misrepresentation of status on employment.

Disobedience to orders.

190. Wilful disobedience to the lawful and reasonable order of the master justifies summary dismissal (*s*). But a servant is not bound to obey orders to do something not properly appertaining to the character or capacity in which he was hired (*t*); and an order

(1816), 1 Stark. 198; *MacDowall's Case* (1886), 32 Ch. D. 366, *per* CHITTY, J., at p. 371); governesses and schoolmistresses, three months (*Todd* v. *Kerrich* (1853), 8 Exch. 151; *Pottle* v. *Sharp* (1896), 65 L. J. (CH.) 908); housekeeper of large hotel, three months (*Lawler* v. *Linden* (1876), 10 I. R. C. L. 188); traveller in woollen trade, one month (*Parker* v. *Ibbetson* (1858), 4 C. B. (N. S.) 346); journalist contributing weekly notes to newspaper, one month (*Re Illustrated Newspaper Corporation* (1900), 16 T. L. R. 157; *Williams* v. *Byrne* (1837), 7 Ad. & El. 177); advertising and canvassing agent for newspaper, one month (*Hiscox* v. *Batchellor* (1867), 15 L. T. 543); clerk in telegraph office, one month (*Vibert* v. *Eastern Telegraph Co.* (1883), Cab. & El. 17); head gardener, one month (*Nowlan* v. *Ablett* (1835), 2 Cr. M. & R. 54); chemist's assistant, one month (*Broxham* v. *Wagstaffe* (1841), 5 Jur. 845); farm bailiff, one month (*Johnson* v. *Blenkensopp* (1841), 5 Jur. 870; see, however, *Louth* v. *Drummond* (1849), *Times*, 28th March, where a jury at assizes awarded a farm bailiff, who had been discharged on a month's notice, a year's wages); milk carrier, one week (*Evans* v. *Ware*, [1892] 3 Ch. 502); and as to reasonable notice, see, further, the cases cited in note (*e*), p. 96, *ante*. In *Stephenson* v. *London Joint Stock Bank, Ltd.* (1903), 20 T. L. R. 8, C. A., a servant who had been "required to resign" was held to have been "dismissed" rather than to have "retired with the consent" of his employers.

(*q*) *Dunn* v. *R.*, [1896] 1 Q. B. 116, C. A.; see title CONSTITUTIONAL LAW, Vol. VII., p. 22, and cases cited *ibid.*, note (*e*); *De Dohse* v. *R.*, [1896] 1 Q. B. 117, n. (military service); *Shenton* v. *Smith*, [1895] A. C. 229 (civil service).

(*r*) *Fletcher* v. *Krell* (1872), 42 L. J. (Q. B.) 55 (where a governess, described as a spinster, was discovered to have been married and divorced, but was nevertheless held entitled to enforce her contract of employment). See, further, the judgment of FLETCHER MOULTON, L.J., in *Ball* v. *Hunt* (*William*) *& Sons, Ltd* (1911), 4 B. W. C. C. 231, and note (*c*), p. 99, *post*, and title MISREPRESENTATION AND FRAUD, p. 738, *post*.

(*s*) *Spain* v. *Arnott* (1817), 2 Stark. 256; *Callo* v. *Brouncker* (1831), 4 C. & P. 518; *Turner* v. *Mason* (1845), 14 M. & W. 112. In the last case the plaintiff, a domestic servant, desiring to see her mother who was in peril of death, requested leave of absence for that purpose, and, on refusal by the master, absented herself without leave. Having no legal right so to do, whatever the moral obligation, she was held properly dismissed. See also *Jacquot* v. *Bourra* (1839), 7 Dowl. 348; *Beale* v. *Great Western Rail. Co.* (1901), 17 T. L. R. 450; *Lilley* v. *Elwin* (1848), 11 Q. B. 742; *Renno* v. *Bennett* (1842), 3 Q. B. 768; *Churchward* v. *Chambers* (1860), 2 F. & F. 229; *Parkin* v. *South Hetton Coal Co.* (1907), 97 L. T. 98; *Smith* v. *Thompson* (1849), 8 C. B. 44. As to the wages due on summary dismissal, see p. 85, *ante*.

(*t*) *Price* v. *Mouat* (1862), 11 C. B. (N. S.) 508 (where it was held that the jury were warranted in finding that the servant had been hired as a lace buyer, and that the order, for disobedience to which he had been dismissed, did not properly appertain to that position, and was therefore not a lawful order).

which involves a reasonable apprehension of danger to the life or person of the servant is an unlawful order and one to which the servant is justified in refusing obedience (*a*).

Misconduct in business.

191. Misconduct, inconsistent with the due and faithful discharge by the servant of the duties for which he was engaged, is good cause for his dismissal (*b*). So if he is guilty of fraud or dishonesty in connection with the business of his employer he may be dismissed (*c*); but the cases justifying dismissal for business misconduct are not confined to those in which moral delinquency is an element (*d*).

Immoral or insulting conduct.

A servant may also be summarily dismissed if he has been guilty of an offence outside his employment of such a character as to make it unsafe for the master to retain him (*e*), or if his conduct is so immoral that it is reasonable to say he cannot be trusted (*f*),

(*a*) *Turner* v. *Mason* (1845), 14 M. & W. 112, *per* ALDERSON and ROLFE, BB., at p. 118.

(*b*) "There is no fixed rule of law defining the degree of misconduct which will justify dismissal. Of course there may be misconduct in a servant which will not justify the determination of the contract of service by one of the parties to it against the will of the other. On the other hand, misconduct inconsistent with the fulfilment of the express or implied conditions of service will justify dismissal. Certainly when the alleged misconduct consists of drunkenness there must be considerable difficulty in determining the extent or conditions of intoxication which will establish a justification for dismissal. The intoxication may be habitual and gross, and directly interfere with the business of the employer or with the ability of the servant to render due service. But it may be an isolated act committed under circumstances of festivity and in no way connected with or affecting the employer's business. In such a case the question whether the misconduct proved establishes the right to dismiss the servant must depend upon facts—and is a question of fact" (*Clouston & Co., Ltd.* v. *Corry*, [1906] A. C. 122, P. C., *per* Lord JAMES OF HEREFORD, at p. 129); see also *Pearce* v. *Foster* (1886), 17 Q. B. D. 536, C. A.; *Baster* v. *London and County Printing Works*, [1899] 1 Q. B. 901, *per* CHANNELL, J., at p. 904; *Callo* v. *Brouncker* (1831), 4 C. & P. 518, *per* PARKE, J., at p. 519; *Beattie* v. *Parmenter* (1889), 5 T. L. R. 396, C. A., *per* LOPES, L.J.; *Speck* v. *Phillips* (1839), 5 M. & W. 279; *Austwick* v. *Midland Rail. Co.* (1909), 25 T. L. R. 728.

(*c*) *Brown* v. *Croft* (1828), 6 C. & P. 16, n. (*g*) (embezzlement by servant). "If a servant robs his master, he may, though a month's notice be required, dismiss him without any notice" (*Cunningham* v. *Fonblanque* (1833), 6 C. & P. 44, *per* PARK, J., at p. 49). "Now, the law gives the master the right to terminate the employment of a servant on his discovering that the servant is guilty of fraud" (*Phillips* v. *Foxall* (1872), L. R. 7 Q. B. 666, *per* BLACKBURN, J., at p. 680); see also *Willets* v. *Green* (1850), 3 Car. & Kir. 59.

(*d*) *Smith* v. *Thompson* (1849), 8 C. B. 44; *Horton* v. *McMurtry* (1860), 5 H. & N. 667; *Read* v. *Dunsmore* (1840), 9 C. & P. 588; see also *Blenkarn* v. *Hodges' Distillery Co., Ltd* (1867), 16 L. T. 608; *Hallward* v. *Snell* (1886), 2 T. L. R. 836; *Beattie* v. *Parmenter, supra*; *Bray* v. *Chandler* (1856), 18 C. B. 718; *Turner* v. *Robinson* (1833), 5 B. & Ad. 789.

(*e*) *Pearce* v. *Foster, supra, per* Lord ESHER, M.R., at p. 539.

(*f*) *Ibid.*, at pp. 539, 540. In *R.* v. *Brampton* (*Inhabitants*) (1777), Cald. Mag. Cas. 11, a maidservant was held properly dismissed on being found to be with child. A servant suspected of pregnancy cannot be medically examined against her will (*Latter* v. *Braddell* (1881), 50 L. J. (Q. B.) 448, C. A.); compare *Agnew* v. *Jobson* (1877), 13 Cox, C. C. 625. In *R.* v.

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or is insulting and insubordinate to such a degree as to be incompatible with the continuance of the relation of master and servant (*g*). Furthermore, the master is justified in turning out of the house a servant who is abusive and who disturbs the peace of the family (*h*).

Neglect.

192. There is good ground for the dismissal of a servant if he is habitually neglectful in respect of the duties for which he was engaged (*i*); but not if there is only an isolated instance of neglect (*k*), unless attended by serious consequences (*l*).

Incompetency.

193. Where a skilled servant is engaged there is on his part an implied warranty that he is reasonably competent for the work he undertakes, and if he proves to be incompetent the employer is not bound to continue him in his service for the term for which he was engaged (*m*).

Illness.

194. Permanent incapacity in the servant caused by illness justifies the master in treating the contract of service as at an end (*n*);

Welford (*Inhabitants*) (1778), Cald. Mag Cas. 57, the summary dismissal of a servant who was the father of a bastard child of a female servant in the same family was held justifiable; as also, in *Atkin* v. *Acton* (1830), 4 C. & P. 208, the dismissal of a clerk and traveller who had indecently assaulted his employer's servant; and see *Connors* v. *Justice* (1862), 13 I. C. L. R. 451.

(*g*) *Edwards* v. *Levy* (1860), 2 F. & F. 94, *per* HILL, J., at p. 95 (where, however, it was pointed out that a single instance of insolence in the case of a servant in such a position as that of a newspaper critic would hardly justify dismissal).

(*h*) *Shaw* v. *Chairlie* (1850), 3 Car. & Kir. 21.

(*i*) *Callo* v. *Brouncker* (1831), 4 C. & P. 518. *per* PARKE, J., at p. 519; *Cunningham* v. *Fonblanque* (1833), 6 C. & P. 44, *per* PARK, J., at p. 49; *Lomax* v. *Arding* (1855), 10 Exch. 734, *per* POLLOCK, C.B., at p. 736; *Edwards* v. *Levy*, *supra*, *per* HILL, J., at p. 95; see also *Robinson* v. *Hindman* (1800), 3 Esp. 235.

(*k*) *Edwards* v. *Levy*, *supra*, *per* HILL, J., at p. 95. In *Fillieul* v. *Armstrong* (1837), 7 Ad. & El. 557, the fact that a master delayed his return to school two days after the commencement of term, the business of the school not being shown to be thereby impeded, was held not to justify the terminating of the contract; see also *Gould* v. *Webb* (1855), 4 E. & B. 933.

(*l*) *Edwards* v. *Levy*, *supra*; *Baster* v. *London and County Printing Works*, [1899] 1 Q. B. 901, *per* DARLING, J., at p. 903: "Neglect as often arises from forgetfulness as from anything else; and, if the forgetfulness is with respect to an important thing, it may well, in my view, be good ground for dismissal of the servant without notice. I do not say that it would be good ground for dismissal in every case . . . but to forget to do a thing which, if not done, may cause considerable damage to the master, or to his property, or to fellow servants, may be a serious neglect of duty . . . In the case before us the machine was worth £800 and the appellant's forgetfulness caused damage to the amount of £30. I think there was evidence of neglect to justify his dismissal."

(*m*) *Harmer* v. *Cornelius* (1858), 5 C. B. (N. S.) 236, *per* WILLES, J., at p. 247: "Misconduct in a servant is, according to every day's experience, a justification of a discharge. The failure to afford the requisite skill which had been expressly or impliedly promised, is a breach of legal duty, and, therefore, misconduct"; *Cuckson* v. *Stones* (1858), 1 E. & E. 248, *per* Lord CAMPBELL, C.J., at p. 257; *Searle* v. *Ridley* (1873), 28 L. T. 411 See, further, title WORK AND LABOUR. As to immoral misconduct, see p. 99, *ante*.

(*n*) *Cuckson* v. *Stones*, *supra*, *per* Lord CAMPBELL, C.J., at p. 257;

but temporary illness does not put an end to the contract unless such incapacity goes to the root of the matter and frustrates the object of the engagement (*o*).

Conduct incompatible with duty or prejudicial to the master's business.

195. A servant, whose conduct is incompatible with the faithful discharge of his duty to his master, may be dismissed, as where, unknown to his employer, he enters into transactions whereby his personal interests conflict with his duty as a servant in his particular capacity (*p*), or if he takes a secret commission (*q*), even though it be an isolated act (*r*), unless he is able to discharge the burden which lies upon him of proving that there is nothing improper in the transaction in question (*s*). Dismissal is also justified in the case of a servant who claims to be a partner (*t*); or if his conduct has been such that it would be injurious to the master's business to retain him (*a*).

As to knowledge of grounds of dismissal.

196. It is not necessary that the master, dismissing a servant for good cause, should state the ground for such dismissal (*b*); and, provided good ground existed in fact, it is immaterial whether or not it was known to the employer at the time of the dismissal (*c*). Justification of dismissal can accordingly be shown

Jackson v. *Union Marine Insurance Co.* (1874), L. R. 10 C. P. 125, Ex. Ch., *per* BRAMWELL, B., at p. 145.

(*o*) *Jackson* v. *Union Marine Insurance Co*, *supra*, *per* BRAMWELL, B., at p. 145; *Poussard* v. *Spiers* (1876), 1 Q. B. D. 410; *K*—— v. *Raschen* (1878), 38 L. T. 38; *Loates* v. *Maple* (1903), 88 L. T. 288, *per* WRIGHT, J., at p. 291, "I think that the matter must be regarded with reference to the nature of the employment and the length of the term for which the agreement was made"; *Storey* v. *Fulham Steel Works Co.* (1907), 24 T. L. R. 89, C. A. As to the payment of wages during temporary illness, see p. 84, *ante*.

(*p*) *Pearce* v. *Foster* (1886), 17 Q. B. D. 536, C. A. (where a confidential clerk to a firm of merchants, who had large dealings in securities in addition to their ordinary business, was held rightly dismissed on it being discovered that he had engaged in extensive gambling in differences on the Stock Exchange).

(*q*) *Boston Deep Sea Fishing and Ice Co.* v. *Ansell* (1888), 39 Ch. D. 339, C. A., *per* FRY, L.J., at p. 370, "It is prejudicial to the interests of the company when a man whose duty it is to buy at the lowest price enters into a bargain which makes it his interest to buy at the highest"; *Swale* v. *Ipswich Tannery, Ltd* (1906), 11 Com. Cas. 88.

(*r*) *Boston Deep Sea Fishing and Ice Co.* v. *Ansell*, *supra*.

(*s*) *Federal Supply and Cold Storage Co. of South Africa* v. *Angehrn and Piel* (1910), 80 L. J. (P. C.) 1.

(*t*) *Amor* v. *Fearon* (1839), 9 Ad. & El. 548. In *Ridgway* v. *Hungerford Market Co.* (1835), 3 Ad. & El. 171, the defendant's clerk was held rightly dismissed for having entered in the minute book a protest against the election of his successor, the act being "inconsistent with his service" (*ibid.*, *per* COLERIDGE, J., at p. 179).

(*a*) *Lacy* v. *Osbaldiston* (1837), 8 C. & P. 80; *Nichol* v. *Martyn* (1799), 2 Esp. 732, *per* Lord KENYON, C.J.; see also *East Anglian Railways Co.* v. *Lythgoe* (1851), 10 C. B. 726.

(*b*) *Ridgway* v. *Hungerford Market Co.*, *supra*; *Cussons* v. *Skinner* (1842), 11 M. & W. 161.

(*c*) *Ridgway* v. *Hungerford Market Co.*, *supra*, *Boston Deep Sea Fishing and Ice Co.* v. *Ansell*, *supra*, *per* COTTON, L.J., at p. 352; *Willets* v. *Green* (1850), 3 Car. & Kir. 59; *Spotswood* v. *Barrow* (1850), 5 Exch. 110.

SECT. 2. Termination of Hiring and Service.

by proof of *facts* known subsequently to the dismissal (*d*), or on grounds differing from those alleged at the time (*e*).

Condonation.

197. A master who, with full knowledge of a servant's misconduct, elects to continue him in his service, cannot subsequently dismiss him for the offence which he has condoned (*f*).

Functions of jury.

198. Whether, upon the facts proved, the summary dismissal of a servant is justified or not, is itself a question of fact (*g*) and a question to be determined by the jury (*h*).

SUB-SECT. 7.—*Summary Determination of Service by the Servant.*

Circumstances justifying throwing up engagement.

199. A servant is justified in terminating his engagement (*i*), and refusing to go on further with his work, (1) if he has a reasonable apprehension of danger to life (*j*) or of personal injury (*k*) as a result of continuing the work, and this includes cases where he has been misled into anticipating the provision of the precautionary measures rendered reasonably necessary by the nature of the work (*l*); (2) where the master has failed to carry out his part of the contract, *e.g.*, has failed to provide him with the food it was his duty to supply (*m*); or (3) where he is subjected to severe ill-treatment (*n*).

SUB SECT. 8 – *Order of Court*

Order of court.

200. A county court in relation to any dispute between an employer and a workman (*o*) may, in certain circumstances, rescind any

(*d*) *Ridgway* v. *Hungerford Market Co.* (1835), 3 Ad. & El 171, *per* Lord DENMAN, C.J., at p. 177; *Boston Deep Sea Fishing and Ice Co.* v. *Ansell* (1888), 39 Ch. D. 339, C. A.

(*e*) *Baillie* v. *Kell* (1838), 4 Bing. (N. C.) 638, *per* TINDAL, C.J., at p. 650.

(*f*) *Horton* v. *McMurtry* (1860), 5 H. & N. 667, *per* BRAMWELL, B., at p. 675; *Phillips* v. *Foxall* (1872), L. R. 7 Q. B. 666, *per* BLACKBURN, J., at p. 680; *Beattie* v. *Parmenter* (1889), 5 T. L. R. 396, C. A., *per* Lord ESHER, M.R., at p. 397. As to condonation and what amounts thereto, see *Federal Supply and Cold Storage Co. of South Africa* v. *Angehrn and Piel* (1910), 80 L. J. (P. C.) 1.

(*g*) *Clouston & Co., Ltd.* v. *Corry*, [1906] A. C. 122, P. C., *per* Lord JAMES OF HEREFORD, at p. 129.

(*h*) *Ridgway* v. *Hungerford Market Co.*, *supra*; *Amor* v. *Fearon* (1839), 9 Ad. & El. 548; *Smith* v. *Thompson* (1840), 8 C. B. 44; *Read* v. *Dunsmore* (1840), 9 C. & P. 588, *per* COLERIDGE, J., at p. 594; *Horton* v. *McMurtry* (1860), 5 H. & N. 667, *per* BRAMWELL, B., at p. 677; *Smith* v. *Allen* (1862), 3 F. & F. 157, *per* COCKBURN, C.J., at p. 161; see also *Price* v. *Mouat* (1862), 11 C. B. (N. S.) 508; *East Anglian Railways Co.* v. *Lythgoe* (1851), 10 C. B. 726; and note (*t*), p. 98, *ante*.

(*i*) If a servant is unlawfully dismissed he may regard the contract as at an end; see p. 95, *ante*.

(*j*) *Limland* v. *Stephens* (1801), 3 Esp. 269, *per* Lord KENYON, C.J., at p. 270; *Turner* v. *Mason* (1845), 14 M. & W. 112, *per* ALDERSON, B., at p. 118.

(*k*) *Priestley* v. *Fowler* (1837), 3 M. & W. 1, *per* Lord ABINGER, C.B., at p. 6; *Turner* v. *Mason*, *supra*, *per* ALDERSON, B., at p. 118.

(*l*) *Woodley* v. *Metropolitan District Rail. Co.* (1877), 2 Ex. D. 384, C. A., *per* COCKBURN, C.J., at p. 388.

(*m*) *The Castilia* (1822), 1 Hag. Adm. 59.

(*n*) *Limland* v. *Stephens*, *supra*; *Edward* v. *Trevellick* (1854), 4 E. & B. 59. As to the chastisement of a servant of full age being a "good cause of departure," see 1 Bl. Com. 428; as to seduction of servants, see 270, *post*.

(*o*) For definition of "workman" in this connection, see titles COUNTY

contract between them (*p*). When the amount claimed does not exceed £10, such a dispute may be heard and determined and the jurisdiction exercised by a court of summary jurisdiction (*q*).

SECT. 3.—*Termination of Apprenticeship.*

SUB-SECT. 1.—*By Elation or Agreement.*

Power of infant to dissolve contract.

201. An infant cannot dissolve his indenture of apprenticeship unless it is clearly shown to be for his benefit to be released, and in general it is not for his benefit (*r*).

Avoidance by apprentice at twenty-one.

Such a contract is, however, voidable (*s*) at the option of the apprentice on attaining the age of twenty-one (*a*), save in the case of parish apprentices (*b*), but the election to avoid must be made within reasonable time after reaching that age (*c*); and it is not enough to justify the master in treating such voidable contract as avoided that the apprentice has been guilty of a simple act of delinquency or done something forbidden by the indenture of apprenticeship, such as running away or otherwise absenting himself (*d*). Avoidance by the apprentice of his contract on reaching the age of twenty-one is no defence in an action for breach of an absolute covenant by another person that the apprenticeship shall be for a period extending beyond that time (*e*).

COURTS, Vol. VIII., p. 646, note (*i*); FACTORIES AND SHOPS, Vol. XIV., pp. 516, 517; and p. 115, *post*. Seamen are included (Merchant Seamen (Payment of Wages and Rating) Act, 1880 (43 & 44 Vict. c. 16), s. 11).

(*p*) See title COUNTY COURTS, Vol. VIII., pp. 646, 647.

(*q*) Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90), s. 4; see, further, p. 115, *post*. The time for bringing such proceedings is not limited to the six months laid down in regard to complaints by the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43) (*Charles* v. *Plymouth Works* (*Mortgagees*) (1890), 60 L. J. (M. C.) 20); see title MAGISTRATES, Vol. XIX., pp. 591, 592.

(*r*) *R.* v. *Great Wigston* (*Inhabitants*) (1824), 3 B. & C. 484; *R.* v. *Austrey* (*Inhabitants*) (1758), Burr. S. C. 441; compare *R.* v. *Mountsorrel* (*Inhabitants*) (1815), 3 M. & S. 497 (where, the master having absconded, so that the infant apprentice could no longer derive instruction or support from him, the court thought it better that the contract should be dissolved than that the apprentice should remain unemployed and uninstructed); see, further, title INFANTS AND CHILDREN, Vol. XVII., p. 71, and p. 72, *ante*. When an infant, having no power to dissolve his apprenticeship, purports to bind himself to a second master, the second binding is invalid (*R.* v. *Great Wigston* (*Inhabitants*), *supra*). In *Richardson* v. *Colne Fishery Co.* (1897), 77 L. T. 501, the fact that the apprentice had, during the apprenticeship period, been in employment other than that of his master did not prevent it being held that he had served his master "duly and truly," such employment being with his master's consent.

(*s*) See title CONTRACT, Vol. VII., pp. 331, 332.

(*a*) *Ex parte Davis* (*M. A.*) (1794), 5 Term Rep. 715, *per* Lord KENYON, C.J., at p. 716, "Every indenture of an infant is voidable at his election, and in such cases the master must trust to the covenant of those who engage for the infant."

(*b*) *Ibid.*

(*c*) *Wray* v. *West* (1866), 15 L. T. (N. S.) 180. What is a reasonable time is a question of fact in each case (*ibid.*).

(*d*) *Gray* v. *Cookson* (1812), 16 East, 13; *Smedley* v. *Gooden* (1814), 3 M. & S. 189; *Coghlan* v. *Callaghan* (1857), 7 I. C. L. R. 291.

(*e*) *Cuming* v. *Hill* (1819), 3 B. & Ald. 59; see also note (*a*), *supra*.

SECT. 3. Termination of Apprenticeship.

By mutual agreement.

202. All the original parties to an indenture of apprenticeship can validly agree to terminate a contract of apprenticeship although the apprentice is still an infant (*f*), and, the parties concerned having consented to the termination of the apprenticeship, its formal dissolution may be effected by the cancellation of the indentures (*g*), by their destruction (*h*), or by their mutual surrender (*i*). In the case of a parish apprentice (*k*), the consent of the parish authorities to the cancellation is necessary (*l*).

Accord and satisfaction.

203. If an agreement for the determination of an indenture of apprenticeship is entered into between the master and the apprentice under which payment is made by the apprentice in consideration of the waiver by the master of his rights during the unexpired portion of the term, so that in an action upon the covenants in the indenture the apprentice could plead accord and satisfaction (*m*), the indenture will be regarded, from the time of such payment, as no longer existing, although in fact not given up nor cancelled (*n*).

SUB-SECT. 2.—*By Death or Change of Master.*

Death.

204. A contract of apprenticeship is determined by the death of the master (*o*), so that, in the absence of a special covenant to the contrary (*p*), the apprentice is not bound to serve the master's personal representatives (*q*), nor are the personal representatives under any obligation to keep and maintain the apprentice (*a*).

(*f*) *R.* v. *Weddington* (*Inhabitants*) (1774), Burr. S. C. 766; *R.* v. *Spawnton* (*Inhabitants*) (1775), Burr. S. C. 801.

(*g*) *R.* v. *Titchfield* (*Inhabitants*) (1763), Burr. S. C. 511.

(*h*) *R. v. Weddington* (*Inhabitants*), *supra*; *R.* v. *Spawnton* (*Inhabitants*), *supra*.

(*i*) *R.* v. *St. Mary Kallendar in Winchester* (*Inhabitants*) (1748), Burr. S. C. 274; *R.* v. *Titchfield* (*Inhabitants*), *supra*; *R.* v. *Notton* (*Inhabitants*) (1768), Burr. S. C. 629.

(*k*) See p. 80, *ante*, and title POOR LAW.

(*l*) *R.* v. *Austrey* (*Inhabitants*) (1758), Burr. S. C. 441; *R.* v. *Langham* (*Inhabitants*) (1781), 1 Bott's Poor Laws by Const, 612; *R.* v. *Sandford* (*Inhabitants*) (1786), 1 Term Rep. 281.

(*m*) See title CONTRACT, Vol. VII., p. 441.

(*n*) *R.* v. *Harberton* (*Inhabitants*) (1786), 1 Term Rep. 139; *R.* v. *Devonshire Justices* (1777), Cald. Mag. Cas. 32; compare *R.* v. *Warden* (*Inhabitants*) (1828), 2 Man. & Ry. (K. B.) 24. As to the recovery of part of the premium on a dissolution of apprenticeship by consent, see *Hale* v. *Webb* (1786), 2 Bro. C. C. 78.

(*o*) *R.* v. *Chirk* (*Inhabitants*) (1774), Burr. S. C. 782; see *R.* v. *Peck* (1698), 1 Salk. 66, *per* HOLT, C.J.: "By the custom of London in these cases, the executor shall put the apprentice to another master of the same trade." The death of the apprentice also determines the contract; see title INFANTS AND CHILDREN, Vol. XVII., p. 71. The marriage of an apprentice is not a good ground for his discharge (*R.* v. *Tardebigg* (*Inhabitants*) (1753), Say. 100). As to the effect of the bankruptcy of the master, see titles BANKRUPTCY AND INSOLVENCY, Vol. II., p. 222; INFANTS AND CHILDREN, Vol. XVII., p. 71.

(*p*) As in *Cooper* v. *Simmons* (1862), 7 H. & N. 707, where such a covenant was held, in the case of an infant, not to be disadvantageous, and was, therefore, enforced.

(*q*) *Baxter* v. *Burfield* (1747), 2 Stra. 1266.

(*a*) *Pett* v. *Wingfeild* (*Inhabitants*) (1692), Carth. 231; *R.* v. *Peck*, *supra*.

SECT. 3. Termination of Apprenticeship.

Partners.

Change of nature of firm.

205. If a person is apprenticed to partners, the dissolution of the partnership by the death (*b*) or retirement (*c*) of one of the partners terminates the apprenticeship. An apprentice to a firm is discharged if the firm divides itself into two or more new firms, neither of which carries on in its entirety the business to which the apprentice was bound (*d*). The same result follows if the master relinquishes a branch of or changes his trade or business (*e*), but not if the business is simply diminished in extent, provided the master remains able to carry out his covenant to teach the apprentice (*f*).

SUB-SECT. 3.—*By Misconduct.*

Misconduct no discharge of contract.

206. Unless there is a covenant (*g*) or a custom (*h*) to the contrary, misconduct on the part of the apprentice does not entitle the master to terminate the contract of apprenticeship (*i*). Thus the master is not justified in dismissing the apprentice merely for neglect (*k*), or for disobedience to orders (*l*), or for absence (*m*), or for intoxication (*n*), but must depend upon the covenants in the indenture for his remedy (*o*). If, however, the master is sued upon the covenant

(*b*) *R.* v. *St Martin's, Exeter* (*Inhabitants*) (1835), 2 Ad. & El. 655.

(*c*) *Brook* v *Dawson* (1869), 20 L. T. 611; *Couchman* v. *Sillar* (1870), 22 L. T. 480; see *Lloyd* v. *Blackburn* (1842), 9 M. & W. 363, *per* Lord ABINGER, C.B., at p. 364; *Popham* v. *Jones* (1853), 13 C. B. 225.

(*d*) *Eaton* v. *Western* (1882), 9 Q. B. D. 636, C. A. (where the apprentice was bound to an engineering firm at Lambeth, which split into two firms, one carrying on the manufacturing part of the business at Derby, and the London firm the repairing and agency part).

(*e*) *Ellen* v. *Topp* (1851), 6 Exch. 424 (where the apprentice was to be taught the business of an "auctioneer, appraiser and corn factor," but after a time the master ceased to act as a corn factor)

(*f*) *Batty* v. *Monks* (1865), 12 L. T. 832 (where the circumstance that the master discontinued making up prescriptions for other medical men and confined himself to making up his own did not disqualify him from teaching the apprentice "the art and mystery of an apothecary").

(*g*) As in *Westwick* v. *Theodor* (1875), L. R. 10 Q. B. 224, and *Maw* v. *Jones* (1890), 25 Q. B. D. 107.

(*h*) "By the custom of London, it is a sufficient cause for a master to turn away his apprentice, because he frequents gaming, and may justify it before the chamberlain" (*Woodroffe* v. *Farnham* (1693), 2 Vern. 291).

(*i*) *Wise* v. *Wilson* (1845), 1 Car. & Kir. 662 (where it was said by Lord DENMAN, C.J., at p. 669: "There is a great distinction between a contract of apprenticeship and a contract with a servant. A person has a right to dismiss a servant for misconduct, but has no right to turn away an apprentice because he misbehaves"); *Westwick* v. *Theodor*, *supra*, *per* BLACKBURN, J., at p. 226; and see *Phillips* v. *Clift* (1859), 4 H. & N. 168, *per* WATSON, B., at pp 173, 174. As to damages for breach of contract. see pp. 107 *et seq.*, *post*.

(*k*) *Therman* v. *Abell* (1688), 2 Vern. 64 (where the master was ordered by the court to refund part of the premium and to deliver up the indentures).

(*l*) *Winstone* v. *Linn* (1823), 1 B. & C. 460.

(*m*) *Ibid.*

(*n*) *Wise* v. *Wilson*, *supra*.

(*o*) *Winstone* v. *Linn*, *supra*, *per* BAYLEY, J., at p. 467: "Such indentures generally contain reciprocal covenants by each party. Those covenants are not dependent, but are mutual and independent, entitling each party to his remedy for a breach of them. The master is liable, therefore, to an action for a breach of the covenant, to instruct and maintain the apprentice during the term agreed upon;" and *per* BEST, J., at p. 470:

SECT. 3. Termination of Apprenticeship.

to teach and maintain the apprentice, it is a good answer that the apprentice was an habitual thief (*p*), or that he absented himself or by other wilful acts prevented the master from carrying out the covenant (*q*).

SUB-SECT. 4.—*Excuse for Non-performance.*

Illness.

207. It is an implied term in a contract of apprenticeship that the fulfilment of the covenant to serve shall depend on the continued capacity of the apprentice to perform his part of the agreement; and, accordingly, non-performance of the contract is excused when due to incapacity caused by illness, even though the covenant to serve is absolute and unconditional (*r*). Temporary illness does not, however, discharge the contract (*s*).

Ill-treatment.

208. An apprentice is justified in quitting the service of his master if he has reasonable grounds for fearing that grievous bodily harm would be inflicted upon him if he remained (*a*).

Service abroad.

209. An apprentice cannot be required by his master to serve outside the United Kingdom save in the case of those whose business normally takes them abroad (*b*).

"The master has at common law a complete remedy if the apprentice misconducts himself by an action for the breach of the covenants"; and as to damages, see pp. 107 *et seq.*, *post*.

(*p*) *Cox* v. *Mathews* (1861), 2 F. & F. 397, approved and followed in *Learoyd* v. *Brook*, *supra*; compare *Phillips* v. *Clift* (1859), 4 H. & N. 168 (where general dishonesty was alleged but not a felonious taking, and the master was held not to be justified in dissolving the contract of apprenticeship); *Addams* v. *Carter* (1862), 6 L. T. 130. In *Wise* v. *Wilson* (1845), 1 Car. & Kir. 662, the master, an apothecary, was held justified in dismissing his "pupil and assistant" for drunkenness, on the ground that such conduct was dangerous to patients for whom the latter had to make up medicines, and was consequently injurious to the business of the master. But the "pupil and assistant" was not regarded exactly as an apprentice, but a person somewhere between a servant and an apprentice.

(*q*) *Winstone* v. *Linn* (1823), 1 B. & C. 460, *per* BAYLEY, J., at p. 467; *Raymond* v. *Minton* (1866), L. R. 1 Exch. 244. With regard to the latter case, it was said in *Learoyd* v. *Brook*, [1891] 1 Q. B. 431, *per* A. L. SMITH, J., at p. 433: "The *ratio decidendi* of that case is not that the master is absolved because the apprentice has not performed the obligations imposed upon him by the articles, but because the apprentice by his own acts has put it out of the power of the master to carry out what he had contracted to do."

(*r*) *Boast* v. *Firth* (1868), L. R. 4 C. P. 1; and compare *R.* v. *Hales Owen* (*Inhabitants*) (1718), 1 Stra. 99.

(*s*) See *Patten* v. *Wood* (1887), 51 J. P. 540 (where an apprentice was held entitled, during temporary illness, to the wages covenanted to be paid in the indenture). As to the duty of the master to provide proper medicine for his apprentice during illness, see p. 119, *post*.

(*a*) *Halliwell* v. *Counsell* (1878), 38 L. T. 176. But the master may administer moderate chastisement (*Gylbert* v. *Fletcher* (1630), Cro. Car. 179; *Penn* v. *Ward* (1835), 2 Cr. M. & R. 338). As to damages for breach of contract, see pp. 107 *et seq.*, *post*.

(*b*) *Coventry* v. *Woodhall* (1616), Hob. 134.

Part V.—Remedies for Breach of Contract.

SECT. 1.—*Damages.*

SUB-SECT. 1.—*Where the Breach is committed by the Servant.*

What is a breach.

210. Where a servant is guilty of a breach of the contract of service the master is entitled to recover damages (*c*). There is a breach of the contract whenever the servant leaves his service without just cause or excuse (*d*) before the expiration of the agreed term (*e*), or, when no term has been fixed for the duration of the contract, without giving due notice (*f*). There is equally a breach where the servant wrongfully repudiates the contract, refusing to be bound by it in the future (*g*), and it is immaterial whether his repudiation is, from his conduct, express or implied, provided his intention to repudiate it is clear (*h*).

Measure of damages.

211. The damages to which a master is entitled are such as are the reasonable and probable consequence of the servant's breach of contract, including any expenses which he may be compelled to incur (*i*). If the contract of service is expressed in writing and specifies a sum payable by the servant in the event of a breach of contract, the master is entitled to recover that sum, provided that from the language of the contract it is clear that it is a genuine pre-estimate of the loss likely to be sustained by the master, and that the parties intended it to be payable as liquidated damages and not as a penalty (*k*). At the same time, if there are any other remedies upon the contract open to the master, the servant cannot, by merely paying or tendering the specified sum, release himself from the continuing obligations of the contract (*l*).

How far wages forfeited.

212. Sometimes the contract of service expressly provides that the master may retain any wages, due to the servant at the time of

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(*c*) *Cotes* v. *Sadler* (1660), 2 Keb. 16, *Huttman* v. *Boulnois* (1827), 2 C. & P. 510, 513; *Richards* v. *Hayward* (1841), 2 Man. & G. 574; *Messiter* v. *Rose* (1853) 13 C. B. 162. As to the servant's criminal liability, see p. 127, *post*.

(*d*) *Cotes* v. *Sadler, supra*; *Messiter* v. *Rose supra*; compare *Bouch and Partners* v. *Press*, [1894] 1 Q. B. 202, C. A. (where trade unionists who refused to go down into a mine in the same cage as non-unionists, but offered to go down in the next cage, were held to be guilty of a breach of contract). As to the effect of an agreement to refer disputes to arbitration, see *Roberts* v. *Hull's Plymouth Co., Ltd.* (1897), 14 T. L. R. 21, C. A.

(*e*) As to the duration of a contract of service, see p. 92, *ante*.

(*f*) *Huttman* v. *Boulnois, supra*

(*g*) *Richards* v. *Hayward, supra*.

(*h*) *Batty* v. *Melillo* (1850), 10 C. B. 282.

(*i*) *Richards* v. *Hayward, supra*; and see title DAMAGES, Vol. X., pp. 332, 338.

(*k*) *Kemble* v. *Farren* (1829), 6 Bing. 141. As to liquidated damages and penalties, see title BONDS, Vol. III., p. 93.

(*l*) *National Provincial Bank of England* v. *Marshall* (1888), 40 Ch. D. 112, C. A.; compare *Carnes* v. *Nesbitt* (1862), 7 H. & N. 778.

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the breach, as liquidated damages (*m*). In the absence of any such provision the master remains liable, notwithstanding the servant's breach of contract, to pay him any wages already accrued due and remaining unpaid at the date of the breach, since the servant's right to payment is not affected by the subsequent breach (*n*). Even where the servant is summarily dismissed for misconduct the same principle applies (*o*). Where, however, no wages have accrued due at the time of the breach (*p*), or of the dismissal (*q*), as the case may be, the servant is not entitled to claim remuneration in respect of the services already rendered, unless there is an agreement to that effect (*r*). He cannot claim wages, since the payment of the wages is, under the contract, conditional upon the completion of the term for which the wages are payable (*s*), and he has by his own act or fault precluded himself from serving his full term (*a*). Nor can he claim as upon a *quantum meruit* for work and labour done (*b*), since there is in existence an express contract specifying the amount of his remuneration and defining the condition upon which it is to be paid (*c*).

Breach by apprentice.

213. Where an apprentice is guilty of a breach of the contract contained in an instrument of apprenticeship, the master is entitled to sue the party to the instrument who has bound himself as surety for the good behaviour of the apprentice (*d*), and to recover damages for the actual loss sustained (*e*). Damages are only recoverable,

(*m*) *Taylor* v. *Carr and Porter* (1861), 30 L. J. (M. C.) 201; *Walsh* v. *Walley* (1874), L. R. 9 Q. B. 367; *Saunders* v. *Whittle* (1876), 33 L. T. 816; *Gregson* v. *Watson* (1876), 34 L. T. 143; *Willis* v. *Thorp* (1875), L. R. 10 Q. B. 383. In the case of a child, young person, or woman, being a factory worker (see title FACTORIES AND SHOPS, Vol. XIV., p. 445), the employer cannot retain more than the amount of the actual damage (Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90), s. 11). As to the effect of such a provision where the servant is suspended for misconduct and afterwards dismissed, see *Warburton* v. *Taff Vale Rail. Co.* (1902), 18 T. L. R. 420.

(*n*) *Parkin* v. *South Hetton Coal Co.* (1907), 24 T. L. R. 193, C. A.; *Button* v. *Thompson* (1869), L. R. 4 C. P. 330; *Warburton* v. *Heyworth* (1880), 6 Q. B. D. 1, C. A.; *Margerison* v. *Bertwistle* (1872), 36 J. P. 100; *George* v. *Davies*, [1911] 2 K. B. 445.

(*o*) *Boston Deep Sea Fishing and Ice Co.* v. *Ansell* (1888), 39 Ch. D. 339, C. A.; and as to summary dismissal, see p. 58, *ante*.

(*p*) *Cutter* v. *Powell* (1795), 6 Term Rep. 320; 2 Smith, L. C., 11th ed., 1; *Plymouth* (*Countess*) v. *Throgmorton* (1688), 3 Mod. Rep. 153.

(*q*) *Crocker* v. *Molyneux* (1828), 3 C. & P. 470; *Spain* v. *Arnott* (1817), 2 Stark. 256; *Ridgway* v. *Hungerford Market Co.* (1835), 3 Ad. & El. 171; *Lilley* v. *Elwin* (1848), 11 Q. B. 742; *Searle* v. *Ridley* (1873), 28 L. T. 411.

(*r*) *Lamburn* v. *Cruden* (1841), 2 Man. & G. 253; compare *Hurcum* v. *Stericker* (1842), 10 M. & W. 553 (where a servant, whose wages were paid quarterly, agreed after his dismissal to finish his month's work, and it was held that, though he could not receive a quarter's wages, he was entitled to be paid for the month).

(*s*) See p. 84, *ante*.

(*a*) *Cutter* v. *Powell*, *supra*; *Lamburn* v. *Cruden*, *supra*.

(*b*) See pp. 85, *ante*, 111, *post*; and title WORK AND LABOUR.

(*c*) *Boston Deep Sea Fishing and Ice Co.* v. *Ansell*, *supra*.

(*d*) *Russell* v. *Shinn* (1861), 2 F. & F. 395; and see title INFANTS AND CHILDREN, Vol. XVII., pp. 70, 71.

(*e*) *Russell* v. *Shinn*, *supra*; *Lewis* v. *Peachey* (1862), 1 H. & C. 518.

however, up to the time of action brought (*f*), and the master is not entitled to recover prospective damages for the loss which he may sustain during the remainder of the term for which the apprentice is bound (*g*). The surety is not liable for misconduct of a slight and trivial character, but only for gross misconduct (*h*). If the apprentice absents himself from work for a long period (*i*), or repudiates the contract on attaining his majority (*j*), the surety is liable.

Remedy against apprentice.

The apprentice himself, if he is of age (*k*), may be sued for any portion of his premium agreed to be paid which may remain unpaid, notwithstanding that he was an infant at the time when the agreement to pay it was made (*l*).

SUB-SECT. 2.—*Where the Breach is committed by the Master.*

Breach of contract.

214. Where the master commits a breach of the contract of service the servant is entitled to recover damages (*m*). If the contract is for service to be rendered at a future date, there is a breach if, before the time fixed for the commencement of the service, the master informs the servant that he will not be required, or otherwise intimates his intention not to be bound by the contract (*n*). In this case the servant is entitled to treat the breach as final and to institute proceedings at once; he need not wait before doing so until the time fixed for performance arrives (*o*). If, however, he thinks fit he may elect to treat the contract as subsisting, and thereby give the master the opportunity of changing his mind (*p*).

Proof required from servant.

To maintain such proceedings, the servant must show that he was ready and willing to enter the master's service (*q*), and that the master had notice that he was so ready and willing (*r*). It is

(*f*) *Russell* v. *Shinn* (1861), 2 F. & F. 395; *Lewis* v. *Peachey* (1862), 1 H. & C. 518.

(*g*) *Lewis* v. *Peachey*, *supra*.

(*h*) *Wright* v. *Gibon* (1829), 3 C. & P. 583.

(*i*) *Ibid.* The fact that the master has taken no steps to find the apprentice may be urged in mitigation of damages (*Russell* v. *Shinn*, *supra*). An apprentice who enlists may be reclaimed by his master (Army Act, 1881 (44 & 45 Vict. c. 58), s. 96). As to fraudulent enlistment, see title ROYAL FORCES.

(*j*) *Cuming* v. *Hill* (1819), 3 B. & Ald. 59.

(*k*) As to the position when he is an infant, see title INFANTS AND CHILDREN, Vol. XVII., p. 70, and see *ibid.*, note (*b*). As to the master's right to chastise him, see note (*a*), p. 106, *ante*. As to the statutory right to take proceedings against an apprentice, see p. 116, *post*.

(*l*) *Walter* v. *Everard*, [1891] 2 Q. B. 369, C. A. A master is also entitled to any money which the apprentice may earn after leaving him (*Merton* v. *Hornsby* (1747), 1 Ves. Sen. 48; *Hill* v. *Allen* (1748), 1 Ves. Sen. 83)

(*m*) As to discovery in an action for wrongful dismissal, see title DISCOVERY, INSPECTION, AND INTERROGATORIES, Vol. XI., p. 106.

(*n*) *Hochster* v. *De la Tour* (1853), 2 E. & B. 678; see also *Bracegirdle* v. *Heald* (1818), 1 B. & Ald. 722; *Richardson* v. *Mellish* (1824), 2 Bing. 229; *Blogg* v. *Kent* (1830), 6 Bing. 614; *Clarke* v. *Allatt* (1847), 4 C. B. 335; *Chaplin* v. *Hicks*, [1911] 2 K. B. 786, C. A.

(*o*) *Hochster* v. *De la Tour*, *supra*.

(*p*) See title CONTRACT, Vol. VII., p. 439.

(*q*) *Wallis* v. *Warren* (1849), 4 Exch. 361. As to what is meant by "ready and willing," see *Levy* v. *Herbert* (*Lord*) (1817), 7 Taunt. 314; *De Medina* v. *Norman* (1842), 9 M. & W. 820; *Granger* v *Dacre* (1844), 12 M. & W. 431; *Griffith* v. *Selby* (1854), 9 Exch. 393; *Cuckson* v. *Stones* (1858), 1 E. & E. 248.

(*r*) *Wilkinson* v. *Gaston* (1846), 9 Q. B. 137; see *Doogood* v. *Rose* (1850), 9 C. B. 132.

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not, however, necessary that the servant should actually tender his services (*s*).

Breach during service.

215. Where the servant has actually entered the master's service, a breach of the contract is committed if the servant is wrongfully dismissed before the expiration of the term for which he is engaged (*a*).

Conditions enabling servant to sue.

To entitle the servant to sue for damages two conditions (*b*) must be fulfilled, namely:— (1) the servant must have been engaged for a period fixed (*c*) or determinable upon notice (*d*), and dismissed before the expiration of the period, if fixed, or without the requisite notice, as the case may be (*e*); (2) his dismissal must have been wrongful, that is to say, without just cause or excuse on the part of the master (*f*).

Remedies of servant:

216. A servant who has been wrongfully dismissed may treat the contract as continuing and sue for damages for its breach, or he may acquiesce in the master's wrongful act and treat the contract as rescinded (*g*), in which case he may sue as upon a *quantum*

(*s*) *Wallis* v. *Warren* (1849), 4 Exch. 361.

(*a*) There need not be an actual dismissal; it is sufficient if the master puts it out of his power to continue the contract (*Driscoll* v. *Australian Royal Mail Steam Navigation Co.* (1859), 1 F. & F. 458). As to the effect of the master's bankruptcy, or the liquidation of a company, see p. 95, *ante*.

(*b*) In addition to any special terms that may have been agreed upon (*Hopkins* v. *Wanostrocht* (1861), 2 F. & F. 368).

(*c*) *Holcroft* v. *Barber* (1843), 1 Car. & Kir. 4; *Peters* v. *Staveley* (1866), 15 L. T. 275; *Doun* v. *Pinto* (1854), 9 Exch. 327; compare *Baxter* v. *Nurse* (1844), 6 Man. & G. 935.

(*d*) *Green* v. *Wright* (1876), 1 C. P. D. 591; *Vibert* v. *Eastern Telegraph Co.* (1883), Cab. & El. 17; *Clarke* v. *Lewisham Borough Council* (1902), 67 J. P. 195; compare *Doe* d. *Jones* v. *Jones* (1830), 10 B. & C. 718; *Doe* d. *Nicholl* v. *McKaeg* (1830), 10 B. & C. 721. As to notice generally, see p. 90, *ante*.

(*e*) *Williams* v. *Byrne* (1837), 7 Ad. & El. 177; *Emmens* v. *Elderton* (1853), 4 H. L. Cas. 624; *McKean* v. *Cowley* (1863), 7 L. T. 828; *Whitehaven Colliery Co.* v. *M'Court* (1893), 57 J. P. 422; compare *Barnsley* v. *Taylor* (1867), 37 L. J. (Q. B.) 39 (where a servant who had been taken back into the master's service after his wrongful dismissal was again wrongfully dismissed, and it was held that he could not sue upon the original contract for the second dismissal).

(*f*) *Baillie* v. *Kell* (1838), 4 Bing. (N. C.) 638; *Edwards* v. *Levy* (1860), 2 F. & F. 94; *Fletcher* v. *Krell* (1872), 42 L. J. (Q. B.) 55; compare *Cussons* v. *Skinner* (1843), 11 M. & W. 161; *Hulton* v. *Ras Steam Shipping Co., Ltd.*, [1907] 1 K. B. 834, C. A. As to what constitutes just cause or excuse, see p. 98, *ante*. When the first condition is proved the burden of proof seems to be on the master to justify the dismissal.

(*g*) *General Billposting Co., Ltd.* v. *Atkinson*, [1909] A. C. 118. As to the effect of a wrongful dismissal upon a covenant in restraint of trade, see *ibid.*; *Measures Brothers, Ltd.* v. *Measures*, [1910] 1 Ch. 336; affirmed [1910] 2 Ch. 248, C. A.; title COMPANIES, Vol. V., pp. 220, note (*o*), 420, note (*m*); and as to such covenants generally, see p. 88, *ante*, and title TRADE AND TRADE UNIONS. Where the contract of service provides that if any dispute arise between the parties it shall be referred to arbitration, and the servant is dismissed for alleged misconduct, any claim he may have for damages for wrongful dismissal is within the contract and reference of such claim to arbitration will be enforced (*Renshaw* v. *Queen Anne Mansions Co.*, [1897] 1 Q. B. 662, C. A., distinguishing *Davis* v. *Starr* (1889), 41 Ch. D. 242, C. A.). As to an application to stay proceedings by a party to a submission to arbitration, see title ARBITRATION, Vol. I., p. 451.

meruit for the value of the work which he has actually performed, and for which he has not been paid (*h*). He may elect to pursue either remedy at his option (*i*), but he is bound by his election and cannot pursue both (*k*). He is not entitled, however, to wait till the termination of the period for which he was engaged and sue for the full amount of his wages (*l*).

(1) *Quantum meruit;*

217. Where the servant elects to sue upon a *quantum meruit* the amount recoverable is limited to the loss sustained at the date of his dismissal (*m*). He is entitled to recover the wages earned and remaining unpaid at that date (*n*). He cannot, however, recover anything further, either in respect of wages for the remainder of the period for which he was engaged (*o*), or by way of damages for wrongful dismissal (*p*).

(2) breach of contract.

218. If the servant elects to treat the contract as continuing and sues for damages for its breach (*q*), he is entitled to recover (1) the estimated pecuniary loss resulting as a reasonable and probable consequence (*r*) from the premature determination of his service (*s*); (2) the amount of wages earned but not paid at the date of his dismissal, provided that such amount is expressly claimed (*t*); and (3) if he is engaged on service away from home, the expenses of his journey home (*a*). Since, however, his claim is

(*h*) *Cutter* v. *Powell* (1795), 6 Term Rep 320, 2 Smith, L. C., 11th ed., 1; *Emmens* v. *Elderton* (1853), 13 C. B. 495, H. L., *per* CROMPTON, J., at p. 509; *Goodman* v. *Pocock* (1850), 15 Q. B. 576; *Prickett* v. *Badger* (1856), 1 C. B. (N. S.) 296; *Cook* v. *Sherwood* (1863), 11 W. R. 595; compare *Planché* v. *Colburn* (1831), 8 Bing. 14. The right of action in respect of a breach of the contract of service must be distinguished from the right of action for wages already due and payable, as to which see the text, *infra.*

(*i*) *Goodman* v. *Pocock*, *supra*, *per* COLERIDGE, J., at p. 583.

(*k*) *Lilley* v. *Elwin* (1848), 11 Q. B. 742; *Goodman* v. *Pocock*, *supra*; compare *Dunn* v. *Murray* (1829), 9 B. & C. 780; *Lush* v. *Russell* (1849), 4 Exch. 637.

(*l*) *Feuings* v. *Tisdal* (1847), 1 Exch. 295, approved in *Emmens* v. *Elderton*, *supra*, and in *Goodman* v. *Pocock*, *supra*; *contra*, *Gandell* v. *Pontigny* (1816), 4 Camp. 375, *per* Lord ELLENBOROUGH, C.J., at p. 376.

(*m*) *Prickett* v. *Badger*, *supra*.

(*n*) *Lilley* v. *Elwin*, *supra*, *Archard* v. *Hornor* (1828), 3 C. & P. 349; compare *Keys* v. *Harwood* (1846), 2 C. B. 905 (where the services were to be paid for in goods). If he is to be paid a lump sum for his services he is entitled to recover the whole (*O'Neil* v. *Armstrong, Mitchell & Co.*, [1895] 2 Q. B. 418, C. A.; followed in *Lloyd* v. *Sheen* (1905), 93 L. T. 174; compare *Re London and Scottish Bank, Ex parte Logan* (1870), L. R. 9 Eq. 149).

(*o*) *Smith* v. *Hayward* (1837), 7 Ad. & El. 544; *Goodman* v. *Pocock*, *supra*, *Emmens* v. *Elderton*, *supra*; *Archard* v. *Hornor*, *supra*.

(*p*) *Feuings* v. *Tisdal*, *supra*.

(*q*) Compare *Dunn* v. *Murray*, *supra*. He may sue at once (*Paqani* v. *Gandolfi* (1826), 2 C. & P. 570).

(*r*) *French* v. *Brookes* (1830), 6 Bing. 354; *Burton* v. *Pinkerton* (1867), L. R. 2 Exch. 340.

(*s*) *Lake* v. *Campbell* (1862), 5 L. T. 582 (where a gift to be paid on the completion of the term was taken into consideration), see *Richardson* v. *Mellish* (1824), 2 Bing. 229; compare *Ross* v. *Pender* (1874), 1 R. (Ct. of Sess.) 352.

(*t*) *Hartley* v. *Harman* (1840), 11 Ad. & El. 798; *Gordon* v. *Potter* (1859), 1 F. & F. 644; compare *Goodman* v. *Pocock*, *supra*.

(*a*) *Gordon* v. *Potter*, *supra*; *Re London and Colonial Bank, Ex parte Clark*

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founded upon breach of a contract, the damages to which he is entitled cannot be increased by reason of the manner in which he was dismissed (*b*), whether in respect of his wounded feelings or of the prejudicial effect upon his chances of finding other employment (*c*).

Measure of damages.

Where it is an express term of the contract that a servant who is dismissed without notice is to be paid his wages for a certain period in lieu of notice, or where there is a custom to that effect (*d*), the measure of damages for the breach is the amount of such wages, which is to be regarded as liquidated damages (*e*). The same principle applies where the contract specifies a particular sum to be payable as and for liquidated damages in the event of a breach (*f*). In any other case the damages are to be measured by the amount of wages which the servant has been prevented from earning by reason of his wrongful dismissal (*g*), including the value of any other benefit to which he is entitled by virtue of his contract and of which he is deprived in consequence of its breach (*h*), after taking

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(1869), L. R. 7 Eq. 550; compare *Read* v. *Dunsmore* (1840), 9 C. & P. 588; and see the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 186; *A.-G.* v. *Fargrove Steam Navigation Co.* (1906), 23 T. L. R. 230. Where a servant is employed abroad under a contract by which he is to be allowed the expenses of his return journey on the termination of his employment, he cannot claim the expenses of bringing back his family (*French* v. *Brookes* (1830), 6 Bing. 354).

(*b*) *Addis* v. *Gramophone Co., Ltd.*, [1909] A. C. 488, overruling *Maw* v. *Jones* (1890), 25 Q. B. D 107, and *Smith* v. *Thompson* (1849), 8 C. B. 44; compare *Lake* v. *Campbell* (1862), 5 L. T. 582 (where the servant was held not to be entitled to recover for loss of property which had been removed by the master from the house which the servant had been occupying).

(*c*) *Addis* v. *Gramophone Co., Ltd., supra.* The action may be referred to an official referee if it mainly involves matters of account (*Sacker* v. *Ragozine & Co.* (1881), 44 L. T. 308).

(*d*) As to the effect of custom upon notice generally, see p. 97, *ante.*

(*e*) *Robinson* v. *Hindman* (1800), 3 Esp. 235; *French* v. *Brookes, supra*; *Hartley* v. *Harman* (1840), 11 Ad. & El 798; *Broxham* v. *Wagstaffe* (1841), 5 Jur. 845; *Fewings* v. *Tisdal* (1847), 1 Exch. 295; *East Anglian Railways Co.* v. *Lythgoe* (1851), 10 C. B. 726; *Re Hutton, Ex parte Allpas, Ex parte Chipchase* (1867), 17 L. T. 179; *Baker* v. *Denkera Ashanti Mining Corporation, Ltd.* (1903), 20 T. L. R. 37; see also *Hurcum* v. *Stericker* (1842), 10 M. & W. 553 (where the servant claimed a quarter's salary and recovered a month's salary). A domestic servant cannot claim compensation for loss of board and lodging (*Gordon* v. *Potter* (1859), 1 F. & F. 644).

(*f*) *Beckham* v. *Drake* (1849), 2 H. L. Cas. 579 (where it was held that, on the bankruptcy of the servant, the action must be brought, not by the bankrupt, but by his trustee); and see p. 95, *ante*, and title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 139; compare *Lowndes* v. *Stamford and Warrington (Earl)* (1852), 16 Jur. 903, 973, Ex. Ch.; *Re London and Scottish Bank, Ex parte Logan* (1870), L. R. 9 Eq. 149; *Shirreff's Case* (1872), L. R. 14 Eq. 417; *Rust* v. *Nottidge* (1852), 1 E. & B. 99.

(*g*) *Smith* v. *Thompson* (1849), 8 C. B. 44; *Re London and Colonial Bank, Ex parte Clark* (1869), L. R. 7 Eq. 550. A servant who is paid by commission only is entitled to recover the estimated value of his commission (*Re Patent Floor Cloth Co., Dean and Gilbert's Claim* (1872), 41 L. J. (CH.) 476); but see *Hartland* v. *General Exchange Bank* (1866), 14 L. T. 863; *Re English and Scottish Marine Insurance Co., Ex parte Maclure* (1870), 5 Ch. App. 737, in both of which cases the servant was partly paid by commission.

(*h*) *Lake* v. *Campbell, supra*; *Re London and Colonial Bank, Ex parte Clark, supra*; *Pashley* v. *Linotype Co., Ltd.* (1903), 20 R. P. C. 633

into consideration the probabilities of his obtaining employment elsewhere (*i*). If, therefore, he obtains other employment immediately after his dismissal, the amount which would otherwise be payable as compensation must be reduced by the amount of remuneration which he receives in respect of such employment (*k*), and if he is paid the same or higher wages, his loss is merely nominal (*l*). Moreover, it is his duty to minimise his loss, and he must therefore use due diligence in endeavouring to obtain employment (*m*). If, but for his own default or neglect, he could, immediately after his dismissal, have obtained suitable employment at similar wages, he cannot recover more than nominal damages against the master (*n*). He is not, however, bound to accept employment of a different kind, or even a lower position in the same kind of employment, and, in such case, it is immaterial that the rate of wages offered is the same (*o*). In assessing the damages the jury is entitled to take into consideration all that has happened, or is likely to happen, to increase or mitigate the servant's loss down to the day of trial (*p*).

Apprentice.

219. In the case of an apprentice who has been wrongfully dismissed, the measure of damages is his actual loss up to the date of action brought and no more (*q*).

SECT. 2.—*Injunction.*

When granted.

220. The court will not decree specific performance (*r*) of a contract

(where the servant was awarded remuneration in respect of certain patents); see also *Ball* v. *Coggs* (1710), 1 Bro. Parl. Cas. 140; and compare *Ellwood* v. *Liverpool Victoria Legal Friendly Society* (1880), 42 L. T. 694 (where a collector for a friendly society, on entering its service, purchased with its approval the collecting book of a retiring collector, and it was suggested that, although the book was the property of the society and must be delivered up on the termination of his employment, the jury might, in an action for wrongful dismissal, take into account the fact that he had made a payment for the book). In the case of a breach of contract, under which the plaintiff has a mere chance of employment, he may recover damages; see *Chaplin* v. *Hicks*, [1911] 2 K. B. 786, C. A.

(*i*) *Beckham* v. *Drake* (1849), 2 H. L. Cas. 579, *per* ERLE, J., at p. 606; *Hartland* v. *General Exchange Bank* (1866), 14 L. T. 863 (where it was also held that the fact of the company employing the servant being afterwards wound up must be taken into consideration (*Yelland's Case* (1867), L. R. 4 Eq. 350; *McKean* v. *Cowley* (1863), 7 L. T. 828). As to the effect of liquidation of a company on contracts of service, see p. 95, *ante*.

(*k*) *Shirreff's Case* (1872), L. R. 14 Eq. 417; *Walton* v. *Tucker* (1880), 45 J. P. 23; *Reid* v. *Explosives Co.* (1887), 19 Q. B. D. 264, C. A.

(*l*) *Ibid.*

(*m*) *Beckham* v. *Drake*, *supra*.

(*n*) *Brace* v. *Calder*, [1895] 2 Q. B. 253, C. A. (where the dismissal was due to a dissolution of partnership and the new firm offered to continue the employment); *Macdonnell* v. *Masters* (1884), Cab. & El. 281.

(*o*) *Ross* v. *Pender* (1874), 1 R. (Ct. of Sess.) 352.

(*p*) *Hochster* v. *De la Tour* (1853), 2 E. & B. 678; and see *Chaplin* v. *Hicks*, *supra*.

(*q*) *Parker* v. *Cathcart* (1866), 17 I. C. L. R. 778.

(*r*) *Wolverhampton and Walsall Rail. Co.* v. *London and North-Western Rail. Co.* (1873), L. R. 16 Eq. 433, *per* Lord SELBORNE, L.C., at p. 439; *Peto* v. *Brighton, Uckfield and Tunbridge Wells Rail. Co.* (1863), 1 Hem. & M. 468; *Gillis* v. *M'Ghee* (1862), 13 I. Ch. R. 48; *White* v. *Boby* (1877), 37

SECT. 2. Injunction.

of service at the suit of the master (*s*) or of the servant (*t*), partly on the ground that the contract is based upon mutual confidence (*u*), and partly because the court is not in a position to supervise the manner in which the contract is performed (*a*). Where, however, the contract of service includes a negative stipulation by which the master (*b*) or the servant (*c*) binds himself not to do a specific act, the court, while declining to enforce specific performance of the contract as a whole, will enforce the negative stipulation (*d*), and will restrain the master or servant by injunction (*e*) from committing a breach thereof. The negative stipulation must, however, be expressed on the face of the contract, or at least be clearly implied from its language (*f*); it is not sufficient for this purpose to show that the act done is inconsistent with some positive stipulation in the contract (*g*). An injunction will not, however, be granted at the suit of the master where he is himself the first to break the contract (*h*).

Apprenticeship.

221. In the case of a contract of apprenticeship, the court will neither order specific performance (*i*) nor grant an injunction against committing a breach (*k*).

L. T. 652, C. A.; *Bainbridge* v. *Smith* (1889), 41 Ch. D. 462, C. A.; see also the cases cited in title INJUNCTION, Vol. XVII., p. 216, notes (*i*), (*n*); and title SPECIFIC PERFORMANCE. The same principle applies when the contract of service forms part of a larger contract (*Ogden* v. *Fossick* (1862), 32 L. J. (ch.) 73, C. A., where there was a contract to grant a lease, one of the terms being that the lessee was to employ the lessor, and it was held that the contract was entire and consequently no part of it could be specifically enforced); compare *Brett* v. *East India and London Shipping Co.* (1864), 2 Hem. & M. 404. As to the statutory powers to order performance of the contract, see p. 115, *post*.

(*s*) *Chaplin* v. *North-Western Rail. Co.* (1862), 5 L. T. 601. As to the special powers of the court where the servant is employed by a trust, see *Daugars* v. *Rivaz* (1860), 28 Beav. 233, and titles CHARITIES, Vol. IV., pp. 294, 295, INJUNCTION, Vol. XVII., p. 226.

(*t*) *Johnson* v. *Shrewsbury and Birmingham Rail Co.* (1853), 3 De G. M. & G. 914, C. A.; *Ogden* v. *Fossick*, *supra*.

(*u*) *Johnson* v. *Shrewsbury and Birmingham Rail. Co.*, *supra*, *per* KNIGHT BRUCE, L.J., at p. 926.

(*a*) *Wolverhampton and Walsall Rail. Co.* v. *London and North-Western Rail. Co.*, *supra*, and see title SPECIFIC PERFORMANCE.

(*b*) *Chaplin* v. *North-Western Rail. Co.*, *supra*.

(*c*) *Lumley* v. *Wagner* (1852), 1 De G. M. & G. 604; *Fellows* v. *Wood* (1888), 59 L. T. 513; *Grimston* v. *Cunningham*, [1894] 1 Q. B. 125; compare *Rolfe* v. *Rolfe* (1846), 15 Sim. 88.

(*d*) The stipulation must, however, be reasonable; see title INJUNCTION, Vol. XVII., p. 243, note (*g*). As to such stipulations generally, including stipulations in restraint of trade after the termination of the service, see pp. 88 *et seq.*, *ante*, and title TRADE AND TRADE UNIONS.

(*e*) As to injunction generally, see title INJUNCTION, Vol. XVII., pp. 197 *et seq.*

(*f*) *Whitwood Chemical Co.* v. *Hardman*, [1891] 2 Ch. 416, C. A.

(*g*) *Ibid.*, overruling *Montague* v. *Flockton* (1873), L. R. 16 Eq. 189, and *Webster* v. *Dillon* (1857), 3 Jur. (N. S.) 432.

(*h*) *Fechter* v. *Montgomery* (1863), 33 Beav. 22.

(*i*) *Webb* v. *England* (1860), 29 Beav. 44. As to the statutory power of the court to order specific performance, see p. 115, *post*.

(*k*) *Argles* v. *Heaseman* (1739), 1 Atk. 518; see title INFANTS AND CHILDREN, Vol. XVII., pp. 70, note (*b*), 72, note (*s*), 73, note (*p*).

SECT. 3.—*Summary Proceedings under the Employers and Workmen Act*, 1875.

SECT. 3. Summary Proceedings under the Employers and Workmen Act, 1875.

SUB-SECT. 1.—*In County Courts.*

County court jurisdiction.

222. A county court, in addition to its ordinary jurisdiction, possesses a special statutory (*l*) jurisdiction in respect of disputes (*m*) between employers and workmen (*n*) to adjust claims and to take security for the performance of a contract in lieu of awarding damages (*o*).

SUB-SECT. 2.—*In Courts of Summary Jurisdiction.*

Summary jurisdiction.

223. A court of summary jurisdiction (*p*), which for this purpose is to be deemed a court of civil jurisdiction (*q*), may exercise the same jurisdiction as a county court (*r*) on the complaint of the person aggrieved (*s*), but (1) the jurisdiction is not to be exercised where the amount claimed exceeds £10; (2) no order may be made for the payment of any sum exceeding £10 exclusive of costs (*a*); and (3) the amount of security to be required may not exceed £10 (*b*).

(*l*) See p. 102, *ante*, and title COUNTY COURTS, Vol. VIII., p. 646. This jurisdiction is apparently exclusive (*ibid.*).

(*m*) As to what constitutes a "dispute," see *Clemson* v. *Hubbard* (1876), 1 Ex. D. 179; *Bowes and Partners* v. *Press*, [1894] 1 Q. B. 202, C. A., where a wrongful absence from service was held to give rise to a "dispute." It is not limited to a cause of action (*Charles* v. *Plymouth Works (Mortgages)* (1890), 60 L. J. (M. C.) 20).

(*n*) For the classes of workmen affected, see titles FACTORIES AND SHOPS, Vol. XIV., pp. 516, 517; INFANTS AND CHILDREN, Vol. XVII., p. 72, note (*u*); SHIPPING AND NAVIGATION, pp. 103, *ante*, 147, *post*.

(*o*) Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90), s. 3; see title COUNTY COURTS, Vol. VIII., p. 646.

(*p*) Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90), s. 4. For courts of summary jurisdiction generally, see title MAGISTRATES, Vol. XIX., pp. 571 *et seq.*

(*q*) Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90), s. 4.

(*r*) The court has no jurisdiction if proceedings have already been taken in a county court (*Routledge* v. *Hislop* (1860), 2 E. & E. 549), provided that the subject-matter of the dispute is the same (*Hindley* v. *Haslum* (1878), 3 Q. B. D. 481). Nor, if summary proceedings have been taken, can proceedings be subsequently taken in a county court (*Millett* v. *Coleman*, *Dawson* v. *Coleman* (1875), 44 L. J. (Q. B.) 194). The jurisdiction of the court may be excluded by a valid arbitration clause (*London Tramways Co.* v. *Bailey* (1877), 3 Q. B. D. 217). The court has, however, jurisdiction although the contract of service provides for unlawful deductions from wages (*Burton* v. *Howe*, [1900] 2 Q. B. 232). The court may deal with all subsisting claims between the parties, and may set off an employer's claim for damages against a workman's wages, although the workman has made no claim for wages (*Keates* v. *Lewis Merthyr Consolidated Collieries, Ltd.*, [1910] 2 K. B. 445, C. A.; affirmed, [1911] A. C. 641). As to deduction and set-off, see p. 91, *ante*.

(*s*) Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90), s. 4. A workman may recover his wages in this way (*Stoddart* v. *Mitchell* (1902), 85 L. T. 686).

(*a*) An employer who has recovered £10 damages cannot, therefore, claim further damages in respect of a continuing breach (*James* v. *Evans & Co.*, [1897] 2 Q. B. 180). An employer does not by continuing to employ a workman after breach waive his right to recover damages for the breach (*Wynnstay Collieries* v. *Edwards* (1898), 79 L. T. 378).

(*b*) Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90), s. 4.

SECT. 3. **Summary Proceedings under the Employers and Workmen Act, 1875.**

Jurisdiction with regard to apprentices.

224. The jurisdiction of a court of summary jurisdiction extends to a dispute between a master and an apprentice (*c*), in respect of which the court has the same powers as if the dispute were between an employer and a workman, the instrument of apprenticeship being regarded as a contract between an employer and a workman (*d*). The court may in addition order the apprentice to perform his duties (*e*). Any person liable for the good conduct of the apprentice may, if the court so directs, be summoned as if he were the defendant to attend the hearing, and the court may, in addition to or in substitution for any order against the apprentice, order such person to pay damages for any breach of the contract of apprenticeship, not exceeding the amount to which he is liable under the instrument of apprenticeship (*f*).

Procedure.

225. The proceedings must be commenced in a court of summary jurisdiction for the district in which the defendant or one of the defendants dwells or carries on business or was employed at the time the cause of action arose, or in which he or one of them happens to be at the time of the entry of the action (*g*). The summons must be served four clear days at least before the hearing (*h*). Except in the case of an apprentice, against whom no order for commitment is to be made until he has been personally served with a judgment summons (*i*), personal service is not necessary, but the summons may be served by leaving it with an adult person at the office or place of business or employment of the defendant or one of the defendants (*j*).

Service of summons.

Notice of set-off and counterclaim.

226. The defendant cannot, except by leave of the court of summary jurisdiction and on terms, rely upon any set-off or counterclaim, unless notice thereof setting forth particulars has been served, by registered letter or otherwise, on the plaintiff at his address mentioned in the summons two clear days at least before the return day (*k*).

Where several workmen involved.

227. Where the liability of an employer to several of his workmen depends upon circumstances common to a whole class of their claims, the names of all the workmen whose claims are grounded

(*c*) Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90), s. 5. The apprentice must be an apprentice to the business of a "workman" within the meaning of the Act (see p. 115, note (*n*), *ante*); and the premium (if any) must not exceed £25 (Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90), s. 12).

(*d*) *Ibid.*, s. 6. If the instrument of apprenticeship is rescinded, the court may order the whole or part of the premium to be repaid (*ibid.*).

(*e*) *Ibid.* The penalty for disobedience is imprisonment for a period not exceeding fourteen days, which may be repeated if the disobedience continues (*ibid.*).

(*f*) *Ibid*, s. 7.

(*g*) Employers and Workmen Rules, 1886, r. 2 (Stat. R. & O. Rev., Vol. XI., Summary Proceedings, England, p. 35). The six months' limit fixed by the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 11 (as to which see title MAGISTRATES, Vol. XIX., p. 591), does not apply (*Charles* v. *Plymouth Works* (*Mortgagees*) (1891), 60 L. J. (M. C.) 20).

(*h*) Employers and Workmen Rules, 1886, r. 2.

(*i*) As to enforcement of order by committal, see p. 117, *post*.

(*j*) Employers and Workmen Rules, 1886, r. 2.

(*k*) *Ibid.*, r. 3. As to set-off and counterclaim generally, see title SET-OFF AND COUNTERCLAIM.

SECT. 3. Summary Proceedings under the Employers and Workmen Act, 1875.

upon common circumstances may be inserted as plaintiffs in one summons, or, where their number is large, the name of one plaintiff only may be inserted in the body of the summons, the names of the others, together with their descriptions and addresses and the amounts of their respective claims, being indorsed on the summons or added in a schedule annexed thereto (*l*). The name of any plaintiff may, however, be struck out by order of the court, if the employer at the hearing objects that his claim ought to be separately heard and determined upon the ground that the amount claimed, as well as the liability, is disputed, or that the claim depends on special circumstances (*m*). The case of the plaintiff first named in the summons is, unless the court otherwise directs, heard and determined, and the claims of the other plaintiffs abide the result (*n*). Where the first case is decided in favour of the plaintiff, the court makes an order on all the claims, which takes effect as if each claim had been separately heard and determined, and an order made upon each (*o*). Where the summons is dismissed, no workman whose name was included in the summons and was not struck out may afterwards institute proceedings in respect of the claim made in the summons, unless he satisfies the court that his name was included without his consent (*p*).

New trial and costs.

228. The court may, at the same or any subsequent court, set aside any judgment given *ex parte* and any process thereon, and may grant a new trial upon such terms as it may think fit (*q*).

The court has also power to allow any party the cost of employing a solicitor (*r*).

Enforcement of orders.

229. The proceedings before a court of summary jurisdiction are not to be deemed criminal proceedings (*s*). No warrant is to be issued for apprehending any person other than an apprentice for failing to appear to answer a complaint (*t*). Any sum of money for the payment of which an order is made may be directed to be paid by instalments, and such order may from time to time be rescinded or varied (*u*). Payment may be enforced by (1) distress, but no goods or chattels are to be taken which may not be taken under an execution issued by a county court (*a*); (2) committal under the Debtors Act, 1869 (*b*), but not by imprisonment otherwise (*c*).

(*l*) Employers and Workmen Rules, 1886, r. 4.
(*m*) *Ibid.*, r. 5.
(*n*) *Ibid.*, r. 6.
(*o*) *Ibid.*, r. 8.
(*p*) *Ibid.*, r. 7.
(*q*) *Ibid.*, r. 9.
(*r*) Not exceeding 10*s.* where the sum claimed exceeds 40*s.*, or 15*s.* where it exceeds £5 (*ibid.*, r. 11). For the court fees payable, and for the forms to be used, see *ibid.*, Schedule.
(*s*) Employers and Workmen Act, 1875 (38 & 39 Vict. c 90), s. 9.
(*t*) *Ibid.* As to the issue of such warrants, see title MAGISTRATES, Vol. XIX., pp. 593 *et seq.*
(*u*) Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90), s. 9.
(*a*) See titles COUNTY COURTS, Vol. VIII., p. 560; DISTRESS, Vol. XI., p. 226.
(*b*) 32 & 33 Vict. c. 62, s. 5. See title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 337 *et seq.*
(*c*) Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90), s. 9. With

Part VI.—Duties of the Master to the Servant.

SECT. 1.

SECT. 1.—*Physical Well-being of the Servant.*

Physical Well-being of the Servant.

230. The master is not, as a general rule, bound to provide board or lodging for his servant in the absence of a contract to that effect (*d*).

Board and lodging

Domestic servants.

231. Unless there is an express term to the contrary, such a contract is, in the case of domestic servants, to be implied from the very nature of their service (*e*).

Apprentices.

232. In the case of apprentices the instrument of apprenticeship usually contains an express term binding the master to provide board and lodging for the apprentice during the continuance of the apprenticeship or to pay wages in lieu thereof (*f*), and it may further require him to provide clothing or washing (*g*).

Medical attendance.

Domestic servants.

233. The master is not bound, in the case of a domestic servant (*h*), to provide medicines or medical attendance during the illness of his servant (*i*). No liability, therefore, rests upon the master, either as regards the medical man (*k*) or as regards any other person (*l*), to pay for such medicines or attendance on the

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these exceptions the powers conferred by the Act are in addition to and not in derogation of the ordinary powers of a court of summary jurisdiction (Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90), s. 9), for which see title MAGISTRATES, Vol. XIX., pp. 602 *et seq.*

(*d*) As to the criminal liability of a master who fails to provide food etc. when he is under a legal liability to do so, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 623 *et seq.*

(*e*) See p. 71, *ante*.

(*f*) When a youth serves a master on trial with a view to apprenticeship the master cannot, in the absence of agreement, charge for the board and lodging of the youth during the agreed probationary period, nor after it, if the youth stays on beyond that period without any apprenticeship (*Wilkins* v. *Wells* (1825), 2 C. & P. 231; *Earratt* v. *Burghart* (1828), 3 C. & P. 381; *Harrison* v. *James* (1862), 7 H. & N. 804; *Attwaters* v. *Courtney* (1841), Car. & M. 51). In such last case, however, the master may be liable on an implied contract for wages when he sends the youth away without taking him into apprenticeship (*Phillips* v. *Jones* (1834), 1 Ad. & El. 333).

(*g*) It is sufficient if the instrument provides for the supply of "lodging and all other necessaries" (*Abbott* v. *Bates* (1875), 45 L. J. (Q. B.) 117, C. A., where a custom for the apprentice to pay for clothes was held to be repugnant to the express terms of the instrument). If the father has bound himself to pay, the father and the master may subsequently agree that the son is to have an allowance, out of which he is to make the necessary payments himself (*Blackburne* v. *Davis* (1843), 1 Car. & Kir. 167).

(*h*) *Sellen* v. *Norman* (1829), 4 C. & P. 80; *a fortiori* in the case of other servants.

(*i*) *Simmons* v. *Wilmott* (1800), 3 Esp. 91; *R.* v. *Smith* (1837), 8 C. & P. 153; and see the cases cited in note (*l*), *infra*, and p. 119, notes (*m*)—(*q*), *post*; *contra*, *R.* v. *Winterset* (*Inhabitants*) (1783), Cald. Mag. Cas. 298, *per* BULLER, J., at p. 300.

(*k*) *Atkins* v. *Banwell* (1802), 2 East, 505; *Wennall* v. *Adney* (1802), 3 Bos. & P. 247; *Scarman* v. *Castell* (1795), 1 Esp. 270; *Cooper* v. *Phillips* (1831), 4 C. & P. 581.

(*l*) *Newby* v. *Wiltshire* (1784), 2 Esp. 739.

ground of the relation of the parties as master and servant. For this purpose the master's liability depends solely upon contract. If the master himself calls in a medical man for the purpose of attending his servant his liability to pay the medical man's charges is clear (*m*). If, on the other hand, the medical man is called in by the servant, the master is not liable (*n*), even though the necessity for the medical attendance arises from the fact that his servant has met with an accident in the course of his employment (*o*). The master may, however, by his conduct ratify his servant's act, and thus render himself liable to pay the medical man his charges, in which case it is immaterial that he has subsequently employed his own medical man for the purpose of attending his servant (*p*). A master who pays for medicines or medical attendance is not entitled to deduct the sum so paid from the servant's wages, unless there is a contract between them to that effect (*q*).

SECT. 1. **Physical Well-being of the Servant.**

As regards an apprentice, where the instrument of apprenticeship, as is usually the case, contains an express provision binding the master to provide medicines and medical attendance, if required, during the term (*r*), the master's duty is absolute, and on failing to discharge this duty he is liable to be convicted of a misdemeanour (*s*).

Apprentices.

SECT. 2.—*Safety of the Employment.*

234. It is an implied term of the contract of service at common law that a servant takes upon himself the risks incidental to his employment (*t*). Apart from special contract (*a*) or statute (*b*),

Extent of the master's duty

(*m*) *Sellen* v. *Norman* (1829), 4 C. & P. 80; *Cooper* v. *Phillips* (1831), 4 C. & P. 58.

(*n*) *Cooper* v. *Phillips*, *supra*.

(*o*) *Wennall* v. *Adney* (1802), 3 Bos. & P. 247; *Cooper* v. *Phillips*, *supra*. For illustrations on "the course of employment," see pp. 130, 168 *et seq.*, *post*.

(*p*) *Cooper* v. *Phillips*, *supra*.

(*q*) *Sellen* v. *Norman*, *supra*. When the servant is a "workman" within the meaning of the Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90) (see pp. 103, 115, note (*n*), *ante*, 147, *post*), such contract must be in writing (Truck Act, 1831 (1 & 2 Will. 4, c. 37), s. 23). As to what such writing must contain, see *Cutts* v. *Ward* (1867), L. R. 2 Q. B. 357. As to deductions from wages for this purpose, see title FACTORIES AND SHOPS, Vol. XIV., pp. 514 *et seq.*

(*r*) See Encyclopædia of Forms and Precedents, Vol. II., pp. 30, 34, 37.

(*s*) *R.* v. *Smith* (1837), 8 C. & P. 153; see Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), s. 26; Conspiracy, and Protection of Property Act, 1875 (38 & 39 Vict. c. 86), s. 6.

(*t*) *Smith* v. *Baker & Sons*, [1891] A. C. 325, *per* Lord HERSCHELL, at p. 360; *Johnson* v. *Lindsay & Co.*, [1891] A. C. 371, *per* Lord WATSON, at p. 382; *Thomas* v. *Quartermaine* (1887), 18 Q. B. D. 685, C. A., *per* BOWEN, L.J., at p. 691; *Hutchinson* v. *York, Newcastle, and Berwick Rail. Co.* (1850), 5 Exch. 343, *per* ALDERSON, B., at p. 352. It is otherwise where the risk is not incidental to the employment (*Mansfield* v. *Baddeley* (1876), 34 L. T. 696), or where the relation between the parties is not, strictly speaking, that of master and servant (*Gibbons* v. *Standon* (1867), 16 L. T. 497). As to the master's liability in case of accident to the servant, see pp. 134 *et seq.*, 153 *et seq.*, *post*.

(*a*) *Riley* v. *Baxendale* (1861), 6 H. & N. 445.

(*b*) See pp. 135 *et seq.*, 153 *et seq.*, *post*.

SECT. 2. **Safety of the Employment.**

therefore, he cannot call upon his master, merely upon the ground of their relation of master and servant, to compensate him for any injury which he may sustain in the course of performing his duties (*e*), whether in consequence of the dangerous character of the work upon which he is engaged (*d*), or of the breakdown of machinery (*e*), or of the negligence (*f*) or default (*g*) of his fellow servants or strangers. The master does not warrant the safety of the servant's employment; he undertakes only that he will take all reasonable precautions to protect him against accidents (*h*).

"Volenti non fit injuria."

235. The master's exemption from liability depends upon the application of the maxim *volenti non fit injuria* to the facts of the particular case (*i*). Where, therefore, the risk to which the servant is exposed is not in any way incidental to his employment (*k*), or, though incidental to the employment, is attributable to the master's personal negligence (*l*), no consent on the servant's part to take it upon himself is to be implied from the existence of the contract of service. The servant is, in such cases, entitled to recover damages for any injury which he may sustain in consequence of his exposure to the risk in the same way as if he were a stranger. He is equally entitled to recover if, in consequence of his youth (*m*), or otherwise (*n*), he fails to appreciate the risk, or where the master conceals or misrepresents it. Further, the master does not escape liability on the ground that the servant knew of the existence of the risk, or even that he appreciated or had the means of appreciating it (*o*); it must be shown, in addition, that the circumstances of the case necessarily lead to the inference that the risk was voluntarily encountered (*p*), and the mere fact that the servant, knowing and appreciating the risk, continues at his work does not

(*c*) *Tunney* v. *Midland Rail. Co.* (1866), L. R. 1 C. P. 291 (where the servant was injured whilst he was being conveyed home from his work); *Brydon* v. *Stewart* (1855), 2 Macq. 30, H. L. (where the servant was coming up out of a coal pit for his own purposes).

(*d*) *Smith* v. *Baker & Sons*, [1891] A. C. 325; *Webb* v. *Rennie* (1865), 4 F. & F. 608; *Woodley* v. *Metropolitan District Rail. Co.* (1877), 2 Ex. D. 384, C. A.

(*e*) *Sarton* v. *Hawksworth* (1872), 26 L. T. 851, Ex. Ch.

(*f*) *Griffiths* v. *Gidlow* (1858), 3 H. & N. 648.

(*g*) *Hall* v. *Johnson* (1865), 3 H. & C. 589, Ex. Ch.

(*h*) *Bond* v. *Wilson & Sons* (1908), 24 T. L. R. 238; *Brydon* v. *Stewart* (1855), 2 Macq. 30, H. L. As to the liability of the master for his own negligence, see pp. 128, 134 *et seq*., *post*.

(*i*) *Smith* v. *Baker & Sons*, *supra*; *Thomas* v. *Quartermaine* (1887), 18 Q. B. D. 685, C. A.; *Membery* v. *Great Western Rail. Co.* (1889), 14 App. Cas. 179; *Tozeland* v. *West Ham Union*, [1906] 1 K. B. 538. As to the defence of *volenti non fit injuria*, see also titles NEGLIGENCE; TORT.

(*k*) *Mansfield* v. *Baddeley* (1876), 34 L. T. 696; compare *Bartonshill Coal Co.* v. *McGuire* (1858), 3 Macq. 300, H. L., *per* Lord CHELMSFORD, L.C., at p. 311.

(*l*) As to the evidence required to support an action for negligence by a servant against his master, see pp. 128 *et seq*., *post*.

(*m*) *Grizzle* v. *Frost* (1863), 3 F. & F. 622; *Bass* v. *Hendon Urban District Council* (1911), 28 T. L. R. 8.

(*n*) *Thomas* v. *Quartermaine*, *supra*, *per* BOWEN, L.J., at p. 696.

(*o*) *Smith* v. *Baker & Sons*, *supra*, *per* Lord WATSON, at p. 355; *Hoey* v. *Dublin and Belfast Junction Rail. Co.* (1870), 5 I. R. C. L. 206.

(*p*) *Thomas* v. *Quartermaine*, *supra*, *per* BOWEN, L.J., at p. 697; *Yarmouth* v. *France* (1887), 19 Q. B. D. 647.

of itself imply his consent to encountering it and to trust to himself to keep from injury (*q*).

SECT. 2. Safety of the Employment.

The nature of the risk and the servant's connection with it must also be taken into consideration (*r*). If the possible cause of danger is under the servant's own control, as in the case of a defect in a machine of such a nature that his personal danger and consequent injury must be produced by his own act, and the servant clearly foresees that there is a likelihood of such a result, the fact that he continues to work must be regarded as consent (*s*). No consent is, however, to be implied where he has complained to the master of the risk and the master has promised to remedy it (*a*), and even his express consent to continue at his work, if given on the faith of the master's promise, will not relieve the master from the consequences of failure to fulfil his promise (*b*). If, on the other hand, the cause of the danger is beyond his own control, his failure to make a complaint may amount to acquiescence and exempt the master from liability (*c*).

Nature of risk.

236. Where the injury to the servant arises from the breach of an express statutory duty on the part of the master to take the prescribed precautions to protect the servant from danger, the maxim *volenti non fit injuria* is not applicable (*d*). In such cases, however, the defence of contributory negligence may be a good defence to an action for damages by the servant (*e*).

Breach of statutory duty.

SECT. 3.—*Character of the Servant.*

237. A master is under no duty either to give a servant a written testimonial as to character on leaving his employment (*f*) or to answer inquiries of persons wishing to take him into their service (*g*), and the servant has, therefore, no remedy in the event

Giving of character privileged.

(*q*) *Smith* v. *Baker & Sons*, [1891] A. C 325; *Watling* v. *Oastler* (1871), L. R 6 Exch. 73, *Brooke* v. *Ramsden* (1890), 63 L. T. 287.

(*r*) *Smith* v. *Baker & Sons*, *supra*.

(*s*) *Griffiths* v. *Gidlow* (1858), 3 H. & N 648.

(*a*) *Clarke* v. *Holmes* (1862), 7 H. & N 937, Ex. Ch.; *Holmes* v. *Worthington* (1861), 2 F. & F. 533; compare *Smith* v. *Dowell* (1862), 3 F. & F. 238. Even a continuance at work after the master's refusal to remedy the defect is not in itself sufficient (*Brooke* v *Ramsden* (1890), 63 L. T. 287; *Smith* v. *Baker & Sons*, *supra*, *per* Lord WATSON, at p 357), compare *Assop* v. *Yates* (1858), 2 H. & N. 768.

(*b*) *Clarke* v. *Holmes*, *supra*.

(*c*) *Thomas* v. *Quartermaine* (1887), 18 Q. B. D. 685, C. A.; but see *Smith* v. *Baker & Sons*, *supra*, *per* Lord HERSCHELL, at p 365

(*d*) *Baddeley* v. *Granville* (*Earl*) (1887), 19 Q. B. D. 423. But the fact that certain matters which were defences at common law have been taken away from the master by statute, so that (indirectly) new obligations are laid on the master, does not affect this defence (*Thomas* v. *Quartermaine*, *supra*, *per* BOWEN, L J., at pp 692, 693; *per* FRY, L J., at p. 703); and see p 129, *post*. As to penalties incurred by the owner of a factory or workshop in consequence of neglect to perform statutory duties, see title FACTORIES AND SHOPS, Vol XIV, pp. 531, 532

(*e*) *Stuart* v. *Evans* (1883), 49 L. T. 138; *Weblin* v. *Ballard* (1886), 17 Q. B. D. 122, *per* A. L. SMITH, L J, at p. 127; *Britton* v. *Great Western Cotton Co.* (1872), L. R. 7 Exch. 130, *per* BRAMWELL, B, at p 137.

(*f*) *Carrol* v. *Bird* (1800), 3 Esp 201.

(*g*) Compare *Handley* v. *Moffat* (1872), 7 I. R. C. L. 104.

SECT. 3. Character of the Servant.

of the master refusing to do so, however great the consequent injury may be. If the master chooses to make a statement as to the servant's character and the servant in consequence suffers damage, either by being unable to obtain employment, or by being dismissed from the employment which he may have obtained, his right of action depends solely upon whether the statement is actionable as being defamatory (*h*). If, therefore, the statement is true, no action will lie against the master (*i*). Even though it is untrue it is a privileged communication (*k*), since it is of importance to the public that characters of servants should be readily given (*l*), and there is, therefore, a presumption that it was made *bonâ fide* (*m*). The privilege is, however, qualified only, and may be rebutted upon proof of express malice (*n*). Thus, the servant is entitled to succeed if he proves that the statement was false to the knowledge of the master (*o*); and the existence of express malice may be inferred from the nature and contents of the statement (*p*), or from the circumstances (*q*) and manner (*r*) in which it is made. The conduct of the master may also be taken into consideration as indicating that the communication was made maliciously (*s*).

Extent of privilege.

238. The privilege not only attaches to communications made to persons who are thinking of engaging the servant (*t*) or have already taken him into their service (*a*), but extends also to communications made to his previous employers (*b*) or to the employment agency through which he may have been procured (*c*). Statements made to other persons are not privileged (*d*), unless it appears

(*h*) As to what constitutes defamation, see, generally, title LIBEL AND SLANDER, Vol XVIII., pp. 618 *et seq* ; and as to servants' characters, see *ibid.*, p. 688, and the cases referred to *ibid.*, note (*k*).

(*i*) *Ibid*, p. 670.

(*k*) *Rogers* v. *Clifton* (1803), 3 Bos. & P. 587 ; *Fountain* v. *Boodle* (1842), 3 Q. B. 5 ; *Harris* v. *Thompson* (1853), 13 C. B. 333 ; *R.* v. *Perry* (1883), 15 Cox, C. C. 169 The communication, if in writing, is not, however, privileged from production (*Webb* v. *East* (1880), 5 Ex. D. 108, C. A. ; title DISCOVERY, INSPECTION, AND INTERROGATORIES, Vol. XI , p. 84).

(*l*) *Edmonson* v. *Stephenson* (1766), Buller, Law of Nisi Prius, 8.

(*m*) *Rogers* v. *Clifton*, *supra*.

(*n*) As to qualified privilege, see, generally, title LIBEL AND SLANDER, Vol XVIII., pp. 685 *et seq*. As to the effect of express malice, see *ibid.*, pp. 711 *et seq*

(*o*) *Fountain* v. *Boodle*, *supra*

(*p*) *Ibid.*, *Fryer* v. *Kinnersley* (1863), 15 C. B. (N. S.) 422.

(*q*) *Rogers* v. *Clifton*, *supra* ; *Pattison* v. *Jones* (1828), 8 B. & C. 578.

(*r*) *Pattison* v. *Jones*, *supra*.

(*s*) *Kelly* v. *Partington* (1833), 4 B. & Ad. 700 ; *Rogers* v. *Clifton*, *supra* ; *Jackson* v. *Hopperton* (1864), 16 C. B. (N. S.) 829 ; *Murdoch* v. *Funduklian* (1886), 2 T. L. R. 215, 614, C. A.

(*t*) *Fountain* v. *Boodle*, *supra*.

(*a*) *Gardner* v. *Slade* (1849), 13 Q. B. 796 ; *Webb* v. *East* (1880), 5 Ex. D. 108, C. A.

(*b*) *Dixon* v. *Parsons* (1858), 1 F. & F. 24. Where the servant is in the employment of two masters at the same time, a communication from one to the other is privileged (*Harris* v. *Thompson*, *supra*).

(*c*) *Farquhar* v. *Neish* (1890), 17 R. (Ct. of Sess.) 716.

(*d*) Compare *Finden* v. *Westlake* (1829), Mood. & M. 461.

from the circumstances in which they are made that the master and the person to whom they were made had a common interest in the subject-matter of the statement (*e*). Thus, the master is entitled to inform his other servants (*f*), or his customers with whom his servant has been in the habit of dealing (*g*), that the servant is no longer in his employment. It does not necessarily follow, however, that a statement of the reasons for the servant being no longer employed should be equally privileged. To justify any such statement it must be made to a person such as a fellow servant (*h*), or, where the employer is a company, a shareholder of the company (*i*), who has an interest not merely in the fact of the servant ceasing to be employed, but also in the reasons therefor (*k*).

It is not necessary that the communication should be made by the master whose service the servant defamed is leaving. The privilege equally extends to a communication made to his present master by a former master (*l*), or even, where the facts are not inconsistent with its existence, by a stranger (*m*).

When privilege applies.

239. The master is protected whether the statement is spoken or written (*n*). The statement may be made in answer to inquiries (*o*), or may be volunteered by the master (*p*); and even where the master so conducts himself as to invite inquiries, in answer to which he makes the defamatory statement, the privilege is not necessarily rebutted (*q*). It must be observed, however, that whilst an answer given to an inquiry made by a would-be employer (*r*), or even by a friend of the servant (*s*), is clearly within the privilege, the fact that the master in the absence of sufficient

(*e*) *Taylor* v. *Hawkins* (1851), 16 Q. B. 308; *Jones* v. *Thomas* (1885), 53 L. T. 678; compare *Johnson* v. *Evans* (1799), 3 Esp. 32; *Toogood* v. *Spyring* (1834), 1 Cr. M. & R. 181, *per* PARKE, B., at p. 193; and see title LIBEL AND SLANDER, Vol. XVIII., pp. 686, 687.

(*f*) *Hunt* v. *Great Northern Rail. Co.*, [1891] 2 Q. B. 189, C. A.; *Somerville* v. *Hawkins* (1851), 10 C. B. 583.

(*g*) *Nevill* v. *Fine Arts and General Insurance Co.*, [1895] 2 Q. B. 156, C. A.

(*h*) *Hunt* v. *Great Northern Rail. Co.*, *supra*; *Somerville* v. *Hawkins*, *supra*; compare *Manby* v. *Witt* (1856), 18 C. B. 544.

(*i*) *Lawless* v. *Anglo-Egyptian Cotton Co.* (1869), L. R. 4 Q. B. 262; *Hamon* v. *Falle* (1879), 4 App. Cas. 247, P. C.; compare *Stott* v. *Evans* (1887), 3 T. L. R. 693.

(*k*) A statement of the reasons for dismissal may also be given to the parents of the servant (*Fowler* v. *Homer* (1812), 3 Camp. 294), or other persons *in loco parentis* (*Aberdein* v. *Macleay* (1893), 9 T. L. R. 539).

(*l*) *Dixon* v. *Parsons* (1858), 1 F. & F. 24.

(*m*) *Stuart* v. *Bell*, [1891] 2 Q. B. 341, C. A.; compare *Amann* v. *Damm* (1860), 8 C. B. (N. S.) 597.

(*n*) *Edmonson* v. *Stephenson* (1766), Buller, Law of Nisi Prius, 8.

(*o*) *Weatherston* v. *Hawkins* (1786), 1 Term Rep. 110; *Child* v. *Affleck* (1829), 9 B. & C. 403.

(*p*) *Pattison* v. *Jones* (1828), 8 B. & C. 578; compare *Stuart* v. *Bell*, *supra*.

(*q*) *Harris* v. *Thompson* (1853), 13 C. B. 333; *Pattison* v. *Jones*, *supra*.

(*r*) *Child* v. *Affleck*, *supra*.

(*s*) *Weatherston* v. *Hawkins*, *supra*; *King* v. *Waring* (1803), 5 Esp. 13; compare *Reid* v. *Blisland School Board* (1901), 17 T. L. R. 626.

SECT. 3. Character of the Servant.

justification volunteers a statement, in answer to inquiries, is evidence of malice (*t*). At the same time the master is entitled to correct any statement which may have been made as to his servant's character, if he subsequently discovers facts which he did not already know (*a*), and the privilege extends to statements as to his servant's conduct after the latter has left his service (*b*).

False character.

240. A master who makes a false and fraudulent statement as to his servant's character is liable to an action at the suit of any person injured thereby (*c*). A servant who forges and utters a testimonial purporting to be given by his master is guilty of a misdemeanour at common law (*d*).

When document property of servant.

241. Though the letters written by a master in answer to inquiries as to a servant's character remain the master's property, a general testimonial, which is intended to be used as a voucher on future occasions, becomes the property of the servant (*e*). An action will, therefore, lie at the suit of the servant against any subsequent employer who defaces any such testimonial by writing a defamatory statement upon it (*f*).

SECT. 4.—*Indemnity to the Servant.*

Implied duty.

242. From the existence of the relation of master and servant a duty is to be implied on the part of the master to indemnify or to reimburse his servant, as the case may be, against all liabilities and in respect of all expenses incurred by the servant either in consequence of obedience to his orders or in the reasonable performance of the duties of his employment (*g*). No right of indemnity or reimbursement, however, exists where the liabilities or expenses are incurred by the servant for his own purposes, or where, though incurred on the master's behalf, they are not covered by the authority to be implied from the course of the servant's employment, or from the master's subsequent ratification (*h*).

Effect of servant's misconduct or default.

243. A servant loses his right of indemnity or reimbursement, notwithstanding the fact that he was acting in the course of his employment, where the liabilities or expenses did not arise out of the nature of the transaction which he was employed to carry out,

(*t*) *Pattison* v. *Jones* (1828), 8 B. & C. 578; *Fountain* v. *Boodle* (1842), 3 Q. B. 5; and see title LIBEL AND SLANDER, Vol. XVIII., p. 686.

(*a*) *Gardner* v. *Slade* (1849), 13 Q. B. 796; *Child* v. *Affleck* (1829), 9 B. & C. 403.

(*b*) *Child* v. *Affleck*, *supra*.

(*c*) *Foster* v. *Charles* (1830), 6 Bing. 396; *Wilkin* v. *Reid* (1854), 15 C. B. 192. The liability is, of course, subject, in cases within it, to the Statute of Frauds Amendment Act, 1828 (9 Geo. 4, c. 14), s. 6; see titles GUARANTEE, Vol. XV., pp. 456 *et seq.*; MISREPRESENTATION AND FRAUD, pp 731 *et seq.*, *post*.

(*d*) See title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 711, note (*e*).

(*e*) *Wennhak* v. *Morgan* (1888), 20 Q. B. D. 635, *per* HUDDLESTON, B., at p. 638.

(*f*) *Wennhak* v. *Morgan*, *supra*; *Norris* v. *Birch*, [1895] 1 Q. B. 639, decided on the London Hackney Carriages Act, 1843 (6 & 7 Vict. c. 86), s. 22; but see *Taylor* v. *Rowan* (1835), 7 C. & P. 70; compare *Hurrell* v. *Ellis* (1845), 2 C. B. 295; *Rogers* v. *Macnamara* (1853), 14 C. B. 27.

(*g*) *Adamson* v. *Jarvis* (1827), 4 Bing. 66; compare *Dugdale* v. *Lovering* (1875), L. R. 10 C. P. 196.

(*h*) See title AGENCY Vol. I. 197.

but were solely attributable to his own default or breach of duty (*i*). The right is also lost where, by reason of his conduct, he has forfeited his right to receive any remuneration for his services (*k*).

SECT. 4. **Indemnity to the Servant.**

Unlawful transactions.

244. Where the transaction in which the servant is engaged is unlawful the servant is not entitled to be indemnified against the consequences of his own unlawful act (*l*). He cannot, therefore, enforce even an express promise on the part of the master to indemnify him (*m*). It is necessary, however, that he should be *in pari delicto* with his master (*n*). If the act done by the servant is one which is not on the face of it unlawful, but which his master appears to have a right to authorise him to do, the servant is not deprived of his right of indemnity by reason of the act turning out to have been unlawful (*o*). Even where the transaction is *primâ facie* unlawful he is entitled to his indemnity if he was led to believe by the master, and was justified in believing, that in the circumstances of the case the transaction was one in which he might lawfully engage (*p*). Since, however, the right of the servant is based upon his own personal innocence, he cannot recover where he knows or must be presumed to know that the transaction was unlawful (*q*).

Part VII.—Duties of the Servant to the Master.

SECT. 1.—*During Employment.*

Obedience.

Exercise of care and skill.

245. It is the duty of the servant to obey the master's lawful orders (*r*) and to serve him faithfully (*s*). It is also the servant's duty to take proper care of such property of the master as is entrusted to his charge (*t*) and to exercise reasonable care and skill in the discharge of his duties (*a*); and for negligence in these respects the servant may be made liable to the master in damages (*b*).

(*i*) See title AGENCY, Vol. I., p. 197.

(*k*) Compare *Lewis* v. *Samuel* (1846), 8 Q. B. 685.

(*l*) *Southern* v. *How* (1618), Cro. Jac. 468; compare *Shackell* v. *Rosier* (1836), 2 Bing. (N. C.) 634.

(*m*) *Smith (W. H.) & Son* v. *Clinton* (1908), 25 T. L. R. 34.

(*n*) *Dixon* v. *Fawcus* (1861), 3 E. & E. 537.

(*o*) *Adamson* v. *Jarvis* (1827), 4 Bing. 66, *Sheffield Corporation* v. *Barclay*, [1905] A. C. 392, *per* Lord HALSBURY, L.C., at p. 397, approving *Dugdale* v. *Lovering* (1875), L. R. 10 C. P. 196.

(*p*) *Burrows* v. *Rhodes*, [1899] 1 Q. B. 816.

(*q*) *Adamson* v. *Jarvis*, *supra*, *per* BEST, C.J., at p. 73, *Southern* v. *How*, *supra*.

(*r*) See pp. 64, 98, *ante*. A servant who has been ordered to produce at a trial, under the Foreign Tribunals Evidence Act, 1856 (19 & 20 Vict. c. 113), s. 5, documents in his physical possession is not bound to produce them unless it can be shown that he has such custody, possession, or control of the documents as would empower him to produce them without the authority of his master (*Eccles & Co.* v. *Louisville and Nashville Railroad Co.* (1911), 28 T. L. R. 67, C. A.).

(*s*) See pp. 99, 101, *ante*.

(*t*) See *Salop (Countess)* v. *Crompton* (1600), Cro. Eliz. 777, 784.

(*a*) See p. 100, *ante*.

(*b*) See, *e.g.*, *Lewson* v. *Kirk* (1610), Cro. Jac. 265; *Hussy* v. *Pacy* (1666), 1 Lev. 188; *Stumore, Weston & Co.* v. *Breen* (1886), 12 App. Cas.

SECT. 1. During Employment.

There is, however, no such breach of duty if the loss is occasioned by mere accident or circumstances beyond the servant's control (*c*). Protection and allegiance being due to the master, a servant may justify an assault committed in his defence (*d*).

Effect of accident.

Assault in master's defence.

SECT. 2.—*After Employment.*

Implied term.

246. It is an implied term in a contract of service that the servant shall act with good faith towards his master (*e*). It is a breach of that term, entitling the master to an injunction (*f*) or damages, or both (*g*), if after leaving his employment the servant uses against the interest of his late employer information surreptitiously gained by him during that employment (*h*); or such act may be regarded as a breach of trust or confidence without reference to any implied contract, in which event the servant will be liable to the same consequences (*i*). There is, however, nothing illegal in a servant, during his employment, endeavouring merely to recommend himself to his master's customers with a view to securing their custom should he subsequently set up in business himself (*k*).

Breach of trust.

698. As to the remedies for breach of contract, see p. 107, *ante*. As to negligence generally, see title NEGLIGENCE.

(*c*) *Savage* v. *Walthew* (1707), 11 Mod. Rep. 135, *per* HOLT, C.J.; *Nickson* v. *Brohan* (1713), 10 Mod. Rep. 109, 111.

(*d*) *Leeward* v. *Basilee* (1695), 1 Salk. 407; see also title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 609.

(*e*) *Robb* v. *Green*, [1895] 2 Q. B. 315, C. A.; *Morison* v. *Moat* (1851), 9 Hare, 241; and see title AGENCY, Vol. I., p. 184, and pp. 99, 101, *ante*.

(*f*) *E.g.*, *Lamb* v. *Evans*, [1893] 1 Ch. 218, C. A.; *Louis* v. *Smellie* (1895), 73 L. T. 226, C. A.; *Merryweather* v. *Moore*, [1892] 2 Ch. 518; *Summers & Co., Ltd.* v. *Boyce and Kinmond & Co.* (1907), 97 L. T. 505; and see title INJUNCTION, Vol. XVII., pp. 255, 256.

(*g*) *E.g.*, *Robb* v. *Green*, *supra*.

(*h*) *Helmore* v. *Smith* (2) (1886), 35 Ch. D. 449, C. A., *per* BOWEN, L.J., at p. 456; *Lamb* v. *Evans*, *supra*; *Robb* v. *Green*, *supra*. In the last case the defendant, while in the plaintiff's employment as his servant, copied from his employer's books a list of customers with their addresses, his intention being to use the list, after leaving the employment, to set up a rival business and induce the plaintiff's customers to deal with himself. See also *East Anglian Rail. Co.* v. *Lythgoe* (1851), 2 L. M. & P. 221; *Mercer* v. *Whall* (1845), 5 Q. B. 447; *Worthington Pumping Engine Co.* v. *Moore* (1902), 19 T. L. R. 84; and *Kirchner & Co.* v. *Gruban*, [1909] 1 Ch. 413, 422. In *Merryweather* v. *Moore*, *supra*, KEKEWICH, J., restrained the clerk to a firm of engine-makers from publishing or communicating a table of dimensions of engines on the ground that it was an abuse of the confidence, necessarily existing between the defendant and his employers, to use, except for the purposes of service, the opportunities which that service gave him of gaining information. See also the cases relating to grounds of discharge cited at pp. 98—101, *ante*.

(*i*) *Yovatt* v. *Winyard* (1820), 1 Jac. & W. 394, where the defendant was restrained from using or communicating certain veterinary recipes obtained while in the plaintiff's employment, "on the ground of there having been a breach of trust and confidence"; and see title INJUNCTION, Vol. XVII., p. 255, note (*l*); *Turner* v. *Robinson* (1833), 5 B. & Ad. 789 (assisting apprentice to quit service); *Boston Deep Sea Fishing and Ice Co.* v. *Ansell* (1888), 38 Ch. D. 339, C. A. (receiving commission).

(*k*) *Nichol* v. *Martyn* (1779), 2 Esp. 732, *per* Lord KENYON, C.J., at pp. 733, 734: "A servant, while engaged in the service of his master, has no right to do any act which may injure his master's trade, or undermine his business; but every one has a right, if he can, to better his situation in

SECT. 2. After Employment.

247. A servant is entitled to set up in business in competition with his late master after quitting his service, and to use the knowledge as to business methods acquired by him during the service (*l*). But a master and servant may enter into an agreement, which will be duly enforced (*m*), whereby the servant is prohibited from competing in business with his employer (*n*), or from soliciting his employer's customers (*o*), after the termination of the period of service.

Competition in business.

Part VIII.—Criminal Liability of the Servant.

SECT. 1.—*Breach of Contract amounting to a Criminal Offence.*

248. The wilful and malicious breach of a contract of service is, in certain circumstances, an offence punishable with fine or imprisonment (*p*); and special provisions apply to persons employed in the supply of gas and water (*q*).

In general.

Gas and water supply

SECT. 2.—*Criminal Offences committed in the Course of Employment.*

249. The criminal law makes special provision for dealing with servants who steal or embezzle the property of their masters; and certain classes of servants are punished with exceptional severity (*r*).

Embezzlement etc.

250. There are, in addition, various statutory provisions relating to persons employed in particular manufactures (*s*). It is an offence

Offences connected with certain manufactures.

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the would; and if he does it by means not contrary to law, though the master may be eventually injured, it is *damnum absque injuriâ*."

(*l*) *Louis* v. *Smellie* (1895), 73 L. T. 226, C. A., *per* LINDLEY, L.J., at p. 228.

(*m*) As to agreements in restraint of trade entered into between master and servant, see, generally, pp. 88—90, *ante*; see also title TRADE AND TRADE UNIONS.

(*n*) *Chesman* v. *Nainby* (1727), 2 Stra. 739; *Sainter* v. *Ferguson* (1849), 18 L. J. (C. P.) 217; *Baines* v. *Geary* (1887), 35 Ch. D. 154.

(*o*) *Homer* v. *Ashford and Ainsworth* (1825), 4 L. J. (O. S.) (C. P.) 62; *Dubowski & Sons* v. *Goldstein*, [1896] 1 Q. B. 478, C. A.

(*p*) Conspiracy, and Protection of Property Act, 1875 (38 & 39 Vict. c. 86), s. 5; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 565, 566.

(*q*) See titles CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 564, 566; GAS, Vol. XV., p. 357; WATER SUPPLY.

(*r*) See title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 644 (larceny by servant); pp. 650 *et seq.* (embezzlement); see *R.* v. *Messer* (1911), 132 L. T. Jo. 62, C. C. A. As to the offence of taking corn, contrary to orders, for the purpose of feeding the master's horses, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 629, note (*n*).

(*s*) These manufactures are (1) woollen, worsted, linen, cotton, flax, mohair, and silk hosiery manufactures (Hosiery Act, 1843 (6 & 7 Vict. c. 40); (2) felt, hat, fustian, iron, leather, fur, and hemp manufactures (Frauds by Workmen Act, 1748 (22 Geo. 2, c. 27), as amended by the Frauds by Workmen Act, 1777 (17 Geo. 3, c. 56), and Hosiery Act, 1843 (6 & 7 Vict. c. 40), s. 1). As to offences by workmen employed in factories, see title FACTORIES AND SHOPS, Vol. XIV., p. 534, and see *ibid.*, pp. 531—536. As to offences committed by miners, see title MINES, MINERALS, AND QUARRIES, pp. 497 *et seq.*, *post*. As to trade generally, see title TRADE AND TRADE UNIONS.

SECT. 2. Criminal Offences committed in the Course of Employment.

punishable on summary conviction (*t*) for any such person fraudulently to sell, pawn, purloin, or otherwise dispose of materials entrusted to him for the purpose of being manufactured or worked up (*a*). To constitute an offence it is sufficient if the materials, or their remains, as the case may be, are not returned to the employer, at his request, within a specified time (*b*). It is also an offence for any such person fraudulently to dispose of the tools, or other apparatus (*c*), entrusted to him for the purpose of manufacturing or working up the materials (*d*). Power is given to the employer, at all reasonable times of the day, to enter any premises where the manufacture is carried on, for the purpose of inspecting the state and condition of the materials (*e*) or tools (*f*) entrusted to the occupier, who is bound under a penalty to admit him.

Provision is made for the punishment of persons who knowingly purchase, receive (*g*), or dispose of (*h*) any materials or tools which have been fraudulently disposed of, and for the granting of search warrants upon reasonable cause for suspicion (*i*).

Part IX.—Liability of the Master in Case of Accident or Death.

SECT. 1.—*Master's Duty at Common Law* (*k*).

SUB-SECT. 1.—*In General.*

Original common law duty.

251. The common law has from early times imposed a duty on the master to take fitting care to see that the servants, jointly

(*t*) Under the Hosiery Act, 1843 (6 & 7 Vict. c. 40), s. 21, costs may be awarded to a successful defendant. As to enforcement of orders of courts of summary jurisdiction, see title MAGISTRATES, Vol. XIX., pp. 602 *et seq.*

(*a*) Hosiery Act, 1843 (6 & 7 Vict. c. 40), s. 2; Frauds by Workmen Act, 1748 (22 Geo. 2, c. 27), s. 1.

(*b*) Hosiery Act, 1843 (6 & 7 Vict. c. 40), s. 3; Frauds by Workmen Act, 1748 (22 Geo. 2, c. 27), s. 7.

(*c*) Including ingredients used for dyeing (Frauds by Workmen Act, 1777 (17 Geo. 3, c. 56), s. 16).

(*d*) Hosiery Act, 1843 (6 & 7 Vict. c. 40), s. 2; Frauds by Workmen Act, 1777 (17 Geo. 3, c. 56), s. 16.

(*e*) Hosiery Act, 1843 (6 & 7 Vict. c. 40), s. 13 (which permits inspection by an agent); Frauds by Workmen Act, 1777 (17 Geo. 3, c. 56), ss. 15, 16.

(*f*) Under the Hosiery Act, 1843 (6 & 7 Vict. c. 40), s. 13, the employer cannot inspect new inventions not disclosed to the public.

(*g*) *Ibid.*, s. 4; Frauds by Workmen Act, 1748 (22 Geo. 2, c. 27), s. 2; Frauds by Workmen Act, 1777 (17 Geo. 3, c. 56), s. 10.

(*h*) Hosiery Act, 1843 (6 & 7 Vict. c. 40), s. 5; Frauds by Workmen Act, 1777 (17 Geo. 3, c. 56), ss. 5, 16.

(*i*) Hosiery Act, 1843 (6 & 7 Vict. c. 40), s. 8; Frauds by Workmen Act, 1777 (17 Geo. 3, c. 56), ss. 10, 16. The police are empowered to arrest on suspicion (Hosiery Act, 1843 (6 & 7 Vict. c. 40), s. 9; Frauds by Workmen Act, 1777 (17 Geo. 3, c. 56), s. 11); see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 303, note (*f*).

(*k*) The master's responsibility to make compensation in case of the accident or death of a servant has a threefold origin, *i.e.*, (1) the common

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engaged with him in carrying on his work or industry, shall not suffer injury either in consequence of his personal negligence, or through his failure properly to superintend and control the undertaking in which he and they are mutually engaged (*l*).

A breach of this duty causing personal injury has always given the servant a right of action for reparation. For his own personal negligence a master was always liable, and still is liable, at common law (*m*); and if the master actually takes part in the work himself, he is responsible for his negligence to a servant equally as to a stranger (*n*); while if the master is a private firm the negligence of one partner is accounted the negligence of the master (*o*).

Extent of duty.

252. The duty to superintend and properly to control his work or industry in the interest of the safety of the servants extends to:—

(1) The provision of proper and suitable plant. It is negligence for which a master is liable if he knows or ought to know (*p*) that the machinery or tackle to be used by the persons employed by him is improper or unsafe, and notwithstanding that knowledge sanctions its use (*q*). An employer is bound at common law so to carry on his business as not to expose his workmen to unreasonable risks (*r*).

(2) The selection of fit and competent fellow servants. Where the master personally selects his servants he owes a duty to each to select and engage only such as are fit and competent (*s*).

(3) A proper system and control of the work. If the system upon which the work is carried on is defective, and the system has been devised or approved by the master, or where, a proper system having been laid down, it is negligently departed from, and the departure is known or (it may be) ought to be known (*t*) to the master, he is liable to a servant who thereby suffers injury (*a*).

(4) The observance of regulations imposed by statute. Where an absolute statutory duty is imposed upon the master to secure the safety of his servants he is liable to his servants for the consequence of a breach of this duty. Probably, in such a case, he cannot rely upon the defence of common employment (*b*), neither

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law; (2) the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42) (see p. 134, *post*); (3) the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58) (see p. 153, *post*).

(*l*) As to the master's duty in respect of the safety of employment, see p. 119, *ante*.

(*m*) *Thomas* v. *Quartermaine* (1887), 18 Q. B. D. 685, C. A., *per* BOWEN, L.J., at p. 691. As to negligence in general, see title NEGLIGENCE.

(*n*) *Ashworth* v. *Stanwix* (1861), 3 E. & E. 701.

(*o*) *Mellors* v. *Shaw* (1861), 1 B. & S. 437; see title PARTNERSHIP.

(*p*) See *Indermaur* v. *Dames* (1866), L. R. 1 C. P. 274, *per* WILLES, J., at p. 288.

(*q*) *Mellors* v. *Shaw*, *supra*, *per* CROMPTON, J., at p. 444; *Paterson* v. *Wallace & Co.* (1854), 1 Macq. 748, H. L.; *Hall* v. *Johnson* (1865), 3 H. & C. 589, Ex. Ch.; *Brydon* v. *Stewart* (1855), 2 Macq. 30, H. L.; *Roberts* v. *Smith* (1857), 2 H. & N. 213, Ex. Ch.

(*r*) *Smith* v. *Baker & Sons*, [1891] A. C. 325; *per* Lord HERSCHELL, at p. 362.

(*s*) *Burtonshill Coal Co.* v. *Reid* (1858), 3 Macq. 266, H. L.

(*t*) Compare *Indermaur* v. *Dames*, *supra*.

(*a*) *Sword* v. *Cameron* (1839), 1 Dunl. (Ct. of Sess.) 493; *Smith* v. *Baker & Sons*, *supra*; *Brydon* v. *Stewart*, *supra*; *Brown* v. *Accrington Cotton Co.* (1865), 3 H. & C. 511.

(*b*) This seems to be the decision in *Groves* v. *Wimborne* (*Lord*), [1898] 2

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is it necessary to prove negligence (*c*). The action is founded upon a breach of statutory duty causing injury to one for whose benefit the duty was imposed (*d*).

Liability depends upon extent of interference.

253. The master's liability in respect of his common law obligations depends upon the extent to which he actively interferes in the control and management of the work or business.

His duty must be determined by reference to all the circumstances of place and time. In many cases it is convenient, sometimes necessary, that the duty imposed upon him should be delegated. If the duty is delegated to a competent subordinate the responsibility of the master in respect of his primary common law responsibility ceases. The master is only liable to his servant for a breach of that which he has contracted with him to do (*e*). A master rarely, if ever, contracts in express terms with a servant personally to superintend the work, and there is no such contract implied by law from the relationship. Further, the master is often wanting in the skill and experience requisite to ensure efficiency and safety, and in many cases the magnitude of his undertaking renders a personal superintendence impossible (*f*).

Delegation of duty.

254. The exception to the master's power to delegate his common law duty arises where the duty is an absolute statutory duty imposed upon him in his capacity of master; and while an action for breach of this duty need not be based upon negligence, the breach of a statutory duty may be regarded as negligence (*g*).

Liability to maintain proper plant and competent servants.

255. A failure to maintain proper plant and equipment and competent servants is equally a breach of the master's duty at common law as is a failure to provide them in the first instance. He must keep the machinery in the condition in which, from the terms of the contract or the nature of the employment, the servant has a right to expect that it will be kept (*h*). This involves a duty to inspect from time to time the plant and equipment employed in the undertaking, whether inanimate or animate (*i*).

Effect of delegation of duty.

Even where the master has delegated the duty of seeing that his

Q. B. 402, C. A., but VAUGHAN WILLIAMS, L.J., at p 415, expresses some doubt on the point. As to common employment, see pp. 132 *et seq.*, *post*.

(*c*) *Holmes* v. *Clark* (1861), 6 H. & N. 349; (1862), 7 H. & N. 937, Ex. Ch.; *Coe* v. *Platt* (1851), 6 Exch. 752; *Baddeley* v. *Granville* (*Earl*) (1887), 19 Q. B. D. 423; *Groves* v. *Wimborne* (*Lord*), [1898] 2 Q. B. 402, C. A.; *David* v. *Britannia Merthyr Coal Co.*, [1909] 2 K. B. 146, C. A. The question whether statutory rules fix an absolute statutory duty on the employer has been questioned by the Scottish courts (*Bett* v. *Dalmeny Oil Co., Ltd.* (1905), 7 F. (Ct. of Sess.) 787; *Calder* v. *Ninimo & Co., Ltd.* (1906), 45 Sc. L. R. 212; *Black* v. *Fife Coal Co., Ltd.*, [1909] S. C. 152).

(*d*) See title ACTION, Vol. I., p. 8.

(*e*) *Wilson* v. *Merry* (1868), L. R. 1 Sc. & Div. 326, 332.

(*f*) *Smith* v. *Howard* (1870), 22 L. T. 130.

(*g*) *Groves* v. *Wimborne* (*Lord*), *supra*; *David* v. *Britannic Merthyr Coal Co*, *supra*.

(*h*) *Clarke* v. *Holmes* (1862), 7 H. & N. 937, Ex. Ch.

(*i*) *Murphy* v. *Phillips* (1876), 35 L. T. 477; *Tarry* v. *Ashton* (1876), 1 Q. B. D. 314; *Webb* v. *Rennie* (1865), 4 F. & F. 608.

plant is fit and proper to another he is liable if, knowing of the condition, he fails to remedy it or to have it remedied, but it is submitted that where he takes no active part in the management of the work, and deputes this to competent deputies, and is in fact ignorant of the failure to maintain, no common law responsibility attaches to him (*j*).

Liability varies according to danger, and skill of servants employed.

256. The extent of the master's duty varies according to the degree of danger involved in the work, and also according to the skill and experience possessed by the servants.

With respect to inexperienced servants, and particularly children, the master's duty extends to giving, or causing to be given, proper instruction where from want of familiarity with the work or dangers involved, or from tender age, such instruction is necessary. Whilst the inexperience or tender age continues there is a duty to exercise oversight, and give cautions, and, sometimes, to take active measures to see that these are observed (*k*).

Effect of delegation.

This duty, as in other cases, the master is able to delegate to a person competent to perform it, and if such person, being competent, neglects to perform the duty, or performs it in an inefficient way, the master has nevertheless performed his duty, and is relieved from responsibility at common law (*l*).

Effect of contributory negligence.

257. If, although there has been a breach of duty on the part of the master, the servant has been guilty of contributory negligence, and the injury to the servant has been occasioned by such joint negligence, the master is not liable (*m*).

"*Volenti non fit injuria.*"

258. If the workman, knowing and appreciating the risk and danger of the work, voluntarily contracts to encounter it, the master is not liable if personal injury results from the risk or danger thus voluntarily undertaken: *volenti non fit injuria* (*n*).

"*Actio personalis moritur cum persona.*"

259. An action at common law cannot be brought by a servant against the personal representatives of an employer in respect of a breach of his common law duty towards such servant (*o*).

An action at common law cannot be brought against the master by the personal representatives or relatives of a servant whose death was occasioned by a breach on the part of the master of

(*j*) *Wilson* v. *Merry* (1868), L. R. 1 Sc. & Div. 326, 332; *Howells* v. *Landore Steel Co.* (1874) L. R. 10 Q. B. 62.

(*k*) *Grizzle* v. *Frost* (1863), 3 F. & F. 622; *O'Byrne* v. *Burn* (1854), 16 Dunl. (Ct. of Sess.) 1025; *Crocker* v. *Banks* (1888), 4 T. L. R. 324; *Robinson* v. *Smith (W. H.) & Son* (1901), 17 T. L. R. 423, C. A.; *Cooke* v. *Midland Great Western Railway of Ireland*, [1909] A. C. 229.

(*l*) *Cribb* v. *Kynoch, Ltd.*, [1907] 2 K. B. 548; *Young* v. *Hoffmann Manufacturing Co., Ltd.*, [1907] 2 K. B. 646, C. A.

(*m*) *Weblin* v. *Ballard* (1886), 17 Q. B. D. 122; compare *Thomas* v. *Quartermaine* (1887), 18 Q. B. D. 685, 699, C. A.; see title NEGLIGENCE.

(*n*) As to the application of this maxim in cases of breach of duty as to safety of employment, see p. 120, *ante*; see also title TORT. Where an action is brought against a master for negligence consisting in allowing the premises to be in an unsafe condition, it is necessary to prove not only that the master knew of that condition, but that the servant was ignorant of the danger (*Griffiths* v. *London and St. Katharine Docks Co.* (1884), 13 Q. B. D. 259, C. A.); see also *Smith* v. *Baker & Sons*, [1891] A. C. 325.

(*o*) See titles ACTION, Vol. I., p. 31; EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 312.

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his common law duty (*p*), but a statutory right of action under certain conditions is now given (*q*).

SUB-SECT. 2.—*The Doctrine of Common Employment.*

Definition of doctrine.

260. The doctrine of common employment (*r*) may be expressed in the following terms:—If the person occasioning and the person suffering an injury are fellow servants engaged in a common employment, for and under the same master, the master is not liable for the consequences of the injury (*s*).

How far available as a defence.

261. An employer sued by a servant in respect of injury incurred in the course of the employment may still set up as a defence the doctrine of common employment, save in so far as the doctrine is abrogated by the Employers' Liability Act, 1880 (*t*).

Where the contract of service in express terms excludes liability under the Employers' Liability Act, 1880 (*t*), it does not impliedly exclude the doctrine of common employment (*u*). That doctrine, being an incident of a contract of service voluntarily entered into, cannot, however, be set up where the work being performed at the time of the accident is not voluntary in its nature, but compulsory (*v*).

Doctrine applies to servants in different positions.

262. The relative positions which the servants occupy in the undertaking or industry makes no difference in the application of the doctrine (*a*). The chief engineer of a vessel is in common

(*p*) See title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 305.

(*q*) By the Fatal Accidents Act, 1846 (9 & 10 Vict. c. 93) (generally known as "Lord Campbell's Act"), as amended by the Fatal Accidents Act, 1864 (27 & 28 Vict. c. 95), and the Fatal Accidents (Damages) Act, 1908 (8 Edw. 7, c. 7); see title NEGLIGENCE.

(*r*) Whether at any time, since the relation of master and servant has been a purely contractual one, the master was accounted liable to a servant for the negligence of a fellow servant is a matter of some doubt. In 1837 this point came before the Court of Exchequer, and it was decided that the master was not liable, and the principle since known as the "doctrine of common employment" was declared to attach to and govern the ordinary contract of master and servant (see *Priestley* v *Fowler* (1837), 3 M. & W. 1)

(*s*) The rule that the master should be responsible for the acts of his servants when engaged in his work, *respondeat superior*, but not to his servants injured in the course of the work, has often been declared unfair and inequitable. This principle has been defended on various grounds. In *Priestley* v. *Fowler*, *supra*, the first decided case, it was placed on the ground of the inconvenience which would result if actions of such a nature were allowed. In *Hutchinson* v. *York, Newcastle, and Berwick Rail. Co.* (1850), 5 Exch. 343, it was defended upon the ground of an implied term in the contract that the servant should take all the ordinary risks incident to the employment, including the risk of injury at the hands of fellow servants. The doctrine was finally established by *Bartonshill Coal Co.* v. *Reid* (1858), 3 Macq. 266, H. L. This doctrine does not apply in the case of an infant too young to appreciate the consequences of agreeing to undertake the risk of a fellow workman's negligence (*Bass* v. *Hendon Urban District Council* (1911), 28 T. L. R. 8).

(*t*) 43 & 44 Vict. c. 42; see pp. 134 *et seq.*, *post.*

(*u*) *Burr* v. *Theatre Royal, Drury Lane, Ltd.*, [1907] 1 K. B. 544, C. A.

(*v*) *Tozeland* v. *West Ham Union*, [1907] 1 K. B. 920, C. A.

(*a*) The operation of the doctrine was felt to occasion special injustice to workmen in large industrial undertakings where the master took no active part in the management, but deputed the whole duties of

employment with an ordinary seaman employed by the same company (*b*), the master of a ship with a seaman (*c*), a railway guard with a ganger of platelayers employed by the same railway company (*d*), a builder's labourer with a foreman (*e*), a miner with an overseer of the mine (*f*).

Contractual liability.

Nor is it necessary, for the doctrine to apply, that the servant occasioning the injury and the sufferer from it should be engaged in the same work or even in work *ejusdem generis*. It is sufficient that they are both engaged in some part of the industry or work carried on by the common master (*g*).

Relationship to one master essential.

263. The doctrine does not apply when, although the servants are collaborating in a common work, they are not employed by the same master. It is relationship to one master, not merely association in a common work, which brings the workmen within the scope of the doctrine (*h*).

Negligence of master essential.

Further, the master is not and cannot be liable to his servant unless there be negligence on the part of the master in that which he has contracted or undertaken to do. The master has not contracted or undertaken to execute in person the work connected with his business.

Servants of contractor and sub-contractor.

264. A workman of a sub-contractor is not precluded from recovering if injured by the negligence of a servant of the principal contractor. In the same way a servant of a principal contractor may recover from a sub-contractor if injured owing to the negligence of the servant of the sub-contractor (*i*).

Workmen lent by one master to another.

265. A workman lent by one master to another may become the servant of the master to whom he is lent, or may remain the servant of the master whom he has contracted to serve, though engaged in the work of the other (*j*). In the former case he becomes

management to deputies and overlookers. In the case of corporations the defence of common employment nearly always succeeded, for a corporation as such could rarely, if ever, be convicted of negligence.

(*b*) *Searle* v. *Lindsay* (1861), 11 C. B. (N. S.) 429.

(*c*) *Hedley* v. *Pinkney & Sons Steamship Co*, [1892] 1 Q. B. 58, C. A.; see also *Gordon* v. *Pyper*, [1892] W. N. 169, H. L.; *Conway* v. *Belfast and Northern Counties Rail Co.* (1877), 11 I. R. C. L. 345, Ex. Ch.; *Gillies* v. *Cairns* (1905), 8 F. (Ct. of Sess.) 174.

(*d*) *Waller* v. *South Eastern Rail. Co.* (1863), 2 H. & C. 102.

(*e*) *Wigmore* v. *Jay* (1850), 5 Exch. 354.

(*f*) *Hall* v. *Johnson* (1865), 3 H. & C. 589, Ex. Ch.

(*g*) *Coldrick* v. *Partridge, Jones & Co, Ltd.*, [1910] A. C. 77.

(*h*) *Vose* v. *Lancashire and Yorkshire Rail. Co.* (1858), 2 H. & N. 728; *Swainson* v. *North-Eastern Rail. Co.* (1878), 3 Ex. D. 341, C. A.; *Johnson* v. *Lindsay & Co.*, [1891] A. C. 371; *Wilson* v. *Merry* (1868), L. R. 1 Sc. & Div. 326, 332.

(*i*) *Vose* v. *Lancashire and Yorkshire Rail. Co.*, *supra*; *Swainson* v. *North-Eastern Rail. Co.*, *supra*; *Turner* v. *Great Eastern Rail. Co.* (1875), 33 L. T. 431; *Johnson* v. *Lindsay & Co.*, *supra*.

(*j*) For cases where the workman lent passed into the service of his temporary master, see *Rourke* v. *White Moss Colliery Co.* (1877), 2 C. P. D. 205, C. A.; *Donovan* v. *Laing, Wharton, and Down Construction Syndicate*, [1893] 1 Q. B. 629, C. A.; *Jones* v. *Scullard*, [1898] 2 Q. B. 565; *Perkins* v. *Stead* (1907), 23 T. L. R. 433. For examples to the contrary, see *Moore* v. *Palmer* (1886), 2 T. L. R. 781, C. A.; *Dewar* v. *Tasker & Sons*

SECT. 1. Master's Duty at Common Law.

a fellow workman with the servants with whom he is working, and the doctrine of common employment can be set up against him or as an answer to his negligence; in the latter case, it is submitted, the doctrine cannot be set up either against him or in respect of his acts (*l*).

Temporary transfer of service.

If the general master has parted for the time being with his right of control as master, including his right of regulating the nature of the servant's duties, and the time, place, and manner in which they are to be performed, within the general scope of his contract of service, and these rights, with the consent of all the parties, have been assumed, though temporarily, by the master to whom he has been lent, the latter, having the rights, has all the responsibilities attaching to the relationship. The workman in this case is in common employment with those with whom he is working. If these rights are not parted with by his general master, or assumed by the temporary master, the servant remains a servant of the general master. The difficulty in practice is that, in a case of temporary service, some of those rights are often parted with to the temporary master and some retained by the general master (*k*).

Effect of voluntary assistance.

266. A workman who voluntarily assists the servant of a master to whom he owes no duty becomes a fellow-workman with him, and is, whilst so engaged, subject to the doctrine of common employment (*l*), but a person who, in a transaction in which he has an interest in common with an employer, assists the workmen of such employer, with the assent, express or implied, of the employer, is not a fellow-workman. Probably both things must concur—the common interest, and the, at least implied, assent of the person who is to be held liable for the accident (*m*).

Necessity for employer's assent.

SECT. 2.—*Employers' Liability Act*, 1880.

SUB-SECT. 1.—*General Effect of the Act.*

General effect.

267. The Employers' Liability Act, 1880 (*n*) (in this section of the title frequently referred to as "the Act"), does not abolish, though it largely modifies, the doctrine of common employment.

(1907), 23 T. L. R. 259, C. A.; *Union Steamship Co.* v. *Claridge*, [1894] A. C. 185, P. C.; see also *Jones* v. *Liverpool Corporation* (1885), 14 Q. B. D. 890; *Waldock* v. *Winfield*, [1901] 2 K. B. 596; *M'Cartan* v. *Belfast Harbour Commissioners*, [1911] 2 I. R. 143, H. L. For the purposes of the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), a workman whose services are temporarily lent or let on hire by his employer to another person is deemed to remain in the employment of the person by whom he is so lent or let on hire (*ibid.*, s. 13), and apparently loses all right to recover compensation from the new employer (*Richards* v. *Payne* (1908) (unreported), 27th November, 2nd December, C. A.); and see p. 191, *post*.

(*k*) See note (*j*), p. 133, *ante*.

(*l*) *Degg* v. *Midland Rail. Co.* (1857), 1 H. & N. 773; *Potter* v. *Faulkner* (1861), 1 B. & S. 800, Ex. Ch.; as to an infant, see *Bass* v. *Hendon Urban District Council* (1911), 28 T. L. R. 8.

(*m*) *Wright* v. *London and North Western Rail. Co.* (1876), 1 Q. B. D. 252, C. A.

(*n*) 43 & 44 Vict. c. 42. The Act was passed as a tentative measure, its duration being limited to seven years (*ibid.*, s. 10). Since the expiration of the limited time it has been kept in force by being inserted

SECT. 2. Employers' Liability Act, 1880.

Modification of common law rules.

The general effect of the Act (*o*) is that, whereas before its passing a workman injured in the course of his employment could only recover compensation when he could prove that his employer had either neglected a statutory duty imposed upon him, or was personally responsible for the negligence which led to the injury, he may now recover where the employer—be he a private employer or a corporation—has delegated his duties or powers of superintendence to other persons, and such other persons have negligently performed the duties or powers delegated to them (*p*).

No additional rights conferred.

268. Where the Act (*o*) applies no special privilege is given either to the workman or, in case of death, to his representatives. They are to have the same right of compensation and remedies against the employer as if the workman had not been a workman of the employer, nor in his service, nor engaged in his work (*q*), and this cannot be construed as an enactment giving to him any additional rights (*r*).

SUB-SECT. 2.—*Defences Open to Master.*

Defences in addition to those given by the Act.

269. In addition to the defences which are given by the Act itself, the employer may avail himself of any defence which would be available to him if the action were brought against him by a person not in his service.

The most important of these defences are:—

(1) That the act of his servant causing the injury was committed wilfully (*s*);

(2) that the servant, when he occasioned the injury, was not acting within the scope of his authority (*t*);

(3) that the injury was unavoidable in the sense that it occurred despite all due care and diligence (*u*);

(4) that the injured person was a trespasser at the time of the injury, or a bare licensee, to whom no duty, or a very slight duty, was owed (*v*);

(5) that the injured person was guilty of contributory negligence (*w*);

(6) that the injured person voluntarily and with full knowledge of the danger contracted to take the risk which led to the injury (*x*).

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annually in the Expiring Laws Continuance Acts. See Expiring Laws Continuance Act, 1911 (1 & 2 Geo. 5, c. 22).

(*o*) See note (*n*), p. 134, *ante*.

(*p*) This is the effect of the Act stated in general terms. In the case of railway companies the obligation is somewhat more extensive; see the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), s. 1 (5); and title RAILWAYS AND CANALS.

(*q*) Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), s. 1.

(*r*) *Thomas* v. *Quartermaine* (1887), 18 Q. B. D. 685, C. A., *per* BOWEN, L.J., at p. 692.

(*s*) See p. 136, *post*.

(*t*) See p. 136, *post*.

(*u*) See p. 137, *post*.

(*v*) See p. 137, *post*.

(*w*) See p. 138, *post*.

(*x*) As to the defence *volenti non fit injuria*, see p. 131, *ante*; see also title TORT; and for a full discussion of the defence, see *Smith* v. *Baker & Sons*, [1891] A. C. 325.

SECT. 2. Employers' Liability Act, 1880.

Wilful act of servant.

270. Recklessness and wanton disregard of life and safety may import not negligence alone, but malice and criminal intent. A master is not liable for the wilful wrongdoing of his servants, at all events where such wilful wrongdoing was not done to further the master's interest (*z*). But where the act, though done wilfully and wrongly, and even maliciously, was done for the purpose of furthering the master's interests, he may be responsible for such wilful act (*a*).

Act not within scope of employment.

271. A servant in the performance of acts not necessarily outside the duties of a person of such class is presumed to do such acts by his master's authority. Hence, where the relation is shown to exist, it lies on the master to negative this presumption if, in fact, authority does not exist (*b*). If, however, the servant is acting in fact outside the general scope of his employment, the master is not responsible (*c*). The question is generally one of fact whether the servant, at the time he caused the injury, was acting entirely outside his master's business or was only, whilst engaged in such business, doing an act unnecessary for the master's service, and which may have been expressly or impliedly forbidden by the master. In the former case he cannot make the master liable, in the latter he may do so (*d*).

The master is responsible only so long as the servant can be said to be doing the act, in the doing of which he is guilty of negligence, in the course of his employment as a servant (*e*).

It is not sufficient that the master may have expressly forbidden the servant to act in the way he was doing it when he occasioned the injury (*f*); and a master by giving secret instructions to his servant cannot discharge himself of liability (*g*)

(*z*) *Lumsden* v. *London and South-Western Rail Co.* (1867), 16 L. T. 609; *Walker* v. *South Eastern Rail. Co.*, *Smith* v. *Same* (1870), L. R. 5 C. P. 640; see *Lloyd* v. *Grace, Smith & Co.*, [1911] 2 K. B. 489, C. A.

(*a*) *Croft* v. *Alison* (1821), 4 B. & Ald 590; *Limpus* v. *London General Omnibus Co.* (1862), 1 H & C. 526, Ex. Ch.; *Dyer* v *Munday*, [1895] 1 Q. B. 742, C. A.; *Cheshire* v. *Bailey*, [1905] 1 K. B 237, C. A. The difficulty arises from the possibility that the motive prompting what is called the wilful act of the servant may be a mixed one, in part the desire to forward the employer's interests, and in part to gratify a feeling of irritation and vexation in the mind of the servant. Possibly the effective motive, if it can be ascertained, must be regarded.

(*b*) *Stevens* v. *Woodward* (1881), 6 Q. B. D. 318; *Beard* v. *London General Omnibus Co*, [1900] 2 Q. B. 530, C. A.

(*c*) *Storey* v. *Ashton* (1869), L. R 4 Q B. 476; *Mitchell* v. *Crasswellar* (1853), 13 C B. 237; *Joel* v *Morrison* (1834), 6 C. & P. 501; *Sanderson* v. *Collins*, [1904] 1 K. B. 628, C. A.; *Harris* v. *Fiat Motors, Ltd.* (1906), 22 T. L. R. 556 (reversed on ground that the point relied on had not been properly taken (1907), 23 T. L. R. 504, C. A); *Coupé Co.* v. *Maddick*, [1891] 2 Q. B. 413; title AGENCY, Vol. I., p. 212.

(*d*) See p. 137, *post*.

(*e*) *Storey* v. *Ashton*, *supra*, *per* COCKBURN, C.J., at p. 479 The question of negligence on the part of the servant is a question for the jury (*Leaver* (*Pauper*) v. *Pont-y-Pridd Urban District Council* (1911), 56 Sol. Jo. 32, H. L.)

(*f*) Thus, where an omnibus company had forbidden its drivers to race with the omnibuses of a rival company, it was nevertheless held responsible for an accident caused by the neglect of these instructions (*Limpus* v. *London General Omnibus Co.*, *supra*).

(*g*) *Ibid.*, *per* WILLES, J., at p. 539; see also *Barwick* v. *English Joint Stock Bank* (1867), L. R. 2 Exch. 259, 265, Ex. Ch. The general rule is that the master is answerable for every such wrong of the servant or

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272. Where the injury has occurred despite all reasonable care, or from causes beyond control, it is regarded in law as inevitable accident, and no responsibility to make compensation attaches to anyone (*h*). All actions in respect of personal injury, in the absence of a contract, are founded on breach of duty owed to the person suffering the injury. This duty is to take reasonable care to avoid causing injury. Where all reasonable care has been taken by the person who unfortunately causes personal injury to another, neither he nor his superior is answerable (*i*).

Injury occurring despite all due care.

Injury occasioned by the uncontrollable forces of nature or act of God is regarded as inevitable accident. An unusual manifestation of the powers of nature may be in a legal sense inevitable though it is not a solitary manifestation; it is sufficient if it could not reasonably have been anticipated (*j*).

Inevitable accident.

Injury occasioned by the King's enemies, *i.e.*, the public enemies of the King (*k*), gives no private right to compensation to anyone.

King's enemies.

A person is not responsible for latent defects in plant or machinery which could not previously to the accident have been avoided by care or discovered by reasonable examination (*l*).

Latent defects.

273. The contract of service generally gives the servant the right to be upon the master's premises, and places him in the position of a person lawfully there. Still, a servant may meet with an injury at a place where he had no right whatever to be, or where he was for purposes entirely of his own. In such case the employer is not responsible (*m*). A trespasser is a wrongdoer, and the law gives no compensation to wrongdoers (*n*).

Injured person a trespasser or bare licensee.

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agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved. That principle is acted on every day in running down cases (*Barwick* v. *English Joint Stock Bank* (1867), L. R. 2 Exch. 259, Ex. Ch., *per* WILLES, J., at p. 265; *Seymour* v. *Greenwood* (1861), 6 H. & N. 359; *Poulton* v. *London and South Western Rail Co.* (1867), L. R. 2 Q. B. 534; *Whatman* v. *Pearson* (1868), L. R. 3 C. P. 422; *Whiteley* v. *Pepper* (1876), 2 Q. B. D. 276; *Rayner* v. *Mitchell* (1877), 2 C. P. D. 357; *Bayley* v. *Manchester, Sheffield, and Lincolnshire Rail. Co.* (1873), L. R. 8 C. P. 148; *Burns* v. *Poulsom* (1873), L. R. 8 C. P. 563; *Stevens* v. *Woodward* (1881), 6 Q. B. D. 318; *Gwilliam* v. *Twist*, [1895] 2 Q. B. 84, C. A.; *Hatch* v. *London and North-Western Rail. Co.* (1899), 15 T. L. R. 246, C. A.; *Jones* v. *Scullard*, [1898] 2 Q. B. 565; *Engelhart* v. *Farrant & Co.*, [1897] 1 Q. B. 240, C. A.; *Beard* v. *London General Omnibus Co.*, [1900] 2 Q. B. 530, C. A.; *Citizens' Life Assurance Co.* v. *Brown*, [1904] A. C., 423, 427, P. C.

(*h*) See *Manzoni* v. *Douglas* (1880), 6 Q. B. D. 145.

(*i*) See title NEGLIGENCE.

(*j*) *Nitro-Phosphate and Odam's Chemical Manure Co.* v. *London and St. Katharine Docks Co.* (1879), 9 Ch. D. 503, C. A.; *Vaughan* v. *Taff Vale Rail. Co.* (1860), 5 H. & N. 679, Ex. Ch.

(*k*) *Russell* v. *Niemann* (1864), 17 C. B. (N. S.) 163.

(*l*) *Readhead* v. *Midland Rail. Co.* (1867), L. R. 2 Q. B. 412; affirmed (1869), L. R. 4 Q. B. 379, Ex. Ch.; *Richardson* v. *Great Eastern Rail. Co.* (1876), 1 C. P. D. 342, C. A.; *Stokes* v. *Eastern Counties Rail. Co* (1860), 2 F. & F. 691.

(*m*) *Bolch* v. *Smith* (1862), 7 H. & N. 736; *Corby* v. *Hill* (1858), 4 C. B. (N. S.) 556; *Gautret* v. *Egerton* (1867), L. R. 2 C. P. 371; *Burchell* v. *Hicknisson* (1880), 50 L. J. (Q. B.) 101; *Batchelor* v. *Fortescue* (1883), 11 Q. B. D. 474, C. A.; *Smith* v. *London and St. Katharine Docks Co.* (1868), L. R. 3 C. P. 326; *Tolhausen* v. *Davies* (1888), 57 L. J. (Q. B.) 392.

(*n*) The case in the House of Lords of *Cooke* v. *Midland Great Western*

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The duty owed to a bare licensee is of a slender character, and is limited to not exposing him to secret or hidden danger (*o*), but the duty towards such licensee, where the licensor accepts the duty of carrying him, though gratuitously, is different from what it is where he merely permits him to be upon or pass through his premises (*p*). Where the person suffering injury is upon the premises either on the business of the occupier of the premises, or on business in which both he and the occupier are jointly interested, a duty rests on the occupier, his agents, and servants, to use reasonable care to prevent injury to such person (*q*).

Contributory negligence.

274. The defence of contributory negligence is always available in actions for compensation for negligence (*r*). It is a common law defence available to a master sued by a workman in respect of personal negligence, and, if proved, defeats the action (*s*). The Act (*a*) has not deprived the employer of this defence (*b*).

SUB-SECT. 3.—*The Liability imposed by the Act.*

Extension of liability.

275. The liability imposed upon employers by the Act (*a*), in extension or derogation of the liability at common law, arises almost entirely from the partial abrogation of the doctrine of common employment which the Act (*a*) effects.

Stated affirmatively, the Act (*a*) places the obligation on the employer to pay compensation for personal injury caused to a workman by: (1) any defect in the condition of the ways, works, machinery, or plant (*c*); (2) the negligence of his superintendents (*d*); (3) the negligence of persons to whom he has delegated the power to give orders to his workmen (*e*); (4) defective bye-laws and defective particular instructions (*f*); (5) the negligent management of signals, points, and trains (*g*), this last-named provision applying to railway servants only (*h*).

Railway of Ireland, [1909] A. C. 229, which seems at first sight to support the proposition, that some duty is owed to a trespasser, is explained by the inference of fact drawn from the evidence that the plaintiff had either received an invitation or at least a licence to go on the premises; see also *Lowery* v. *Walker*, [1911] A. C. 10.

(*o*) See *Lygo* v. *Newbold* (1854), 9 Exch. 302 (where the court held that there was some evidence of a trap having been set for the licensee).

(*p*) *Harris* v. *Perry & Co.*, [1903] 2 K. B. 219, C. A.

(*q*) *Indermaur* v. *Dames* (1866), L. R. 1 C. P. 274; affirmed (1867), L. R. 2 C. P. 311, Ex. Ch.; *White* v. *France* (1877), 2 C. P. D. 308.

(*r*) The subject of contributory negligence is only dealt with here so far as it affects the actions by workmen against employers at common law and under the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42). See, further, title NEGLIGENCE.

(*s*) The rule is different in the Admiralty Court, where the loss is shared; see title SHIPPING AND NAVIGATION.

(*a*) See note (*o*), p. 134, *ante*.

(*b*) *Stuart* v. *Evans* (1883), 49 L. T. 138; approved in *Weblin* v. *Ballard* (1886), 17 Q. B. D. 122.

(*c*) See pp. 139 *et seq.*

(*d*) See p. 142, *post*.

(*e*) See p. 143, *post*.

(*f*) See p. 144, *post*.

(*g*) See p. 145, *post*.

(*h*) Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), s. 1.

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Defect in ways, works, machinery, and plant.

276. Where personal injury is caused to a workman by reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer (*i*), and the defect arose from, or had not been discovered or remedied owing to, the negligence of the employer, or of some person in his service, and entrusted by him with the duty of seeing that the ways, works, machinery or plant were in proper condition, the master is responsible (*k*).

Negligence must be proved as well as defect.

277. The workman has a right of action, not merely where he can prove a defect in the condition of the ways, works, machinery or plant, but only where he can prove in addition that the defect arose, or had not been discovered, or remained undiscovered, through negligence either on the part of the employer or his *alter ego* (*l*).

Every such action, as indeed every action brought under the Act (*m*), is founded on negligence, and must necessarily fail if negligence is not shown either on the part of the employer himself or of his superintendent (*n*).

Meaning of a "way."

278. A "way" is the course which a workman would in ordinary circumstances take in order to go from one part of the workshop, where a part of his employer's business is being done, to another part of the workshop or premises, where another part of his employer's business is being done, when the business of his employer requires him to go or be there, and when he goes there on the business of his employer (*o*). A "way" need not be a defined and marked-out path, so long as it is a route authorised to be, or customarily, used by the workmen in going from one part of the employer's premises to another (*o*).

Defect in a "way."

279. Defect in a "way" imports something defective in its permanent or *quasi*-permanent condition, as opposed to a mere temporary obstruction existing in or upon it (*p*). A hole, though

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(*i*) Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), s. 1 (1).

(*k*) *Ibid*, s. 2 (1).

(*l*) *Kiddle* v. *Lovett* (1885), 16 Q. B. D. 605. The Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), ss. 1 (1), 2 (1), must be read together. They have not amplified the employer's liability where he has not delegated his duty to see that his plant etc. are kept in proper condition, but only where he has delegated it. An employer was at common law responsible for a defect in the plant etc. where he personally looked after it (*Seymour* v. *Maddox* (1851), 16 Q. B. 326; *Paterson* v. *Wallace & Co.* (1854), 1 Macq. 748, H. L.; *Brydon* v. *Stewart* (1858), 2 Macq. 30, H. L.; *Williams* v. *Clough* (1858), 3 H. & N. 258; *Bartonshill Coal Co.* v. *Reid* (1858), 3 Macq. 266, H. L.; *Mellors* v. *Shaw* (1861), 1 B. & S. 437; *Wilson* v. *Merry* (1868), L. R. 1 Sc. & Div. 326, 332; *Murphy* v. *Phillips* (1876), 35 L. T. 477; *Smith* v. *Baker & Sons*, [1891] A. C. 325; see p. 130, *ante*.

(*m*) Employers' Liability Act, 1880 (43 & 44 Vict. c. 42).

(*n*) Before the passing of the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), the employer got rid entirely of his obligation if he entrusted his duty to a competent person (*Murphy* v. *Phillips*, *supra*, *per* CLEASBY, B., at p 479); see p. 130, *ante*. As to negligence generally, see title NEGLIGENCE.

(*o*) *Willetts* v. *Watt & Co*, [1892] 2 Q. B. 92, C. A.

(*p*) *McGiffin* v. *Palmer's Shipbuilding Co., Ltd.* (1882), 10 Q. B. D. 5; *Pegram* v. *Dixon* (1886), 55 L. J. (Q. B.) 447. Although in such cases as

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made for a temporary purpose, and insecurely covered, renders the way defective within the meaning of the Act (*q*); but leaving off, temporarily, the cover of a well-hole situated in a way does not make the way itself defective; it is only a negligent user of the way, for which the employer may or may not be responsible according as the Act (*r*) does or does not import negligence in the employer himself or in the person or persons entrusted by him with the duty of seeing that the way is in proper condition (*s*).

Temporary negligent user.

Improper protection.

A way may be defective by not being properly protected (*t*); and the defective condition of the roof of a mine is a defect in a way (*u*).

Choice of dangerous way.

Where a safe way is provided, and a workman uses from choice another way which is dangerous, the employer is not liable (*v*).

Meaning of "works."

280. The "works" must be the employer's own works, or connected with or used in his business (*a*). Works in course of erection, intended when completed to be used by the employer, but which were not being so used at the time of the accident, are not his works (*b*), but buildings in course of erection are the works of the person engaged in constructing them (*c*). The term is not confined to factories, workshops, or permanent premises of an employer. A plot of ground in the course of being cleared of old buildings in order to form a site for new building operations is the "works" of the employer of labour who has contracted to clear it, and whose business it is to perform such contract (*c*). "Works" rendered unsafe by process of demolition are not therefore defective (*d*).

Machinery or plant.

Ownership.

281. The machinery or plant need not belong to the employer if at the time of his using it it is defective, and the defect connotes negligence in him or his deputy: thus a ship's machinery and

these there is no right of action under the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), s. 1 (1), there may well be a cause of action under one or other of the other sub-sections of *ibid*, s. 1.

(*q*) *Bromley* v. *Cavendish Spinning Co.* (1886), 2 T. L. R. 881.

(*r*) Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), s. 1.

(*s*) *Willetts* v. *Watt & Co*, [1892] 2 Q. B. 92, C. A.

(*t*) *E.g.*, where a staircase aperture is not protected (*Wood* v. *Dorrall & Co.* (1886), 2 T. L. R. 550). It has been held in Scotland that the open joists of a room in a house in course of construction was not a "way" (*M'Gowan* v. *Smith*, [1907] S. C. 548).

(*u*) *Woods* v. *Carron Iron Co.* (1892), 8 T. L. R. 376, C. A.

(*v*) *Prichard* v. *Lang* (1889), 5 T. L. R. 639.

(*a*) Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), s. 1.

(*b*) *Howe* v. *Finch* (1885), 17 Q. B. D. 187; *Conway* v. *Clemence* (1885), 2 T. L. R. 80.

(*c*) *Brannigan* v. *Robinson*, [1892] 1 Q. B. 344, *per* WRIGHT, J., at p. 347: "I cannot see why premises which are in the possession of a person for the purposes of his business should not be regarded as the 'works' of such person, so long as he is carrying on his business there." See *Reynolds* v. *Holloway* (1898), 14 T. L. R. 551, C. A., where the negligence relied upon was the failure of a contractor to examine the condition of a house before proceeding to demolish it. It was decided that such failure would render him responsible under the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), s. 1 (1).

(*d*) *Booker* v. *Higgs* (1887), 3 T. L. R. 618.

plant which is used by a stevedore for the purpose of loading or discharging such vessel, becomes his plant (*e*) within the meaning of the Act (*f*). The use must, however, be authorised by the employer (*g*).

What is included in the term "plant."

282. Plant includes all apparatus which is used by a business man for carrying on his business; it does not include his stock-in-trade, which he buys or makes for sale, but does include all goods and chattels, fixed or movable, live or dead, which he keeps for permanent employment in his business (*h*).

A living animal used in the employer's business is plant, and a vicious disposition in the animal renders it defective plant (*i*).

Recurring defect.

The defect may be a recurring one, capable of instant remedy (*k*); and the fact of machinery being unfenced may render it defective (*l*), as may the fact that it continually gets clogged and so impedes the working and renders it dangerous (*m*). Where the machinery works unevenly or in an erratic manner it is defective within the meaning of the statute, though the cause of the abnormal working cannot be ascertained (*n*).

An employer is not, however, bound to provide the newest or most perfect machinery (*a*).

Machinery or plant need not be in use.

283. To make the employer liable the defective machinery or plant need not be in use at the time when the defect occasions the injury (*b*), and a machine does not cease to be plant in the interval between the giving an order that it shall be repaired and the completion of the repair (*c*).

Burden of proof

284. If part of the employer's machinery proves defective, the burden of proof is on him to show that it was properly constructed,

(*e*) *Bacon* v. *Dawes & Co.* (1887), 3 T. L. R. 557; *Biddle* v. *Hart*, [1907] 1 K. B. 649, C. A.; see *Coughlin* v. *Gillison*, [1899] 1 Q. B. 145, C. A. See, further, *Carter* v. *Clarke* (1898), 14 T. L. R. 172, where a vessel not belonging to, but being discharged by, the defendants was held to be a part of their plant.

(*f*) Employers' Liability Act, 1880 (43 & 44 Vict. c. 42).

(*g*) *Jones* v. *Burford* (1884), 1 T. L. R. 137; *Watson* v. *M'Leish and M'Taggart* (1898), 25 R. (Ct. of Sess.) 1028.

(*h*) *Yarmouth* v. *France* (1887), 19 Q. B. D. 647, C. A., *per* LINDLEY, L.J., at p. 658.

(*i*) *Yarmouth* v. *France*, *supra*.

(*k*) A driving band which continually fell off the drum of a machine which it worked was held to make the machine defective (*Baxter* v. *Wyman & Sons* (1888), 4 T. L. R. 255); compare *Corcoran* v. *East Surrey Ironworks Co.* (1888), 58 L. J. (Q. B.) 145; *Smith* v. *Harrison & Co.* (1889), 5 T. L. R. 406.

(*l*) *Iles* v. *Abercarn Welsh Flannel Co.* (1886), 2 T. L. R. 547; *Tate* v. *Latham & Son*, [1897] 1 Q. B. 502, C. A. This does not depend upon any statutory obligation to fence, though the absence of fencing where such obligation exists would be an *a fortiori* case.. As to statutory obligations to fence, see title FACTORIES AND SHOPS, Vol. XIV., pp. 464 *et seq.*

(*m*) *Paley* v. *Garnett* (1885), 16 Q. B. D. 52.

(*n*) *Bacon* v. *Dawes & Co.* (1887), 3 T. L. R. 557.

(*a*) *Race* v. *Harrison* (1893), 10 T. L. R. 92, C. A.; *Gill* v. *Thornycroft* (1894), 10 T. L. R. 316; *Butler* v. *Birnbaum* (1891), 7 T. L. R. 287.

(*b*) *Thompson* v. *City Glass Bottle Co.*, [1902] 1 K. B. 233, C. A.

(*c*) *Ibid.*, *per* COLLINS, M.R., at p. 235.

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not on the plaintiff to prove that the defect was not due to some unauthorised interference (*d*).

Unfit for use authorised by employer.

285. Machinery or plant is defective if it is unfit for the purpose for which it is used (*e*), but the purpose for which it is used must be one authorised by the employer himself or his deputy (*f*).

Unusual danger must import negligence.

While unusual danger may make plant or machinery defective (*g*), the element of danger must be something more than the danger necessarily or usually incident to the user of such class of machinery or plant, and must import negligence on the part of the employer or his superintendent (*h*). Want of proper instruction as to the manner of working a machine does not make the machine defective (*i*).

Defect must be due to negligence of employer or person entrusted by him.

286. The defect must be due to negligence either on the part of the employer himself or the person entrusted by him with the duty of seeing that the ways, works, machinery or plant are in proper condition (*k*). But the defective condition is not imputable to the employer when the negligence arises on the part of an independent contractor to whom the work has been entrusted by the employer, and upon whom the employer has good reason to rely for the work being done safely (*l*).

Negligence of superintendents.

287. The employer is responsible for the negligence of a workman entrusted by him with any superintendence whilst in the exercise of such superintendence (*m*). A person with superintendence means a person whose sole or principal duty is that of superintendence, and who is not ordinarily engaged in manual labour (*a*).

(*d*) *Giles* v. *Thames Ironworks Shipbuilding Co.* (1885), 1 T. L. R. 469; see *Heaven* v. *Pender* (1883), 11 Q. B. D. 503, C. A.

(*e*) *Ileske* v. *Samuelson* (1883), 12 Q. B. D. 30, followed in *Cripps* v. *Judge* (1884), 13 Q. B. D. 583, C. A.

(*f*) *Jones* v. *Burford* (1884), 1 T. L. R. 137; see also *Perry* v. *Brass & Son* (1889), 5 T. L. R. 253 (which is not an authority for the proposition that the plant must belong to the employer).

(*g*) *E.g.*, absence of a guard from a circular saw (*Tate* v. *Latham & Son*, [1897] 1 Q. B. 502, C. A.) or unguarded cogs at the side of a machine (*Morgan* v. *Hutchins* (1890), 59 L. J. (Q. B.) 197); see *Sanders* v. *Barker & Son* (1890), 6 T. L. R. 324.

(*h*) *Walsh* v. *Whiteley* (1888), 21 Q. B. D. 371, C. A. As to dangerous machinery, see, further, title FACTORIES AND SHOPS, Vol. XIV., p. 464.

(*i*) *Greenwood* v. *Greenwood* (1907), 24 T. L. R. 24.

(*k*) See judgment in *Walsh* v. *Whiteley*, *supra*.

(*l*) Thus, an employer is not responsible to his workman for a defective "boat staging" erected by an independent contractor whom he had reason to believe would erect it securely (*Kiddle* v. *Lovett* (1885), 16 Q. B. D. 605); nor for the negligence of an independent contractor who had not shored up a wall safely in accordance with his contract (*Moore* v. *Gimson* (1889), 58 L. J. (Q. B.) 169).

(*m*) Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), s. 1 (2).

(*a*) *Ibid.*, s. 8. The duties of superintendence may, it is submitted, be exercised over the system of work, the plant etc., or the workmen, or some of the workmen. If the person, though exercising superintendence, is ordinarily engaged in manual labour, the employer is not responsible under *ibid.*, s. 1 (2); compare the text and note (*f*), p. 143, *post*.

The negligence must arise whilst in the exercise of superintendence (*b*). But a negligent manual act may be so intimately associated with the duty of superintendence that it may constitute negligent superintendence (*c*). The superintendence need not be over the workman injured by the negligence of the person exercising it (*d*).

Negligence of persons to whom employer has delegated power to give orders.

288. The employer is liable for injury resulting from negligent orders or directions given by a person to whose orders or directions the workman at the time of the injury was bound to conform and did conform (*e*). The person giving the orders or directions may be himself ordinarily engaged in manual labour (*f*), but the orders or directions must emanate from such person. It is not sufficient where he is merely a conduit pipe to convey the employer's own orders and directions to fellow workmen (*g*).

Nature of orders.

289. The orders or directions need not be given in express words if it is apparent that the person subject to the orders or directions of another was meant by the latter to act as he did; general orders are sufficient (*h*). An order which is incomplete, and thus improper, is within the statute (*i*).

There must, however, be an obligation on the workman to obey the order (*k*); and even if the order or direction be contrary to the employer's general or written rules, he is not thereby relieved from responsibility if the workman was bound to conform to the order (*l*).

A mere direction by one workman to another when they are engaged in a joint operation necessitating some concerted action does not amount to an order or direction (*m*).

(*b*) A gangwayman who had some duties of superintendence, but had also to guide by means of a rope the motions of a crane derrick, was negligent in the performance of the latter duty. The employer was held not liable (*Shaffers* v. *General Steam Navigation Co.* (1883), 10 Q. B. D. 356).

(*c*) *E.g.*, a foreman handed a scaffold plank to a labourer, directing him to hold it (which he was unable to do), and the foreman released his hold. The employer was held liable for negligence of the foreman in the exercise of superintendence (*Osborne* v. *Jackson* (1883), 11 Q. B. D. 619); *Hooper* v. *Holme and King* (1896), 13 T. L. R. 6, C. A. (a claim which failed owing to the absence of evidence of superintendence exercised by the person occasioning the accident); *Hall* v. *North-Eastern Rail. Co.* (1885), 1 T. L. R. 359.

(*d*) *Ray* v. *Wallis* (1887), 3 T. L. R. 777.

(*e*) Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), s. 1 (3).

(*f*) The definition in *ibid.*, s. 8, only applies to the person with superintendence mentioned in *ibid.*, s. 1 (2); see note (*a*), p. 142, *ante*.

(*g*) *Snowden* v. *Baynes* (1890), 24 Q. B. D. 568.

(*h*) *Millward* v. *Midland Rail. Co.* (1884), 14 Q. B. D. 68.

(*i*) *I.e.*, within the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), s. 1 (3); see *Medway* v. *Greenwich Inlaid Linoleum Co.* (1898), 14 T. L. R. 291, C. A. (where the negligent order was to work a machine without giving directions as to the proper manner of stopping the machine before taking material out).

(*k*) *Bunker* v. *Midland Rail. Co.* (1882), 47 L. T. 476.

(*l*) *Marley* v. *Osborn* (1894), 10 T. L. R. 388; see *Barker* v. *Burt* (1894), 10 T. L. R. 383.

(*m*) Two men were working one machine, one in front and one behind. The man in front gave a direction to the one behind, which necessitated

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Orders need not in themselves be negligent.

290. The orders or directions need not be negligent in themselves if the workman complying with them is injured by the negligence of the person giving them (*n*).

Liability not limited to injury arising from order negligent in itself.

291. The liability of the employer is not limited to injury arising from an order, which order is negligent in itself, nor is it necessary to show that conformity to the order was the *causa causans* of the injury (*o*), though, probably, the negligence must have an intimate connection with the order and with the conforming of the workman thereto at the time of the injury (*p*).

Defective bye-laws and particular instructions.

292. The employer is liable for injury occurring by reason of the act or omission of any person in the service of the employer, done or made in obedience to the rules or bye-laws of the employer, or in obedience to particular instructions given by any person delegated with the authority of the employer in that behalf (*q*), provided that the injury resulted from some impropriety or defect in such rules, bye-laws or instructions (*r*).

Where a rule or bye-law has been approved or has been accepted as a proper rule or bye-law by one of His Majesty's Principal Secretaries of State, or by the Board of Trade, or any other department of the Government under or by virtue of any Act of Parliament, it

his putting his hands near the rollers of the machine, and the man in front then started the machine. This was not an "order or direction" within the meaning of the Act (*Howard* v. *Bennett & Sons* (1888), 58 L. J. (Q. B.) 129). This case was also decided on the ground that the injury did not result from the order or direction, which in itself was a proper one, but from the subsequent negligent act of starting the machine. This point has not been followed, see also *Hooper* v. *Holme and King* (1896), 13 T. L. R. 6, C. A., and *Reynolds* v. *Holloway* (1898), 14 T. L. R. 551, C. A. See, further, note (*g*), p. 143, *ante*, and the text, *infra*.

(*n*) This appears to be the principle deducible from the cases on the point, but probably the order and the subsequent negligent act which occasions the injury must bear some relationship the one to the other. A ganger ordered a labourer to work in a barge alongside a ship which was being discharged, and, some hours after, himself negligently threw a bundle of rails into the barge which injured the workman. The employer was held liable (*Wright* v. *Wallis* (1887), 3 T. L. R. 779, C. A.). In this case the subsequent negligent act which caused the injury seemed to have no close relationship to the order given some hours before. But where a gangwayman, who had authority to give orders, negligently threw a bale of goods from a ship into a barge alongside, calling out "stand from under," but not giving sufficient time for his direction to be obeyed, the accident was held not to have resulted from any negligent order (*Kellard* v. *Rooke* (1888), 21 Q. B. D. 367, C. A.). In *Wild* v. *Waygood*, [1892] 1 Q. B. 783, C. A., LINDLEY, L.J., speaking of *Wright* v. *Wallis*, *supra*, says: "I should be sorry if it should be supposed that that case was an authority for any proposition of law." See also *Snowden* v. *Baynes* (1890), 24 Q. B. D. 568, where WILLS, J., at p. 572, pointed out and relied upon the difference between injury caused by obedience to an order then and there given and which exposes the workman to immediate risk if the order is negligent, and a case where obedience to the order is accompanied by no present risk from the negligence of the person giving the order; see, however, *Wild* v. *Waygood*, *supra*.

(*o*) *Wild* v. *Waygood*, *supra*, *per* Lord HERSCHELL, at p. 789.

(*p*) *Ibid.*, *per* KAY, L.J., at p. 795.

(*q*) Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), s. 1 (4).

(*r*) *Ibid* s. 2 (2).

is not to be deemed for the purposes of the Act (*s*) to be an improper or defective rule or bye-law (*t*).

Meaning of "particular instructions."

293. "Particular instructions" may either be instructions given by the employer himself, on a particular occasion, through the medium of a workman to other workmen, or instructions emanating from a workman delegated by the employer with authority to give particular instructions on an occasion (*u*); but a particular instruction to do a certain thing does not imply the instruction to do it unreasonably or without taking due precaution (*a*).

The statements of fellow-workmen to one another necessary for carrying on a joint work are not "particular instructions" within the meaning of the statute (*b*).

Negligent management of trains, points, and signals.

294. The employer is also responsible for the negligence of any person in his service, who has the charge or control of any signal, points, locomotive engine, or train upon a railway (*c*). Railway servants have thus special privileges in addition to those conferred on other workmen (*d*).

Meaning of "railway."

295. The word "railway" is used in its popular sense, and is not restricted to railways worked under statutory powers (*e*). A light railway (*f*) or a tramway would probably be deemed a "railway" for the purposes of the above provision (*g*).

The person in control of points.

296. The person having charge or control of points must be the person who really controls them. The mere fact that he has some duties in connection with them, and that the negligent discharge of

(*s*) Employers' Liability Act, 1880 (43 & 44 Vict. c 42).

(*t*) *Ibid.*, s 2 (2) Many industries are now largely regulated by rules and bye-laws with Government sanction; see, for example, titles CARRIERS, Vol. IV., p. 62; EXPLOSIVES, Vol. XIV., p 384. FACTORIES AND SHOPS, Vol. XIV., pp. 436, 527; MINES, MINERALS AND QUARRIES, pp. 593 *et seq.*, *post*, PUBLIC HEALTH AND LOCAL ADMINISTRATION; RAILWAYS AND CANALS.

(*u*) Employers' Liability Act, 1880 (43 & 44 Vict c. 42), s. 1 (4).

(*a*) *Whateley* v. *Holloway* (1890), 6 T. L. R. 353, C. A. In this case a man whose instructions were to attend to an engine, and who had another duty, by leaving the other duty suddenly to attend to the engine caused injury to a fellow-workman. Held, that the only particular instruction being "not to neglect the engine" could not be considered an improper instruction.

(*b*) *I e*, within the Employers' Liability Act, 1880 (43 & 44 Vict 42), s. 1 (4); see *Claxton* v. *Mowlem & Co.* (1888), 4 T. L. R. 750, C. A

(*c*) Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), s. 1 (5).

(*d*) In the definition of workman (*ibid.*, s. 8) railway servants are expressly mentioned; see title RAILWAYS AND CANALS.

(*e*) *Doughty* v. *Firbank* (1883), 10 Q. B. D. 358. The Employers' Liability Act, 1880 (43 & 44 Vict c 42), itself contains no definition of either of the words "train" or "railway." A temporary line of rails, or tramway, constructed for the purpose of making a permanent railway is a "railway" (*Doughty* v. *Firbank*, *supra*). A number of trucks moving on fixed lines, but without any locomotive engine attached, is a "train," and a person who was in charge of a turntable worked by a capstan and engine for the purpose of shifting the trucks is a person "in charge or control of a train" (*Cox* v. *Great Western Rail Co.* (1882), 9 Q. B. D. 106).

(*f*) *I.e.*, a railway constructed under the Light Railways Act, 1896 (59 & 60 Vict. c. 48); see title TRAMWAYS AND LIGHT RAILWAYS.

(*g*) See note (*c*), *supra*.

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these duties occasions an accident, does not render the employer liable (*h*).

What is not a locomotive.

297. A steam crane fixed upon a trolly, and which could when desired be moved along a set of rails, for the purpose of lifting weights, is not a locomotive engine (*i*) within the meaning of the statute (*j*).

Charge and control of train.

298. The engine-driver in charge of a train does not necessarily cease to have charge or control of it because the carriages are uncoupled from the engine for some temporary purpose (*k*). Neither is it necessary that one person should be in charge of the whole train; more than one person, with different duties to perform in respect of parts of the train, may be in charge of it (*l*).

SUB-SECT. 4.—*Limit of Damages Recoverable.*

Limit of damages.

299. The damages recoverable under the Employers' Liability Act, 1880 (*m*), must not exceed the estimated earnings, during the three years preceding the injury, of a person in the same grade employed during those years in the like employment and in the district in which the workman is employed at the time of the injury (*n*).

This is the limit of compensation recoverable, whether the action is brought by the injured workman, or by his representatives, or persons entitled in case of death under the Fatal Accidents Act, 1846 (*o*).

Meaning of "earnings."

300. The term "earnings" includes not only money, but other things given in the form of remuneration for services, and capable of being estimated in money, such as rent, food, or clothes (*p*).

So long as the statutory limit is not exceeded the tribunal assessing damages may take into consideration remuneration acquired in other employments, including overtime worked for another master (*q*).

(*h*) *Gibbs* v. *Great Western Rail. Co.* (1884), 11 Q. B. D. 22. In this case the man whose negligence was relied upon had to clean, oil, and adjust the points and wires of the locking apparatus at various parts of the line, but he had no power to move or work them. The injury was not caused by mismanagement of the points, but by the workman's negligence in leaving a cover, which he had taken off the points, in a dangerous position.

(*i*) *Murphy* v. *Wilson & Son* (1883), 52 L. J. (Q. B.) 524.

(*j*) *I.e.*, within the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), s. 1 (5).

(*k*) *McCord* v. *Cammell & Co.*, [1896] A. C. 57.

(*l*) *Ibid.*, *per* Lord HALSBURY, at p. 63: "The legislature meant in a very wide way to protect workmen who are engaged in such dangerous employment (*i.e.*, railways), and they said that if a person in charge of a locomotive, or of a train, shall be guilty of negligence, then, quite apart from any question of superiority of employment, and quite apart from the necessity of superintendence, the employer may be liable."

(*m*) 43 & 44 Vict. c. 42.

(*n*) *Ibid.*, s. 3

(*o*) 9 & 10 Vict. c. 93.

(*p*) *Noel* v. *Redruth Foundry Co.*, [1896] 1 Q. B. 453. Tuition given by a master to an apprentice is of too vague a character to be capable of pecuniary valuation (*ibid.*).

(*q*) *Bowtick* v. *Head, Wrightson, & Co.* (1885), 53 L. T. 909.

301. If the action is brought under the Fatal Accidents Act, 1846 (*r*), the damages are further limited by the construction placed upon that statute, namely, that they must be limited to the pecuniary loss suffered by the death (*s*).

Limit of claim under Fatal Accidents Act, 1846.

302. No penalty can be claimed under any statute in respect of an injury where an action has been brought under the Act (*t*), but if a penalty has been claimed and paid before action, the action may, notwithstanding this, be proceeded with, though the penalty recovered must be deducted from the damages (*u*).

Penalty in respect of injury.

SUB-SECT. 5.—*Persons entitled to the Benefit of the Act.*

"Workman."

303. "Workman" for the purposes of the Act (*t*) is defined (*v*) as a railway servant (*w*) and any person to whom the Employers and Workmen Act, 1875 (*x*), applies (*y*). Accordingly, "workman" does not include a domestic or menial servant (*z*), but, excluding them, means any person who, being a labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or otherwise engaged in manual labour, whether under the age of twenty-one years or above that age, has entered into or works under a contract with an employer (*a*).

Duties of manual labour.

304. The words "or otherwise engaged in manual labour" have been the subject of many decisions (*b*). The cases have largely turned upon the evidence at the trial as to the actual duties of the workman, and the extent to which they may be said to be duties of, or to involve, manual labour.

(*r*) 9 & 10 Vict. c. 93.

(*s*) See title NEGLIGENCE. For cases on term "earnings" used in the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. I., see pp. 201 *et seq.*, *post*.

(*t*) Employers' Liability Act, 1880 (43 & 44 Vict. c. 42).

(*u*) *Ibid.*, s. 5.

(*v*) *Ibid.*, s. 8.

(*w*) A railway servant need not apparently be a workman in the ordinary sense.

(*x*) 38 & 39 Vict. c. 90.

(*y*) See title FACTORIES AND SHOPS, Vol. XIV., pp. 516, 517; and pp. 70, 115, *ante*.

(*z*) As to who are domestic or menial servants, see p. 70, *ante*.

(*a*) Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90), s. 10; see, further, for the full definition, titles COUNTY COURTS, Vol. VIII., p. 646, note (*i*); FACTORIES AND SHOPS, Vol. XIV., p. 517. Female workers of the classes defined are within the Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90) (see the Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 1), and are thus within the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42).

(*b*) See title FACTORIES AND SHOPS, Vol. XIV., p. 517, note (*f*). A wharfinger's carman was held to be within the statute, the evidence in the case showing that he not only drove the car, but also loaded and unloaded the goods carried upon it (*Yarmouth* v. *France* (1887), 19 Q. B. D. 647, C. A.). A stage manager, who acted also as one of the stage hands, and in that capacity had to move the theatre scenery and furniture, was held to be a "workman" (*Rushbrook* v. *Grimsby Palace Theatre* (1908), 25 T. L. R. 258, C. A.). An ordinary shop assistant is not a person "engaged in manual labour," though generally a not inconsiderable

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Where the chief duties of the servant are those which require intellectual labour, and the duties of manual labour are subordinate to these, the servant is not a "workman" (*c*); but where duties of superintendence and duties of manual labour are performed by a servant in about equal degree, he is a "workman" (*d*).

Independent contractor.

305. An independent contractor, who is not subject to control as a servant, is not (*e*) within the Act (*f*), nor is a partner, though working as a foreman for the firm with which he is associated (*g*).

Workman assisted by another.

But a working man who has contracted to do certain work, and who employs another to assist him in the work, may come within the term "labourer" (*h*).

Servant in husbandry.

306. The term "servant in husbandry" is not confined to those who till the land and aid in the production of crops; it includes a waggoner on a farm who works in the fields at harvest time (*i*).

Journeyman.

307. A journeyman is a man who works and is paid by the day (*k*).

Artificer. Handicraftsman.

308. An artificer and a handicraftsman are the same thing, and signify a skilled workman (*l*).

Persons not within the Act.

309. Workmen of the Crown are excluded from the benefits of the Act (*f*), as the Crown is not responsible for torts committed by its servants (*m*).

Seamen (*n*) are not within the protection of the Act (*f*)

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part of his duties involves manual labour (*Bound* v. *Lawrence*, [1892] 1 Q. B. 226, C. A); this decision was given under the Employers and Workmen Act, 1875 (38 & 39 Vict c. 90), but the definition is the same.

(*c*) *Jackson* v. *Hill* (1884), 13 Q. B. D. 618; *Bagnall* v. *Levinstein, Ltd.*, [1907] 1 K. B. 531, C A.

(*d*) *Leech* v. *Gartside & Co.* (1885), 1 T. L. R. 391.

(*e*) *Squire* v. *Midland Lace Co*, [1905] 2 K. B. 448. The following cases may be consulted as to the distinction between an independent contractor and a workman:—*Simmons* v. *Faulds* (1901), 17 T. L. R. 352, C. A.; *Evans* v. *Penwyllt Dinas Silica Brick Co.* (1901), 18 T. L. R 58, C. A.; *Vamplew* v. *Parkgate Iron and Steel Co*, [1903] 1 K. B. 851, C. A.; *Maynard* v. *Peter Robinson, Ltd.* (1903), 89 L. T. 136.

(*f*) Employers' Liability Act, 1880 (43 & 44 Vict. c. 42)

(*g*) *Ellis* v. *Joseph Ellis & Co.*, [1905] 1 K. B. 324, C. A

(*h*) *Lowther* v. *Radnor* (*Earl*) (1806), 8 East, 113. In this case the man was not really an independent contractor, but rather a workman paid by piece wage. He had contracted to dig a well at so much a foot

(*i*) *Lilley* v. *Elwin* (1848), 11 Q. B. 742; *Ex parte Hughes* (1854), 2 C. L. R. 1542; *Morgan* v. *London General Omnibus Co.* (1885), 13 Q. B. D. 832, 834, C. A.

(*k*) *Morgan* v. *London General Omnibus Co.* (1883), 12 Q. B. D. 201, *per* DAY, J., at p. 206; but in practice the journeyman is often spoken of in contradistinction to the master carrying on the same trade.

(*l*) *Morgan* v. *London General Omnibus Co.*, *supra*, *per* BRETT, M.R.; see *Ex parte Ormrod* (1844), 1 Dow. & L. 825.

(*m*) *Johnstone* v. *Sutton* (1786), 1 Term Rep. 493, H. L.; *Buron* v. *Denman* (1848), 2 Exch. 167.

(*n*) They are excluded in terms from the definition "workman" in the Employers and Workmen Act, 1875 (38 & 39 Vict. c 90), s. 13, which is repealed so far as it operates to exclude seamen and sea apprentices

SUB-SECT. 6.—*The Employer.*

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310. The term "employer" includes a body of persons corporate or unincorporate (*o*).

Employer, who is.

311. The employer is generally the person with whom the workman enters into a contract of service; but many persons are employed by others, in the sense that such persons are selected by them, subject to their dismissal, and their duties generally defined by them, without being under a contract of service with them (*p*).

If an independent contractor is interposed between the alleged employer and the workman the contractor is the employer, though the work may be performed for the benefit of the alleged employer and upon his works (*q*).

SUB-SECT. 7.—*Contracting out of the Act.*

Contracting out.

312. A workman may contract with his employer that the benefit of the Act (*a*) shall be excluded from his contract of service (*b*), and if he enters into such a contract for valuable consideration he likewise deprives his representatives of the right which they would otherwise have under the Fatal Accidents Act, 1846 (*c*), for the representatives and persons entitled to sue in case of death have no separate cause of action (*d*).

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from the Act (Merchant Seamen (Payment of Wages and Rating) Act, 1880 (43 & 44 Vict. c. 16), s. 11). But such repeal does not, in the absence of any enactment to the contrary, extend to or affect any provision contained in any other Act of Parliament passed, or to be passed, whereby "workman" is defined by reference to the persons to whom the Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90), applies. The definition of seaman in the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s 742, includes every person (except masters, pilots, and apprentices duly indentured and registered) employed or engaged in any capacity on board any ship; see title SHIPPING AND NAVIGATION. This definition has not been followed for the purposes of the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), it having been decided that for the purpose of this Act the expression "seaman" must bear its ordinary signification (*Chislett* v. *Macbeth & Co.* (1909), 25 T. L. R. 761, C. A.).

(*o*) Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), s. 8.

(*p*) See *Hall* v. *Lees*, [1904] 2 K. B. 602, C. A.; *Hillier* v. *St. Bartholomew's Hospital (Governors)* (1909), 25 T. L. R. 762, C. A.; compare *Smith* v. *Martin and Kingston-upon-Hull Corporation*, [1911] 2 K. B. 775, C. A. As to the time when the contract of service commences and terminates, see p. 171, *post*.

(*q*) For cases as to sub-contracts, see *Reedie* v. *London and North Western Rail. Co.*, *Hobbit* v. *Same* (1849), 4 Exch. 244; *Rapson* v. *Cubitt* (1842), 9 M. & W. 710; *Murray* v. *Currie* (1870), L. R. 6 C. P. 24; *Charles* v. *Taylor* (1878), 3 C. P. D. 492, C. A.; *Pendlebury* v. *Greenhalgh* (1875), 1 Q. B. D. 36, C. A.; *Levering* v. *St. Katharine's Dock Co.*, *Doe* v. *Same* (1887), 3 T. L. R. 607; *Brown* v. *Butterley Coal Co.* (1885), 2 T. L. R. 159; *Marrow* v. *Flimby and Broughton Moor Coal and Fire Brick Co.*, [1898] 2 Q. B. 588, C. A.; *Fitzpatrick* v. *Evans & Co.*, [1901] 1 K. B. 756; affirmed, [1902] 1 K. B. 505, C. A.

(*a*) Employers' Liability Act, 1880 (43 & 44 Vict. c. 42).

(*b*) *Griffiths* v. *Dudley (Earl)* (1882), 9 Q. B. D. 357.

(*c*) 9 & 10 Vict. c. 93.

(*d*) *Griffiths* v. *Dudley (Earl)*, *supra*; see *Read* v. *Great Eastern Rail. Co.*

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An infant may contract out of the Act (*e*), if the contract considered as a whole is for his benefit (*f*).

SUB-SECT. 8.—*Notice of Injury.*

Infant.

To whom given.

When.

Contents.

Inaccuracies.

Writing necessary.

313. Notice of injury, in respect of which a claim is made, must be given to, and served on, the employer, or, if there is more than one employer, to, and on, one of the employers within six weeks from the time the injury was sustained (*g*).

The notice must give the name and address of the person injured, and state in ordinary language the cause of the injury, and the date at which it was sustained (*h*), but it is not to be deemed invalid by reason of any defect or inaccuracy therein, unless the judge who tries the action is of opinion that the defendant is prejudiced in his defence by such defect or inaccuracy, and that the defect or inaccuracy was for the purpose of misleading (*i*). The notice must be in writing (*j*), but probably it need not be contained in one single document if the documents refer to and incorporate one another (*k*).

Omissions.

314. Where a notice omitted to give particulars in writing of the injury, but stated that they had already been delivered to the superintendent, and omitted also the date of the injury, it was held to be no notice at all under the Act (*e*), and consequently not within the relieving provisions (*l*). But material omissions of the requirements

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(1868), L. R. 3 Q. B. 555. As to the effect of contracting out upon the doctrine of common employment, see p. 132, *ante*

(*e*) Employers' Liability Act, 1880 (43 & 44 Vict. c. 42).

(*f*) *Clements* v. *London and North Western Rail. Co.*, [1894] 2 Q. B. 482, C. A.

(*g*) Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), ss. 4, 7. The notice may be served by delivering it at the residence or place of business of the person on whom it is to be served (*ibid.*, s. 7). It may also be served by registered letter, addressed to the person on whom it is to be served at his last known place of residence or place of business, and if served by post shall be deemed to have been served at the time when a letter containing the same would be delivered in the ordinary course of post, and in proving the service of the notice it is sufficient to prove that the notice was properly addressed and registered (*ibid*). Where the employer is a body of persons corporate or unincorporate, the notice must be served by delivering the same at, or by sending it by post in a registered letter addressed to, the office, or, if there be more than one office, to any of the offices of such body (*ibid.*). The advantage of giving notice in a registered letter is that the notice is deemed to be good though the letter should miscarry; but so long as the notice reaches the employer this is sufficient, even though sent by ordinary unregistered letter, the posting of the letter being *primâ facie* evidence of its receipt (*Previsi* v. *Gatti* (1888), 4 T. L. R. 487); and see title EVIDENCE, Vol. XIII., p. 556; and note (*s*), p. 179, *post*.

(*h*) Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), s. 7.

(*i*) *Ibid.*

(*j*) *Moyle* v. *Jenkins* (1881), 8 Q. B. D. 116.

(*k*) *Keen* v. *Millwall Dock Co.* (1882), 8 Q. B. D. 482, C. A. In this case, where the Act was construed far more strictly against the workman than has since been done, Lord COLERIDGE, C. J., stated his opinion to be that the statute meant the notice to be one and single, delivered at one time, and containing in it at one and the same time all the incidents which the statute has made a condition precedent to the right to maintain an action. In the same case the other members of the court inclined to the opinion that all the requisites of a valid notice need not be contained in one document; see *Lamley* v. *East Retford Corporation* (1891), 55 J. P. 133.

(*l*) *Keen* v. *Millwall Dock Co.*, *supra*.

of a valid notice have been excused as falling within the meaning of those provisions (*m*).

Want of notice.

315. In the case of death the want of notice is no bar to the maintenance of the action if the judge is of opinion that there was reasonable excuse for such want of notice (*n*); but if notice of injury is not given within six weeks the right of action under the Act (*o*) is gone, except in the case of death resulting from the injury (*p*).

SUB-SECT. 9.—*The Action.*

Within what time action must be brought.

316. If the injury is a non-fatal one the action must be brought within six months from the date of the injury (*p*). If the injury results in death the action must be brought within twelve months from the time of death (*p*). If the action is brought in respect of a fatal injury against a public authority, then, notwithstanding the express words of the Act (*o*), the time limited by the Public Authorities Protection Act, 1893 (*q*), must be observed, namely, six months (*r*).

Court having jurisdiction.

Removal.

317. Every action under the Act (*a*) must be brought in a county court, but, on the application of either party, it may be removed into a superior court, in like manner and on the same conditions as an action commenced in a county court may by law be removed (*b*). The usual ground upon which the removal is granted is that difficult questions of law may probably be involved in the action which cannot satisfactorily be tried in a county court (*c*); but the High Court has shown itself unwilling to remove actions, the county court being the tribunal named in the Act (*a*) for their trial (*d*).

(*m*) Thus a notice of injury which did not give the date of the injury was held good (*Carter* v. *Drysdale* (1883), 12 Q. B. D. 91); as was a notice in which the cause of injury was wrongly stated (*Stone* v. *Hyde* (1882), 9 Q. B. D. 76). In another case the notice of injury omitted the address of the plaintiff and the cause of the injury, and wrongly stated the date of the injury. It was held that these were defects and inaccuracies within the meaning of the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), s. 7, and the defendant not being misled the notice was good (*Previsi* v. *Gatti* (1888), 4 T. L. R. 487).

(*n*) Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), s. 4. There is no power to excuse want of notice of injury except in the case of death resulting therefrom. As to pleading want of notice as a defence, see title COUNTY COURTS, Vol. VIII, pp. 485, note (*r*), 486.

(*o*) Employers' Liability Act, 1880 (43 & 44 Vict. c. 42).

(*p*) *Ibid.*, s. 4. The word "month" in an Act of Parliament means a calendar month (Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 3)' An action is commenced in a county court on the day on which the plaint is entered (County Court Rules, Ord. 5, r. 1). As to the general procedure in a county court, see title COUNTY COURTS, Vol. VIII., pp. 448 *et seq.*

(*q*) 56 & 57 Vict. c. 61, s. 1 (a); see title PUBLIC AUTHORITIES AND PUBLIC OFFICERS.

(*r*) See *Markey* v. *Tolworth Joint Isolation Hospital District Board*, [1900] 2 Q. B. 454; *Parker* v. *London County Council*, [1904] 2 K. B. 501; *Williams* v. *Mersey Docks and Harbour Board*, [1905] 1 K. B. 804, C. A.

(*a*) Employers' Liability Act, 1880 (43 & 44 Vict. c. 42).

(*b*) *Ibid.*, s. 6 (1); see titles COUNTY COURTS, Vol. VIII., pp. 610, 611; CROWN PRACTICE, Vol. X., p. 185

(*c*) See *Longbottom* v. *Longbottom* (1852), 8 Exch. 203; *Rees* v. *Williams* (1851), 7 Exch. 51; *Hunt* v. *Great Northern Rail. Co.* (1851), 2 L. M. & P. 268; *Donkin* v. *Pearson*, [1911] 2 K. B. 412.

(*d*) *Munday* v. *Thames Ironworks Co.* (1882), 10 Q. B. D. 59; see also

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318. The defendant cannot object to the jurisdiction of the county court on the ground of the amount claimed (*e*), as he may do in the case of other actions (*f*).

Objection to jurisdiction.

319. The procedure follows generally that of an ordinary action in the county court; but some special rules of procedure have been made under the powers of the Act (*g*). With the entering of the plaint particulars of demand must be filed (*h*). The summons must be served thirty clear days before the return day (*i*). A jury must be summoned fifteen clear days before the return day (*k*).

Procedure.

Special rules.

Assessors may be appointed to assist the judge in ascertaining the amount of compensation where the action is tried without a jury (*l*).

Assessors.

Joinder of plaintiffs.

320. Several persons may be joined as plaintiffs in one action where a common question of law or fact arises (*m*).

Judgment for co-plaintiffs.

Where the cause of action is proved judgment is given for all the plaintiffs, but the damages and costs ordered to be paid to each plaintiff are found and set out separately in the judgment (*n*). If the defendant fails to pay each plaintiff execution may issue, and the proceeds of the execution are, after payment of costs, apportioned between the joint plaintiffs (*o*).

Judgment against one of several defendants

321. Where there are joint defendants, and judgment is recovered against one only, the judge of the county court may in an exceptional case order the unsuccessful defendant to pay the costs of a successful defendant, in addition to the costs incurred by the plaintiffs (*p*).

Potter v. *Great Western Colliery Co.* (1894), 10 T. L. R. 380, C. A. In practice the removal of county court actions is, in the King's Bench Division, effected by *certiorari*, although there is power to make an order for removal instead of an order for *certiorari* to issue; see titles COUNTY COURTS, Vol. VIII., pp. 610, 611; CROWN PRACTICE, Vol. X., p. 200. The question of removal of an action depends upon whether it is one which, in the opinion of the judge, is more fit to be tried in the High Court than in the county court (*Donkin* v. *Pearson*, [1911] 2 K. B. 412). As to the obligation of the plaintiff to follow the action into the High Court, see title CROWN PRACTICE, Vol. X., p. 203.

(*e*) See *R.* v. *City of London Court* (*Judge*) (1885), 14 Q. B. D. 905, C. A.

(*f*) See title COUNTY COURTS, Vol. VIII., p. 490.

(*g*) Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), s. 6 (3); see County Court Rules, Ord. 44.

(*h*) County Court Rules, Ord. 44, r. 2.

(*i*) *Ibid.*, r. 1. It should be delivered to the bailiff, if to be served in the home district thirty-five, and if to be served in a foreign district thirty-eight, clear days at least before the return day (*ibid.*).

(*k*) The return day is the original return day, not a day to which the hearing may be adjourned (*R.* v. *Leeds County Court* (*Registrar*) (1888), 16 Q. B. D. 691).

(*l*) Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), s. 6 (2). Notwithstanding the wording of this provision the assessors may assist the judge in determining liability as well as amount (County Court Rules, Ord. 44, r. 17).

(*m*) County Court Rules, Ord. 3, r. 1. *Carter* v. *Rigby & Co.*, [1896] 2 Q. B. 113, C. A., which decided that plaintiffs could not sue jointly under the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), must now be considered as overruled. As to joinder of defendants, see title COUNTY COURTS, Vol. VIII., p. 454. As to stay of several actions brought against one defendant, pending trial of test action, see *ibid.*, pp. 481, 482.

(*n*) County Court Rules, Ord. 44, r. 18.

(*o*) *Ibid.*, r. 19.

(*p*) *Bullock* v. *London General Omnibus Co.*, [1907] 1 K. B. 264, C. A.

SECT. 2 Employers' Liability Act, 1880.

322. A claim at common law for damages, not exceeding an amount which may be recovered in a county court (*q*), may be joined with an action under the Act (*r*). Where an action has been brought at common law in the High Court and remitted for trial to the county court, a claim under the Act (*r*) may be added in the county court (*s*).

Joinder of claims under common law and the statute.

323. Where an action is brought under the Act (*r*) which fails, but it is determined in the action (*t*) that the employer would be liable to pay compensation in respect of the injury under the Workmen's Compensation Act, 1906 (*u*), the plaintiff may ask the court which tries the unsuccessful action to assess the compensation, and the court may deduct therefrom all or any of the costs which were occasioned by bringing the action instead of proceeding under the Workmen's Compensation Act, 1906 (*v*).

Assessment of compensation under Workmen's Compensation Act, 1906.

324. A new trial may be granted by the judge of the county court in the same manner and for the same reasons as would justify the granting a new trial in an ordinary action in the court (*a*). An appeal lies to the High Court from the decision of the judge granting or refusing a new trial (*b*), but where the judge has applied the correct rule of law to the facts as found by him his decision cannot be overruled (*c*).

New trial.

325. The procedure relating to an appeal from the decision of the judge of the county court, and to an appeal from a Divisional Court, is dealt with elsewhere (*d*).

Appeal.

SECT. 3.—*Workmen's Compensation Act*, 1906.

SUB-SECT. 1.—*Scope of the Act.*

326. The liability to pay compensation under the Workmen's Compensation Act, 1906 (*e*), attaches to the relation of employer and workman, and is quite irrespective of negligence. With few exceptions, it is an obligation placed upon every employer of labour to make pecuniary compensation to a limited extent, whenever

General obligation upon employers of labour.

(*q*) £100; see title COUNTY COURTS, Vol. VIII., p. 428.

(*r*) Employers' Liability Act, 1880 (43 & 44 Vict. c. 42).

(*s*) *Wood* v. *Weber* (1908), 24 T. L. R. 587. As to remitted actions, see title COUNTY COURTS, Vol. VIII., pp. 438 *et seq.*

(*t*) Usually the question is decided after the determination of the action; see pp. 195 *et seq.*, *post.*

(*u*) 6 Edw. 7, c. 58.

(*v*) *Ibid.*, s. 1 (4); and see title COUNTY COURTS, Vol. VIII., p. 579. As to allowing counsel's fees, see *ibid.*, p. 594.

(*a*) County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 93. As to the usual grounds upon which new trials are granted, see title COUNTY COURTS, Vol. VIII., pp. 548 *et seq.*

(*b*) See *ibid.*, p. 602, note (*c*).

(*c*) *How* v. *London and North Western Rail. Co.*, [1892] 1 Q. B. 391, C. A.; see *Smith* v. *General Motor Cab Co., Ltd.*, [1911] A. C. 188.

(*d*) See title COUNTY COURTS, Vol. VIII., pp. 601—609.

(*e*) 6 Edw. 7, c. 58; hereinafter, in the text of this section of the title, referred to as "the Act." In this title the abbreviations "B. W. C. C. (O. S.)" and "B. W. C. C." respectively refer to (1) "Butterworths' Workmen's Compensation Cases," 1899—1907, edited by the late Mr. Minton-Senhouse, and (2) "Butterworths' Workmen's Compensation Cases," New Series, edited by His Honour Judge Ruegg, K.C., and Mr. Douglas Knocker.

SECT. 3. Workmen's Compensation Act, 1906.

death or disablement happens to a workman in the course of his employment (*f*).

Employments within the Act.

327. Every employment is within the Act (*g*) where a contract of service or apprenticeship exists, whether the work involved is manual labour, clerical work, or otherwise, except those employments (*h*) which are in terms excluded in the Act (*g*) itself (*i*).

Contract of service or of apprenticeship.

328. In order that the obligation to pay compensation should attach, the contract must be a contract of service or of apprenticeship with an employer (*k*).

A contract of service is one in which one person undertakes to serve another and to obey his reasonable orders, within the scope of the duties undertaken, which duties are generally, though not specially, defined (*l*).

Persons excluded from the Act by name.

329. The following persons are expressly excluded from the operation of the Act (*m*) :—

(*f*) The Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37) (now repealed), the first statute passed in England involving the principle of compulsory insurance of workmen, applied to a limited number of industries only. As to employers' liability insurance, see title INSURANCE, Vol. XVII., pp. 570 *et seq.*

(*g*) See note (*e*), p. 153, *ante*.

(*h*) See the text, *infra*, and pp. 155 *et seq.*, *post*.

(*i*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 13, definition "Workman"

(*k*) *Ibid.*, s. 13. A contract of apprenticeship is by its very nature, even apart from express terms, a contract of service, since an apprentice, in return for instruction, contracts to serve his master; see p. 71, *ante*.

(*l*) *E.g.*, a lecturer, employed at an exhibition, whose duty was to lecture upon and explain an airship exhibited there, is not a workman within the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), the contract not being one of service (*Waites* v. *Franco-British Exhibition* (1909), 25 T. L. R. 441, C. A.; 2 B. W. C. C. 199). A person doing work for a voluntary charitable institution at their labour yard in exchange for board and lodging and occasional small donations of money does not work under a contract of service (*Burns* v. *Manchester and Salford Wesleyan Mission* (1908), 1 B. W. C. C. 305). The distinction is often a fine one. A man working for the London (Unemployed) Relief Body, a committee constituted under the Unemployed Workmen Act (5 Edw. 7, c. 18), s. 1, is entitled to compensation under the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), a contract of service arising out of this relation (*Porton* v. *Central Unemployed Body for London*, [1909] 1 K. B. 173, C. A.; 2 B. W. C. C. 296); see also *Crump* v. *Lewis*, [1908] 1 K. B. 858; *Hillier* v. *St. Bartholomew's Hospital (Governors)* (1909), 25 T. L. R. 762, C. A.; *Simpson* v. *Ebbw Vale Steel, Iron, and Coal Co*, [1905] 1 K. B. 453, C. A.; 7 B. W. C. C. (o. s.) 101; *Bagnall* v. *Levinstein, Ltd.*, [1907] 1 K. B. 531, C. A.; 9 B. W. C. C. (o. s.) 100; *Macgillivray* v. *Northern Counties Institute for the Blind* (1911), 48 Sc. L. R. 811 (blind man employed in department of the institution); *Green* v. *Davies* (1911), 46 L. J. 546 (where the question whether the injured workman was working under a contract of service or as a contractor was considered); *Smith* v. *General Motor Cab Co., Ltd.*, [1911] A. C. 188; 4 B. W. C. C. 249 (relation between taxi-cab owner and driver not one of master and servant). As to the nature of the contract of service, see p. 64, *ante*.

(*m*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 13.

(1) Any person employed, otherwise than by way of manual labour, whose remuneration exceeds £250 a year (*n*).

Where remuneration exceeds £250 per annum.

In this connection, not merely monetary remuneration, but other things capable of pecuniary valuation, must be taken into account (*o*). What the workman saves by getting such other things is not the test (*a*). Where no other test is available the cost of such other things to the employer may be regarded in ascertaining the total remuneration (*b*). Even gratuities or tips habitually received may be properly taken into account in estimating remuneration (*c*).

Persons in casual employment.

(2) A person whose employment is of a casual nature, and who is employed otherwise than for the purposes of the employer's trade or business (*d*).

Casual employment is employment necessitated by chance circumstances (*e*). The expression "casual" is not used in contradistinction to "permanent" (*f*).

If the employment, though casual, is for purposes of the employer's trade or business, it is within the Act. "Business" means anything which occupies the time and attention and labour of a man for the purposes of profit (*g*). A person engaged under a contract of service may be a workman though his duties are of a nature

(*n*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 13.

(*o*) *Dothie* v. *Macandrew (Robert) & Co.*, [1908] 1 K. B. 803, C. A.; 1 B. W. C. C. 308; followed in *Skailes* v. *Blue Anchor Line, Ltd.*, [1911] 1 K. B. 360, C. A.; 4 B. W. C. C. 16.

(*a*) *Ibid.*

(*b*) *Rosenqvist* v. *Bowring & Co., Ltd.*, [1908] 2 K. B. 108, C. A.; 1 B. W. C. C. 395.

(*c*) *Penn* v. *Spiers and Pond, Ltd.*, [1908] 1 K. B. 766, C. A.; 1 B. W. C. C. 401. As to "earnings," see pp. 201 *et seq.*, *post.*

(*d*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 13.

(*e*) "Casual." Definition: "Depending on chance; occurring or coming at uncertain times; unsettled; coming without design or premeditation."—MURRAY. "Arising from chance; not certain."—JOHNSON. "Happening to come without being foreseen; coming without regularity."—WEBSTER. "Coming at uncertain times, or without regularity; a labourer or artizan employed only irregularly."—CENTURY.

(*f*) *Dewhurst* v. *Mather*, [1908] 2 K. B 754, C. A.; 1 B. W. C. C. 328. In this case a washer-woman employed to wash at a private house on Fridays in each week, and on alternate Tuesdays, was held not to be engaged in casual employment. A person who got his living by doing odd jobs, and who was employed, though not at stated or periodic intervals, to clean the windows of a private house, was held to be engaged in employment of a casual nature. See *Hill* v. *Begg*, [1908] 2 K B 802, *per* BUCKLEY, L.J., at p. 805 (S. C. 1 B. W. C. C 320): "Suppose that a host, when from time to time he entertains his friends at dinner or his wife gives a reception or a dance, has been in the habit for many years of employing the same men to come in and wait at his table or assist at the reception, . . . the employment is of a casual nature. It depends upon the whim or the hospitable instincts or the social obligations of the host whether he gives any, and how many, dinner parties or receptions, and the number of men he will want will vary with the number of his guests. In such a case the waiters may not incorrectly be said to be regularly employed in an employment of a casual nature."

(*g*) *Smith* v. *Anderson* (1880) 15 Ch. D. 247, C. A., *per* JESSEL, M.R., at p. 258. It is the employer's trade or business, not the trade or business of the workman, which forms the test whether or not casual labour is within the Act.

SECT. 3. Workmen's Compensation Act, 1906.

similar to those often undertaken by others for sport or amusement, *e.g.*, a professional football player (*h*).

(3) A member of a police force (*i*).

Police.

"Police force" in England means a force maintained in the Metropolitan Police District, a county, a borough, or town not being a borough and maintaining a separate police force under any local Act of Parliament, also the police force of the river Tyne (*k*).

A policeman called upon in virtue of his office to perform duties other than strictly police duties is not thereby entitled to the statutory benefits, for example, a policeman acting as a fireman and injured whilst so acting (*l*).

Outworkers.

(4) An outworker (*m*).

An outworker is a person to whom articles or materials are given out to be made up, cleaned, washed, altered, ornamented, finished, or repaired, or adapted for sale (*n*), in his own home or on other premises not under the control or management of the person who gave out the materials or articles (*o*).

Members of employer's family.

(5) A member of the employer's family, dwelling in his house (*o*).

The term "member of a family" means wife or husband, father, mother, grandfather, grandmother, stepfather, stepmother, son, daughter, grandson, granddaughter, stepson, stepdaughter, brother, sister, half-brother, half-sister (*o*).

Though the member of the family may be employed and receive wages from the employer, he is not within the Act (*p*) if living in the house with the employer (*q*). A member of the employer's family, where the employer is a sub-contractor, is not entitled to sue the principal, as the right given by the Act (*a*) against the principal only exists where there is a right under the Act (*a*) against the immediate employer (*b*).

(*h*) *Roberts* v. *Crystal Palace Football Club, Ltd.* (1909), 3 B. W. C. C. 51, C. A. This case is not an authority for saying that any professional player attached to a sporting club is within the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), The terms of the employment must be carefully regarded to see whether there really is a contract to serve the club, or the committee of the club.

(*i*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 13. A member of a police force to which the Police Act, 1890 (53 & 54 Vict. c. 45), or the Police (Scotland) Act, 1890 (53 & 54 Vict. c. 67), applies, or a member of the City of London Police Force, the Royal Irish Constabulary, or the Dublin Metropolitan Police Force, is excluded (Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 13). See title POLICE.

(*k*) Police Act, 1890 (53 & 54 Vict. c. 45), s. 33, and Sched. III.

(*l*) *Sudell* v. *Blackburn Corporation* (1910), 3 B. W. C. C. 227, C. A.

(*m*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 13.

(*n*) As to the meaning of "adapted for sale," see title FACTORIES AND SHOPS, Vol. XIV., pp. 438, note (*a*).

(*o*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 13.

(*p*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58).

(*q*) The Scottish courts have held that a man who is employed by, lives with, and pays for board and lodging to, his father, and who is injured while absent on his father's business, is a "member" of his employer's family "dwelling in his house" (*M'Dougall* v. *M'Dougall*, [1911] S. C. 426).

(*a*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 4.

(*b*) *Marks* v. *Carne*, [1909] 2 K. B. 516, C. A.; 2 B. W. C. C. 186. The members of the family dwelling in the employer's house who are excluded, are such as are connected with him by legitimate relationship. An

(6) Persons in the naval or military service of the Crown (*c*). Persons in naval or military service.

This expression, it is thought, means the combatant forces of the Crown who are subject to the Naval Discipline Act, 1866 (*d*), or the Army Act, 1881 (*e*).

(7) Seamen who are members of the crew of a fishing vessel and remunerated by shares in the profits, or the gross earnings of the working of the vessel (*f*). Seamen sharing in takings.

330. The following persons are not within the Act (*g*), although not in terms excluded:—

(8) An independent contractor; for no contract of service exists between him and the person for whom he is working (*h*). Independent contractors.

(9) A partner is not a workman in the employ of the firm of which he is a member, even though he performs the duties of working foreman (*i*). Partners.

illegitimate child or other relation, it is believed, would under like circumstances be within the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58). As to sub-contracting, see p. 192, *post*.

(*c*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 9; see title ROYAL FORCES, and see p. 223, *post*.

(*d*) 29 & 30 Vict. c. 109; see *S.S. Raphael* (*Owners*) v. *Brandy*, [1911] A. C. 413; 4 B. W. C. C. 307, referred to p. 205, *post*.

(*e*) 44 & 45 Vict. c. 58; see title ROYAL FORCES.

(*f*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 7 (2). A seaman so remunerated was injured whilst voluntarily doing casual work for the owners, for extra remuneration, which he shared with the other members of the crew. Held, that the man's remuneration was by shares in the profits of the vessel and he was, therefore, excluded from the Act by *ibid.*, s. 7 (2) (*Whelan* v. *Great Northern Steam Shipping Co.* (1909), 78 L. J. (K. B.) 860, C. A.; 2 B. W. C. C. 235). A seaman on a steam fishing vessel was remunerated by a twenty-fourth share of the net profits, with a guarantee from the owners that such share should not fall short of 30*s*. a week. Held, that he was "remunerated by a share," and within the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 7 (2), and, therefore, not entitled to compensation (*Admiral Fishing Co.* v. *Robinson*, [1910] 1 K. B. 540, C. A.; 3 B. W. C. C. 247). The word "solely" is not to be read into the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 7 (2) (*Admiral Fishing Co.* v. *Robinson*, *supra*). As to the position of seamen generally, see pp. 158—160, *post*; and see title SHIPPING AND NAVIGATION. As to compensation of members of the Naval Reserve, see p. 205, *post*.

(*g*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58).

(*h*) *Evans* v. *Penwyllt Dinas Silica Brick Co.* (1901), 18 T. L. R. 58, C. A.; 4 B. W. C. C. (o. s.) 101; *Vamplew* v. *Parkgate Iron and Steel Co.*, [1903] 1 K. B. 851, C. A.; 5 B. W. C. C. (o. s.) 144. In this case COLLINS, M.R., at p. 852, speaking of the Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37), says: "Where a man undertakes to do work as a contractor that *primâ facie* at any rate negatives the existence of the relation of employer and employed, and shows that the contract is not one of employment within the meaning of the Act"; see *Hall* v. *Lees*, [1904] 2 K. B. 602, C. A. See, generally, as to distinction between a servant and a contractor, p. 67, *ante*.

(*i*) *Ellis* v. *Ellis* (*Joseph*) & *Co.*, [1905] 1 K. B. 324, C. A.; 7 B. W. C. C. (o. s.) 97. Whether a person is a partner or not is a question of fact. Participation in profits is evidence of partnership, but the Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 2, declares that "A contract for the remuneration of a servant or agent of a person engaged in a business by a share of the profits of the business does not of itself make the servant or agent a partner"; and see title PARTNERSHIP.

Workmen's Compensation Act, 1906.

Seamen within the Act.

331. Subject to the exception as to seamen remunerated by shares in the earnings of the vessel (*j*), masters, seamen, and apprentices to the sea service, and apprentices in the sea-fishing service are within the Act (*k*) provided they are workmen, and members of the crew of any ship registered in the United Kingdom, or of any other British ship or vessel of which the owner (or if there is more than one owner), the managing owner, or manager resides or has his principal place of business in the United Kingdom (*l*).

Definitions.

332. The expressions "ship," "vessel," "seaman," and "port" have the same meanings (*a*) as in the Merchant Shipping Act, 1894 (*b*).

Master.

333. The master of a ship must be a workman within the meaning of the Act (*c*) in order that it may apply to him. Where a vessel is sailed under the sharing system, the master taking any cargo he pleases and a share of the gross receipts, the master is generally not a workman within such meaning (*d*).

Pilots.

Pilots, duly licensed by any pilotage authority to conduct ships to which they do not belong, are seamen within the Act (*e*).

Manager.

The term "manager," in relation to a ship, means the ship's husband or other person to whom the management of the ship is entrusted by or on behalf of the owner (*f*).

Seamen excluded as not being workmen.

Probably the only persons, who are seamen within the Act (*g*) and definition and may be excluded on the ground that they are not workmen within the meaning of the Act (*g*), are those masters and other officers whose remuneration exceeds £250 per annum (*h*).

(*j*) See p. 157, *ante*.

(*k*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58).

(*l*) *Ibid.*, s. 7 (1). As to vessels exempt from registration, see titles FERRIES, Vol. XIV., p. 564, note (*p*); SHIPPING AND NAVIGATION.

(*a*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 13.

(*b*) 57 & 58 Vict. c. 60, s. 742; see titles FACTORIES AND SHOPS, Vol. XIV., p. 484, note (*h*); FERRIES, Vol. XIV., p. 564; SHIPPING AND NAVIGATION.

(*c*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58).

(*d*) *Boon* v. *Quance* (No. 1) (1909), 3 B. W. C. C. 106, C. A., followed in *Hughes* v. *Postlethwaite* (1910), 4 B. W. C. C. 105, C. A.; see, however, *Jones* v. *Ship "Alice and Eliza"* (*Owners*) (1910), 3 B. W. C. C. 495, C. A., where the facts appear to be almost identical with those in *Boon* v. *Quance*, *supra*, the decision in the former case turning largely upon the absence of evidence by the owners to show what the relationship between them and the master of the ship really was.

(*e*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 7 (3). *I.e.*, pilots to whom the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), Part X., applies. This extends to the United Kingdom and the Isle of Man only, but applies to all ships, British and foreign (*ibid.*, s. 572).

(*f*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 13; see *Shea* v. *Drolenvaux* (1903), 19 T. L. R. 473, C. A.; 5 B. W. C. C. (o. s.) 144, a decision under the Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37).

(*g*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58).

(*h*) As to the remuneration of such officers, see *Dothie* v. *Macandrew (Robert) & Co.*, [1908] 1 K. B. 803, C. A.; 1 B. W. C. C. 308; *Rosenqvist* v. *Bowring & Co., Ltd.*, [1908] 2 K. B. 108, C. A.; 1 B. W. C. C. 395; *Skailes* v. *Blue Anchor Line, Ltd.*, [1911] 1 K. B. 360, C. A.; 4 B. W. C. C. 16.

If a vessel is chartered and the charterers select master and crew, the charterers become owners within the meaning of the Merchant Shipping Act, 1894 (*i*), and it is the owners who are to pay compensation (*j*).

Owners.

334. The modifications of the Act (*k*) as it affects seamen are the following:—

Modifications of the Act as to seamen.

(1) The notice of accident and claim for compensation may (except in the case of the master) be served on the master. No notice of accident is required where the accident and incapacity occur on the ship (*l*).

(2) In case of death, six months are allowed for making the claim after news of the death reaches the claimant (*m*).

(3) In the case of injured seamen left abroad, depositions as to the circumstances and nature of the injury may be taken by British officials abroad, and transmitted to the Board of Trade and used in evidence for enforcing a claim (*n*).

(4) In the case of the death of a seaman leaving no dependants, no compensation for funeral expenses is recoverable if the owner is liable to pay the expenses of burial (*o*).

(5) The owner is not liable to pay compensation during the period in which he is liable to defray the expenses of maintenance of the injured seaman (*p*).

(6) Compensation is to be paid to a seaman in full, notwithstanding the statutory limitation of a shipowner's liability in certain cases of loss, injury, or damage (*q*).

(*i*) 57 & 58 Vict. c. 60, ss. 503, 504; see *Steam Hopper No.* 66 (1907), 77 L. J. (P.) 84, H. L.; *Jackson* (*Sir John*), *Ltd.* v. *S S. Blanche* (*Owners*), [1908] A. C. 126.

(*j*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s 7. For procedure, see Workmen's Compensation Rules, r. 36, Forms 6, 7.

(*k*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58).

(*l*) *Ibid*, s. 7 (1) (a).

(*m*) *Ibid.*, s. 7 (1) (b).

(*n*) *Ibid.*, s. 7 (1) (c). The Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 691, 695, apply to such depositions.

(*o*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 7 (1) (d). The Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 207 (1), requires these expenses to be borne by the owner if the injury occasioning death occurred in the service of the ship; and see the Merchant Shipping Act, 1906 (6 Edw. 7, c. 48), s. 34; *Anderson* v. *Rayner*, [1903] 1 K. B. 589, C. A.

(*p*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 7 (1) (e). The owner is liable to pay the expenses of the maintenance of a seaman injured in the service of the ship until he dies or recovers or is brought home (Merchant Shipping Act, 1906 (6 Edw. 7, c. 48), s. 34). Payments of wages made at such a time cannot be deducted from the compensation which afterwards becomes payable, as only payments made during the period during which the employer is liable to pay compensation are within the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. I. (3) (*McDermott* v. *S.S. Tintoretto* (*Owners*), [1911] A. C. 35; 4 B. W. C. C. 123).

(*q*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 7 (1) (f). The Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 503, limits the owners' liability, where there has been no personal default, for loss of life, or injury to persons carried in the ship, to an amount not exceeding £15 for each ton of the ship's tonnage; see title SHIPPING AND NAVIGATION. If, however, the owners claim indemnity under the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 6, against another shipowner,

SECT. 3. Workmen's Compensation Act, 1906.

(7) The dependants of a seaman lost with his ship are allowed eighteen months from the time at which the ship is deemed to have been lost within which to claim compensation (*r*).

Detention of ship.

335. Provision is made in the Act (*s*) for the detention of a ship found in any port or river in England or Ireland, or within three miles of the coast, by a judge of any court of record, on his being satisfied that the owners are probably liable to pay compensation under the Act and that none of the owners reside in the United Kingdom, until the compensation is paid or security given. The person giving the security is to be made defendant in the proceedings, and the provisions of the Merchant Shipping Act, 1894 (*t*), are made applicable (*s*).

Seamen incapacitated by industrial disease.

336. A seaman is not entitled to claim under the Act (*a*) for incapacity arising from industrial disease (*b*) contracted at sea, though the disease is within the Act (*a*): he cannot get a certificate of disablement from the certifying surgeon of the district in which he is employed, for there is no such official, nor can he be suspended from work under special rules made under the Factory and Workshop Act, 1901 (*c*).

Injury to seamen abroad.

337. Although the operation of the Act (*a*) is limited generally to the territorial limits of the United Kingdom, the injury to a seaman need not occur in the United Kingdom (*d*).

SUB-SECT. 3.—*Territorial Limit.*

Territorial limit.

338. The Act (*a*) has no application outside the territorial limits of the United Kingdom (*e*). A convention (*f*), however, exists between England and France by which the subjects of each country reciprocally enjoy the benefits of the compensation and guarantees secured by each country to its own subjects.

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the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 503, is to apply and limit the liability of such other shipowner (Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 7 (1) (f).

(*r*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 7 (1) (g), applying the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 174 (2), (3), relating to recovery of wages, to such a claim.

(*s*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 11; for procedure, see Workmen's Compensation Rules, r. 37, Forms 8, 26, 27, 28, 29, 30, 30A.

(*t*) 57 & 58 Vict. c. 60, s. 692.

(*a*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58).

(*b*) As to industrial disease, see pp. 164 *et seq.*, *post.*

(*c*) 1 Edw. 7, c. 22; see *Curtis* v. *Black & Co.*, [1909] 2 K. B. 529, C. A.; 2 B. W. C. C. 239. The question whether in similar circumstances, if the injury resulted in death, a claim for compensation could be made by the dependants was left open.

(*d*) *Tomalin* v. *Pearson (S.) & Son, Ltd.*, [1909] 2 K. B. 61, C. A.; 2 B. W. C. C. 1.

(*e*) *Ibid.* It is submitted, though no decision exists, that dependants living abroad may claim the benefit of the statute if the death of a workman occurs in the United Kingdom As to seamen, see the text, *supra.*

(*f*) Dated 3rd July, 1909, ratified by Parliament by the Workmen's Compensation (Anglo-French Convention) Act, 1909 (9 Edw. 7, c. 16). The chief object of this convention is to enable the dependants of an English workman killed in France, who reside in England, to receive compensation. Previously this was not permitted by the law of France. For procedure, see Workmen's Compensation Rules of 31st March, 1911, rr. 86—93 and Forms; and see p. 243, *post.*

SUB-SECT. 4.—*Accident.*

SECT. 8. Workmen's Compensation Act, 1906.

339. Injury, to give rise to a claim under the Act (*g*), must arise from accident (*h*).

Injury must arise from accident.

The term "accident" generally means some unexpected event happening without design, but perhaps no general definition can be given of the word to cover all cases falling within the Act (*g*). The result of an unexpected manifestation of a natural law, such as lightning, earthquake, flood, or tempest, may constitute an accident (*i*); so may the effects of a heatstroke from a furnace (*k*).

No general definition.

An occurrence, though designed by the author of it and committed wilfully, may yet, if it is unexpected and without design on the part of the person who suffers from it, be an accident (*l*).

340. Such a word as "fortuitous" is not the test to be applied for the purpose of ascertaining, for the purposes of the Act (*g*), whether an occurrence is or is not an accident (*a*). The word

What is the test.

(*g*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58).

(*h*) *Ibid.*, s. 1 (1).

(*i*) *Andrew* v. *Failsworth Industrial Society*, [1904] 2 K. B. 32, C. A.; 6 B. W. C. C (o. s.) 11; but see *Warner* v. *Couchman*, [1911] 1 K. B. 351, C. A.; 4 B. W. C. C. 32; affirmed (1911), 28 T. L. R. 58, H. L. (journeyman baker, while out with his cart, frost-bitten; held not an "accident"), discussed in *Pierce* v. *Provident Clothing and Supply Co., Ltd*, [1911] 1 K. B. 997, C. A.; 4 B. W. C. C. 242. See also *Karemaker* v. *S.S. "Corsican" (Owners)* (1911), 4 B. W. C. C. 295, C. A. (frost bite); compare *Davies* v. *Gillespie* (1911), 28 T. L. R. 6, C. A. (sunstroke; claim allowed); *Wignall* v. *Watson* (1911), 131 L. T. Jo. 556 (arbitration; a similar case).

(*k*) *Ismay, Imrie & Co.* v. *Williamson*, [1908] A. C. 437; 1 B. W. C. C. 232; *Morgan* v. *S.S. "Zenaida" (Owners)* (1909), 25 T. L. R. 446, C. A.; 2 B. W. C. C. 19; see also *Johnson* v. *Ship "Torrington" (Owners)* (1909), 3 B. W. C. C. 68, C. A.; *Thackway* v. *Connelly & Sons* (1909), 3 B. W. C. C. 37, C. A. Though such events may be covered by the term "accident," the happening thereof will not necessarily give a cause of action, owing to the provision of the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 1 (1), that the accident must arise "out of . . . the employment."

(*l*) *E.g.*, the wilful murder of a cashier who had to travel by train with considerable sums of money for his employers was held to be death by "accident," and to entitle the widow to compensation (*Nisbet* v. *Rayne and Burn*, [1910] 2 K. B. 689, C. A.; 3 B. W. C. C. 507; compare *Murray* v. *Denholm & Co.* (1911), 48 Sc. L. R. 896).

(*a*) A workman employed to turn the wheel of a machine, by over exerting himself, ruptured himself; held that this was an accident (*Fenton* v. *Thorley & Co., Ltd.*, [1903] A. C. 443; 5 B. W. C. C. (o. s.) 1); and Lord MACNAGHTEN, at p. 446, expressed regret that the word "fortuitous" should have been applied to the term "injury by accident" in the Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37). "If," he said, "it means the same thing as accidental, the use of the word is superfluous. If it introduces the element of haphazard, an element which is not necessarily involved in the word "accidental," its use is misleading and not warranted by anything in the Act." The earlier decisions under the Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37), on the meaning of "accident" must now be regarded as overruled, *i.e.*, such cases as *Hensey* v. *White*, *Lloyd* v. *Sugg & Co.*, *Walker* v. *Lilleshall Coal Co.*, [1900] 1 Q. B. 481, C. A.; 2 B. W. C. C. (o. s.) 1, 5, 7; *Roper* v. *Greenwood & Sons* (1900), 83 L. T. 471, C. A.; 3 B. W. C. C. (o. s.) 23; overruled by *Fenton* v. *Thorley & Co., Ltd., supra.* These decisions were largely based upon the adoption by the Court of Appeal of the supposition (see *Hamilton, Fraser & Co.* v. *Pandorf & Co.* (1887), 12 App. Cas. 518, 524) that the word "accident" involved the idea of something fortuitous and unexpected; compare *Timmins* v. *Leeds Forge Co.* (1900), 83 L. T. 120, C. A.; 2 B. W. C. C. (o. s.) 10; *Boardman*

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"accident" is used in the Act (*b*) in its popular and ordinary sense—an unlooked for mishap, or an untoward event not expected nor designed (*c*).

Injury by workman himself.

341. The fact that a workman injures himself does not make the occurrence less an accident (*d*); and the fact that the workman had some inherent defect or weakness which, combined with the occurrence, resulted in death or incapacity is immaterial (*e*), as is also the fact that the occurrence would not have led to death or incapacity in a stronger man (*f*).

The accident need not be caused by direct objective injury to the body; some physiological injury due to mental shock is sufficient (*g*).

Disease.

342. Even what is ordinarily regarded as a disease may be an accident if it results from an unexpected mishap the time of the occurrence of which can be fixed (*h*).

All diseases contracted by a workman in the course of his employment are not, however, regarded as accidents (*i*), though certain industrial diseases are to be so deemed (*j*), for instance lead poisoning contracted gradually is not an accident (*k*), nor are injuries

v. *Scott and Whitworth*, [1902] 1 K. B. 43, C. A.; 4 B. W. C. C. (o. s.) 1; *Thompson* v. *Ashington Coal Co., Ltd.* (1901), 17 T. L. R. 345, C. A.; 3 B. W. C. C. (o. s.) 21.

(*b*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58).

(*c*) *Fenton* v. *Thorley & Co., Ltd.*, [1903] A. C. 443, *per* Lord MACNAGHTEN, at p. 448.

(*d*) *Ibid.*, *per* Lord ROBERTSON, at p. 452.

(*e*) *Lloyd* v. *Sugg & Co.*, [1900] 1 Q. B. 486, C. A.; 2 B. W. C. C. (o. s.) 5; *Roper* v. *Greenwood & Sons* (1900), 83 L. T. 471, C. A. (overruled on ground on which it was decided); *Dotzauer* v. *Strand Palace Hotel, Ltd.* (1910), 3 B. W. C. C. 387, C. A. A workman suffering from aneurism of the aorta strained himself at work and the result of the strain upon his enfeebled heart caused death; held that this was death by accident (*Clover, Clayton & Co., Ltd.* v. *Hughes*, [1910] A. C. 242; 3 B. W. C. C. 275); compare *Barnabas* v. *Bersham Colliery Co.* (1911), 103 L. T. 513; 4 B. W. C. C. 119, H. L. (death from apoplexy during working hours in mine; arteries diseased; no evidence of attack during strain; claim disallowed); compare also *Hawkins* v. *Powells Tillery Steam Coal Co., Ltd.*, [1911] 1 K. B. 988, C. A.; 4 B. W. C. C. 178; *Ball* v. *Hunt (W.) & Son, Ltd.*, [1911] 1 K. B. 1048, C. A.; 4 B. W. C. C. 225 (accident only making patent a pre-existing incapacity not ground for compensation); *Noden* v. *Galloways, Ltd.*, [1911] W. N. 192, C. A. (previous accident; contributing cause to subsequent accident; claim disallowed); see also *Wright* v. *Kerrigan*, [1911] 2 I. R. 301, C. A. (pneumonia supervening on pleurisy caused by accident); *Groves* v. *Burroughes and Watts, Ltd.* (1911), 4 B. W. C. C. 185, C. A. (septic poisoning from re-opened wound; held that there was evidence on which to draw inference that death was due to the accident).

(*f*) *Clover, Clayton & Co., Ltd.* v. *Hughes*, *supra*.

(*g*) *Yates* v. *South Kirby, Featherstone, and Hemsworth Collieries, Ltd.*, [1910] 2 K. B. 538; 3 B. W. C. C. 418, C. A.

(*h*) A workman was sorting wool, and at a time which could be approximately fixed an anthrax bacillus flew from the wool into his eye and infected him with anthrax, from which disease he died; held that this was death by accident within the Act (*Brintons, Ltd.* v. *Turvey*, [1905] A. C. 230; 7 B. W. C. C. (o. s.) 1); see also *Wright* v. *Kerrigan*, *supra*.

(*i*) *Brintons, Ltd.* v. *Turvey*, *supra*, *per* Lord LINDLEY, at p. 237.

(*j*) See pp. 164 *et seq.*, *post*.

(*k*) *Steel* v. *Cammell, Laird & Co., Ltd.*, [1905] 2 K. B. 232, C. A.; 7 B. W. C. C. (o. s.) 2; see, however, pp. 164, 165, *post*.

known as "beat hand" (*l*) and "beat knee" (*m*), for they are contracted by gradual process in the course of more or less prolonged work (*n*), yet all these are now included in the schedule of industrial diseases which in certain circumstances are to be deemed accidents (*o*).

When question becomes one of law.

343. When the facts are ascertained, the question what is an accident becomes a question of law and appealable as such (*p*).

Proximate cause.

344. If the occurrence relied upon as the accident is a cause *sine quâ non*, it is not always necessary that it should be the proximate cause, at all events in time (*q*).

Death resulting from accident.

345. If death in fact results from the accident, it is no answer to a claim to show that it was not a natural or probable consequence thereof (*r*).

If the death is caused by a complaint supervening upon the accident, although such complaint may not be a natural or usual result of the injury, the death is caused by the accident (*s*).

Death, or unexpected consequences arising from reasonable endeavours to effect a cure, or alleviate symptoms, are attributable to the accident (*t*).

(*l*) *Marshall* v. *East Holywell Coal Co.* (1905), 93 L. T. 360, C. A.; 7 B. W. C. C. (o. s.) 19; see now, however, pp. 164, 165, *post*.

(*m*) *Gorley* v. *Backworth Collieries* (1905), 93 L T. 360, C. A.; 7 B. W. C. C. (o. s.) 19; see also to same effect, *Walker* v. *Hockney Brothers* (1909), 2 B. W. C. C. 20, C. A; see, however, pp. 164, 165, *post*.

(*n*) Where a workman contracted ptomaine poisoning, which resulted in death, from working on several occasions laying open drains, manholes, and cesspools for inspection, and the county court judge found that it was not possible to specify the time when the disease was contracted, it was held not to be death by accident (*Eke* v. *Hart-Dyke*, [1910] 2 K. B. 677, C. A.; 3 B. W. C. C. 482); see also *Broderick* v. *London County Council*, [1908] 2 K. B. 807, C. A.; 1 B. W. C. C 219; compare *Buck* v. *Took* (1911), 46 L. J. 546 (compensation awarded to dependants of workman poisoned by gases from cesspool).

(*o*) See pp. 164—168, *post*.

(*p*) In *Hoddinott* v. *Newton, Chambers & Co., Ltd.*, [1901] A. C. 49; 3 B. W. C. C. (o. s.) 74, the House of Lords decided that the question of what constituted a scaffolding within the meaning of the Workmen's Compensation Act, 1897 (60 & 61 Vict c 37), was not a question of fact; see the judgments of Lords MACNAGHTEN and BRAMPTON (*ibid*). "When personal injury and its cause or causes have been ascertained, the question whether such cause or causes amount to an accident within the meaning of the Act is a question of law on which the decision of the county court judge is not final, and is not a question of fact, on which his decision is not open to appeal" (*Fenton* v. *Thorley & Co., Ltd.*, [1903] A. C. 441, *per* Lord LINDLEY, at p. 453; 5 B W. C. C. (o. s.) 1).

(*q*) A workman whose duty required him to stand by an open hatchway on a ship was seized with an epileptic fit and fell into the hold; held, that the personal injury sustained through the fall was an accident (*Wicks* v. *Dowell & Co., Ltd.*, [1905] 2 K. B. 225, C. A.; 7 B. W. C. C. (o. s.) 14).

(*r*) *Dunham* v. *Clare*, [1902] 2 K. B. 292, C. A.; 4 B. W. C. C. (o. s.) 102; see *Dunnigan* v. *Cavan and Lind* (1911), 48 Sc. L. R. 459.

(*s*) *Ystradowen Colliery Co., Ltd.* v. *Griffiths*, [1909] 2 K. B. 533, C. A.; 2 B. W. C. C. 57; see *Kelly* v. *Auchenlea Coal Co.* (1911), 48 Sc. L. R. 768 (pneumonia, caused by inhaling gas); compare *Noden* v. *Galloways, Ltd*, [1911] W. N. 192, C. A.; *Groves* v. *Burroughes and Watts, Ltd.* (1911), 4 B. W. C. C. 185, C. A.

(*t*) *E.g.*, a workman died under an anæsthetic, when having a slight operation performed on his hand which had been injured by accident;

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The onus of proving that the death (*u*) resulted from accident rests upon the dependants claiming compensation. Where death is equally consistent with disease as with accident the claim for compensation fails (*v*).

SUB-SECT. 5.—*Industrial Diseases.*

Industrial diseases.

346. Certain diseases due to the nature of the employment are within the Act (*w*), and are for the purposes of compensation to be deemed personal injury by accident (*a*).

held, that the death was caused by the accident (*Shirt* v. *Calico Printers' Association, Ltd.*, [1909] 2 K. B. 51, C. A.; 2 B. W. C. C. 342); see also *Charles* v. *Walker, Ltd.* (1909), 25 T. L. R. 609, C. A.; 4 B. W. C. C. 5).

(*u*) As to statements made by a deceased workman as to the cause of his bodily injuries, see note (*r*), p. 176, *post*.

(*v*) *Barnabas* v. *Bersham Colliery Co.* (1910), 104 L. T. 513; 4 B. W. C. C. 119, H. L.; see *Brown* v. *Kidman* (1911), 4 B. W. C. C. 199, C. A. (workman fell from cart and died from injury nine days later; no medical evidence that death resulted from the accident; compensation was refused). In the cases of a workman who had complained that he had hurt his back, and went home, where he died a week later from intestinal obstruction (*Farmer* v. *Stafford, Allen, & Sons, Ltd* (1911), 4 B. W. C. C. 223); of a workman who collapsed during work and died subsequently of heart disease (*Hawkins* v. *Powells Tillery Steam Coal Co., Ltd*, [1911] 1 K. B. 988, C. A.; 4 B. W. C. C. 178); of a carman who died three weeks after a fall (*Honor* v. *Painter* (1911), 4 B. W. C. C. 188, C. A.), compensation was refused.

(*w*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58).

(*a*) *Ibid.*, s. 8 (1). The following are the diseases (*ibid*, Sched. III.):—

Disease.	*Description of Process.*
Anthrax	Handling of wool, hair, bristles, hides, and skins.
Lead poisoning or its *sequelæ*	Any process involving the use of lead or its preparations or compounds.
Mercury poisoning or its *sequelæ*	Any process involving the use of mercury or its preparations or compounds.
Phosphorus poisoning or its *sequelæ*	Any process involving the use of phosphorus or its preparations or compounds.
Arsenic poisoning or its *sequelæ*	Any process involving the use of arsenic or its preparations or compounds.
Ankylostomiasis . . .	Mining.

Added by Order of the Secretary of State dated 22nd May, 1907, in pursuance of power given in ibid, s. 8 (6).

1. Poisoning by nitro- and amido-derivatives of benzene (dinitro-benzol, anilin and others) or its *sequelæ*.	Any process involving the use of a nitro- or amido- derivative of benzene or its preparations or compounds.
2. Poisoning by carbon bisulphide or its *sequelæ*.	Any process involving the use of carbon bisulphide or its preparations or compounds.
3. Poisoning by nitrous fumes or its *sequelæ*.	Any process in which nitrous fumes are evolved.
4. Poisoning by nickel carbonyl or its *sequelæ*.	Any process in which nickel carbonyl gas is evolved.

347. Compensation is payable in respect of any of these diseases in three cases :—

(1) Where the certifying surgeon for the district appointed under

When compensation is payable.

Added by Order of the Secretary of State dated 22nd May, 1907, in pursuance of power given in ibid., s. 8 (6)—continued.

Disease.	*Description of Process.*
5. Arsenic poisoning or its *sequelæ* .	Handling of arsenic or its preparations or compounds.
6. Lead poisoning or its *sequelæ* .	Handling of lead or its preparations or compounds.
7. Poisoning by *Gonioma Kamassi* (African boxwood) or its *sequelæ*.	Any process in the manufacture of articles from *Gonioma Kamassi*. (African boxwood).
8. Chrome ulceration or its *sequelæ*	Any process involving the use of chromic acid, or bichromate of ammonium, potassium, or sodium, or their preparations.
9. Eczematous ulceration of the skin, produced by dust or caustic, or corrosive liquids, or ulceration of the mucous membrane of the nose or mouth producedb y dust	(*Repealed and re-enacted in extended form by Order dated 2nd December*, 1908 (*infra*).
10. Epitheliomatous cancer, or ulceration of the skin, or of the corneal surface of the eye, due to pitch, tar, or tarry compounds	Handling or use of pitch, tar, or tarry compounds.
11. Scrotal epithelioma (chimney sweeps' cancer).	Chimney sweeping.
12. Nystagmus	Mining.
13. Glanders	Care of any equine animal suffering from glanders; handling the carcase of such animal.
14. Compressed air illness or its *sequelæ*.	Any process carried on in compressed air.
15. Subcutaneous cellulitis of the hand (beat hand).	Mining.
16. Subcutaneous cellulitis over the patella (miner's beat knee).	Mining.
17. Acute bursitis over the elbow (miner's beat elbow).	Mining.
18. Inflammation of the synovial lining of the wrist joint and tendon sheaths.	Mining.

Added by Order of the Secretary of State dated 2nd December, 1908.

1. Cataract in glassworkers	Processes in the manufacture of glass involving exposure to the glare of molten glass.
2. Telegraphists' cramp .	Use of telegraphic instruments.
3. Eczematous ulceration of the skin, produced by dust or liquids, or ulceration of the mucous membrane of the nose or mouth produced by dust.	

In cases of lead poisoning the processes within the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), are only those as to which special rules or regulations made under any Act of Parliament exist.

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the Factory and Workshop Act, 1901 (*b*), certifies that a workman is suffering from such a disease and is unable to earn full wages at his work (*c*).

(2) Where in pursuance of special rules or regulations made under the Factory and Workshop Act, 1901 (*d*), a workman is suspended on account of having contracted such a disease (*e*).

(3) Where the death of a workman is caused by such a disease (*f*).

When workman is deemed to have contracted scheduled disease.

348. A workman who at or immediately before the date of disablement or suspension is employed in a process mentioned in the second column of the Third Schedule to the Act (*g*), and the disease contracted is the disease in the first column of that Schedule set opposite the description of the process, is deemed to have contracted the disease from that employment, unless the certifying surgeon certifies that in his opinion the disease is not due to that employment, or unless his employer proves that it is not so due (*h*).

Disease must be contracted within twelve months of disablement.

349. The disease must be contracted within twelve months previous to the date of his disablement or suspension (*i*), whether under one or more employers (*k*).

The disablement or suspension is treated as the happening of the accident (*l*).

Compensation.

350. The compensation is recoverable from the employer who last employed the workman within the twelve months in an employment to which the nature of the disease is due (*m*).

(*b*) 1 Edw. 7, c. 22; see title FACTORIES AND SHOPS, Vol. XIV., p. 473. The Secretary of State may confer on any medical practitioner appointed by him for the purposes of the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 8, all the powers and duties of a certifying surgeon (*ibid.*, s. 8 (5)).

(*c*) *Ibid*, s 8 (1) (i).

(*d*) 1 Edw. 7, c. 22; see title FACTORIES AND SHOPS, Vol. XIV., pp. 462, 476.

(*e*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 8 (1) (ii.).

(*f*) *Ibid.*, s. 8 (1) (iii.).

(*g*) *Ibid.*, Sched. III. Including the orders of the Secretary of State extending the list of diseases in that schedule; see note (*a*), p. 164, *ante*.

(*h*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 8 (2); see note (*a*), p. 164, *ante*.

(*i*) The date of disablement is the date certified by the certifying surgeon, or if he cannot fix the date, then the date of the certificate itself, but where there is an appeal to a medical referee (see p. 167, *post*) the date of disablement is such date as the medical referee may determine. Where the workman, who is not in receipt of compensation, dies without obtaining a certificate of disablement, the date of disablement is the time of the death (Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 8 (4)).

(*k*) *Ibid.*, s. 8 (1).

(*l*) *Ibid.*, s. 8 (1) (a).

(*m*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 8 (1) (c). To aid in ascertaining this, and the claim to contribution (see p. 167, *post*), the workman or his dependants must furnish the employer so far as possible with the names and addresses of other employers who employed the workman during the last twelve months. If this is not done, or the information supplied is insufficient to enable the employer to take proceedings to show that he is not liable as above, or to enable him to claim indemnity, then, on showing that the disease was not contracted in his employment, he is

Such employer may, however, join another employer as a party to the arbitration proceedings (*n*), and show that the disease was contracted in the employment of the latter employer during the previous twelve months. If the allegation be proved, the latter employer is the employer from whom compensation is recoverable (*o*).

From whom recoverable.

If the disease is one contracted by gradual process, all the employers who during the previous twelve months employed the workman in a like employment are liable to contribute towards the compensation payable by the employer from whom compensation is claimed. The question of contribution may be determined in the arbitration proceedings (*p*).

Contribution.

False representation by workman.

351. If a workman entering an employment wilfully and falsely represents in writing that he has not previously suffered from the disease which afterwards incapacitates him, he loses his right to receive compensation from that employer (*q*).

Compensation, how calculated.

352. The amount of compensation is calculated upon the workman's earnings in the service of the employer from whom compensation is recoverable (*r*).

Notices.

353. The notice of death, disablement, or suspension is given to the employer who last employed the workman during the previous twelve months in the employment to the nature of which the disease is due (*s*). The notice may be given after the workman has voluntarily left his employment, and, in addition to the particulars required (*t*), must state the date and cause of the disablement or suspension, and, if a certificate has been given, a copy must be furnished to the employer on demand (*u*).

Appeal from decision of certifying surgeon.

354. An appeal is given to the employer or the workman against the decision of the certifying surgeon to a medical referee appointed by the Secretary of State, and his decision is final (*b*).

Compensation in respect of disease as a personal injury.

355. A workman may recover in respect of a disease which is a personal injury by accident apart from the above provisions (*c*).

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not liable to pay compensation (Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 8 (1) (c)).

(*n*) As to such proceedings, see pp. 209 *et seq.*, *post*.

(*o*) Workmen's Compensation Act, 1906 (6 Edw. 7, c 58), s. 8 (1) (c).

(*p*) *Ibid.*, s. 8 (1) (c) (iii) For procedure, see Workmen's Compensation Rules, r. 39 (5), 19—23, 25, 26, Form 23.

(*q*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 8 (1) (b).

(*r*) *Ibid.*, s. 8 (1) (d); see, however, *ibid*, Sched. I. (2), as to concurrent contracts of service.

(*s*) *Ibid.*, s. 8 (1) (e).

(*t*) See pp. 179 *et seq.*, *post*.

(*u*) Workmen's Compensation Rules, 1907, r. 39 (2).

(*b*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 8 (1) (f). Medical referees have been appointed for each district in England. Rules have been made pursuant to power given in *ibid*, s. 8 (3), by the Secretary of State with the sanction of the Treasury regulating the duties and fees of certifying and other surgeons, and as to references to and remuneration and expenses of medical referees; see Ruegg, Employers' Liability and Workmen's Compensation Act, 8th ed., pp. 850—865.

(*c*) *I.e.*, the provisions contained in the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 8; as to disease being "a personal injury by accident," see *Brintons, Ltd.* v. *Turvey*, [1905] A. C. 230; 7 R. W. C. C. (o. s.) 1.

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Though many of the diseases within the Act (*d*) are diseases contracted in factories, this is not the case with all of them. Miners' diseases (*e*) and diseases contracted in stables and by chimney-sweeps, and other cases, are also included. Still, a certificate of disablement must be obtained from the certifying surgeon for the district (*f*).

Sequelæ to diseases.

356. In many cases a *sequela* to an industrial disease included in the Act (*d*) gives a right to recover compensation (*g*). To enable the workman to recover, it must be shown that the *sequela* is a *sequela* of a disease within the Act (*d*): it is not sufficient that it may be and often is a consequence of such a disease, unless in the case it is shown to be so (*h*).

SUB-SECT. 6.—*Arising out of and in the Course of the Employment.*

How the injury must arise.

357. The personal injury by accident must arise out of and in the course of the employment (*i*). This provision is the chief restriction placed by the Act (*d*) upon the right to receive compensation.

An accident in the course of his work does not entitle the workman to compensation unless it can be said also to arise out of the employment (*k*).

Meaning of the condition.

358. The words "in the course of his employment" are generally held to mean that the injury must occur at a time when the relation of master and servant can reasonably be held to be subsisting (*l*); The words "arising out of the employment" mean that, during the course of the employment, injury has resulted from some risk incident to the duties of the service, which, unless engaged in the duty owing to the master, it is reasonable to believe the workman would not otherwise have suffered (*m*). An injury suffered during the course of the employment from a natural force, or an unusual

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(*d*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58).

(*e*) "Ankylostomiasis" is a miners' disease, often called miners' anæmia; and see pp. 164, 165, *ante*.

(*f*) As to the effect of inability to obtain such a certificate upon a claim, see *Curtis* v. *Black & Co.*, [1909] 2 K. B. 529, C. A.; 2 B. W. C. C. 239; and p. 160, *ante*. Though the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 8 (1), speaks of the district where the workman is employed, it is believed that a workman who has left that district and is afterwards found to be suffering from a disease mentioned in the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), or Orders (see note (*a*), p. 164, *ante*), may obtain a certificate of disablement from the certifying surgeon of the district within which the disease was contracted.

(*g*) See the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. III. and Orders of Secretary of State, pp. 164, 165, *ante*.

(*h*) *Haylett* v. *Vigor & Co.*, [1908] 2 K. B. 837, C. A.; 1 B. W. C. C. 282. For rules regulating claims for industrial disease, see Workmen's Compensation Rules, r. 39, Forms 9, 10, 19—23.

(*i*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 1 (1).

(*k*) The words are "arising out of *and* in the course of the employment" (*ibid.*). See *Kitchenham* v. *S.S. Johannesburg (Owners)*, [1911] A. C. 417; 4 B. W. C. C. 311.

(*l*) See the judgment of Lord LOREBURN, L.C., in *Moore* v. *Manchester Liners, Ltd.*, [1910] A. C. 498, at p. 500; 3 B. W. C. C. 527; see also *Amys* v. *Barton* (1911), 28 T. L. R. 29, C. A.

(*m*) See *Pierce* v. *Provident Clothing and Supply Co., Ltd.* [1911] 1 K. B. 997, C. A.; 4 B. W. C. C. 242.

manifestation of a natural force, may be an accident, but still it is necessary to show that but for some incident of the service it would probably not have occurred (*n*).

Burden of proof.

359. The burden of proof both that the accident arose out of and in the course of the employment rests upon the workman or his dependants (*o*).

Inference from facts.

360. If, from facts admitted or proved, a reasonable inference (*p*) can be drawn that the accident arose out of and in the course of the employment, and that inference is drawn by the arbitrator, his decision cannot be reversed (*q*).

Guess.

If a conclusion can only be arrived at by what amounts to a guess, then such a guess, though called an inference, arrived at in favour of the applicant will be set aside (*r*).

(*n*) *Andrew* v. *Failsworth Industrial Society*, [1904] 2 K. B. 32, C. A.; 6 B. W. C. C. (o. s.) 11; *Davies* v. *Gillespie* (1911), 28 T. L. R. 6, C. A. (sunstroke; abnormal risk); see also *Warner* v. *Couchman*, [1911] 1 K. B. 351, C. A.; 4 B. W. C. C. 32; affirmed (1911), 28 T. L. R. 58, H. L.; *Morgan* v. *S.S. "Zenaida" (Owners)* (1909), 25 T. L. R. 446, C. A.; 2 B. W. C. C. 19; *Karemaker* v. *S.S. Corsican (Owners)* (1911), 4 B. W. C. C. 295, C. A. (frost-bite, due to no particular circumstance connected with the employment); *Wignall* v. *Watson* (1911), 131 L. T. Jo. 556.

(*o*) *Pomfret* v. *Lancashire and Yorkshire Railway*, [1903] 2 K. B. 718, C. A.; 5 B. W. C. C. (o. s.) 22; *Reed* v. *Great Western Railway*, [1909] A. C. 31; 2 B. W. C. C. 109. In giving judgment in the latter case Lord MACNAGHTEN says, at p. 33: "I agree . . that in all these cases it is incumbent upon the claimant to make out that the accident in respect of which compensation is claimed arose out of and in the course of the injured man's employment, not upon the employer to prove the contrary": where, however, the workman is engaged in his employer's work up to the time of his death, and the last acts known about him are consistent with the continuance of that work, the burden is on those who allege a cessation of the work (*Astley* v. *Evans (R.) & Co.*, [1911] 1 K. B. 1036, C. A.; 4 B. W. C. C. 209, *per* FLETCHER MOULTON, L.J., at p. 212; affirmed *sub nom. Evans (Richard) & Co., Ltd.* v. *Astley*, [1911] A. C. 674; 4 B. W. C. C. 319; when the *dictum* of FLETCHER MOULTON, L.J., was neither dissented from nor approved).

(*p*) In considering what is sufficient evidence in a fatal accident to justify an inference that the accident has arisen "out of and in the course of the employment," a distinction must be drawn between cases where death occurs at a time when a workman is engaged in his employer's work and cases where death occurs at a time when the workman is free, without any breach of contract, to do what he pleases (*Astley* v. *Evans (R.) & Co.*, *supra*, *per* COZENS-HARDY, M.R., [1911] 1 K. B. at p. 1040).

(*q*) *Bist* v. *London and South Western Railway*, [1907] A. C. 209; 9 B. W. C. C. (o. s.) 19; *Edmunds* v. *Peterston (Owners)* (1911), 28 T. L. R. 18, C. A. (asphyxiation by fumes of stove in cabin). Great difference of opinion has been manifested by the judges as to what is or what is not a reasonable inference from facts found to exist.

(*r*) *Mitchell* v. *Glamorgan Coal Co.* (1907), 23 T. L. R. 588, C. A.; 9 B. W. C. C. (o. s.) 16; commented on in *Jenkins* v. *Standard Colliery Co.* (1911), 28 T. L. R. 7, C. A.; *Bender* v. *S.S. Zent (Owners)*, [1909] 2 K. B. 41, C. A.; 2 B. W. C. C. 22. In the following cases it was held that the facts did not warrant an inference that the accident arose out of and in the course of the employment:—A seaman returning to his ship fell from the gangway and was killed; the applicant gave no evidence of the purpose for which deceased left the ship, whether on his own business or that of the ship, and so failed to satisfy the onus (*McDonald* v. *S.S. Banana (Owners)*, [1908] 2 K. B. 926, C. A.; 1 B. W. C. C. 185) A seaman was lost overboard whilst the weather was fine, the ship steady, and there was a good bulwark round the sides of the ship; held, that the onus was not satisfied (*Bender* v. *S.S. Zent (Owners)*, *supra*). A sailor, on board a ship

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lying in harbour, went on deck late at night to get some fresh air; he was found dead in the water in the morning; held, that evidence of a sailor being found drowned alongside his ship in circumstances such as this is not sufficient to discharge the onus that the accident arose out of the employment (*Marshall* v. *Ship Wild Rose (Owners)*, [1910] A. C. 486; 3 B. W. C. C. 514). This case was admittedly very near the line, and considerable difference of opinion existed amongst the judges in the House of Lords: the arbitrator had drawn the inference that death resulted from accident arising out of the employment; see also *Charles* v. *Walker, Ltd.* (1909), 25 T. L. R. 609, C. A.; 2 B. W. C. C. 5. Whilst a carter was driving a cart the horse fell, the shaft broke, and the man apparently was thrown out. He went to a farm to borrow another cart, but being unsuccessful he walked away with the horse and was subsequently found dead on the road, death being due to syncope; held, onus not discharged (*Powers* v. *Smith* (1910), 3 B. W. C. C. 470, C. A.). A workman whose hand had been injured on 17th April died of erysipelas of the face on 7th July: there was a dispute between the medical experts as to whether micro-organisms of erysipelas could remain latent for this period; a medical referee stated that such a thing was possible: held, that the decision of the arbitrator that death was due to accident arising out of the employment was a guess merely and must be set aside (*Hugo* v. *Larkins & Co.* (1910), 3 B. W. C. C. 228, C. A.); see *Jenkins* v. *Standard Colliery Co.*, (1911), 28 T. L. R. 7, C. A. A gas-fitter, who had inhaled coal gas, three days later developed paralysis due to cerebral hæmorrhage and died shortly afterwards; he had had a transient attack some months before: the arbitrator found that the paralysis was equally consistent with other causes as with gas poisoning: held, that it was open to the judge to draw the inference that the death did not result from accident arising out of the employment (*Dean* v. *London and North Western Rail. Co.* (1910), 3 B. W. C. C. 351, C. A.). A captain left his ship and went to an hotel; he returned to the quay and hailed his ship for a boat, but before the boat reached him he fell over the quay side and was drowned; no evidence was given why he went ashore: held, onus not satisfied (*Hewitt* v. *Duchess (Owners)*, [1910] 1 K. B. 772, C. A.; 3 B. W. C. C. 239; affirmed *sub nom. Fletcher* v. *Steamship Duchess (Owners)*, [1911] A. C. 671; 4 B. W. C. C. 317); compare *Low or Jackson* v. *General Steam Fishing Co., Ltd.*, [1909] A. C. 523; 2 B. W. C. C. 51, 56, where the workman, who had absented himself, was held to have returned to the ambit of the employment before the occurrence of the accident. In *Kitchenham* v. *S.S. Johannesburg (Owners)*, [1911] A. C. 417; 4 B. W. C. C. 311, a steward went ashore with leave while his ship was lying at a quay; on his return at night he fell into the water between the ship and the quay and was drowned; access to the ship was by a secure and properly lighted gangway, but there was no evidence that he had ever reached the gangway: held, that there was no evidence that the accident arose out of the employment: see also *Leach* v. *Oakley, Street & Co.; Kitchenham* v. *S.S. Johannesburg (Owners)*, *supra*. In both cases seamen had gone ashore with leave. In the latter the man was found drowned and had last been seen on the wharf returning to the ship: held, that the onus was not discharged. In the former case the man returned as far as the gangway, which broke whilst he was upon it: held, that the accident arose out of the employment. A workman died of pneumonia; his vitality was said to have been lowered in consequence of an accident, the only evidence of which was several inconsistent statements made by the workman on the day after the alleged accident: the medical referee gave a report that the pneumonia could not have been caused by the alleged accident, but the arbitrator found that it was: held, that the facts would not support such inference (*Langley* v. *Reeve* (1910), 3 B. W. C. C. 175, C. A.); see also *Hawkins* v. *Powells Tillery Steam Coal Co., Ltd.*, [1911] 1 K. B. 988, C. A.; 4 B. W. C. C. 178). A collier working night shift returned with a red patch on his arm and a scratch on his thumb; he died of blood poisoning fourteen days later; held, facts insufficient to support inference (*Jenkins* v. *Standard Colliery Co.*, (1911) 28 T. L. R. 7, C. A.).

In the following cases the facts were held sufficient to warrant an inference that the accident arose out of and in the course of the employment:—A workman returned home direct from his work with a crushed hand;

361. If the claim is brought against "the principal" by the servant of a sub-contractor, it must be proved that the accident occurred on, or in, or about premises on which the principal has undertaken to execute the work, or which are otherwise under his control or management (*s*).

Accident occurring on, or in, or about premises.

Also, in determining whether the accident arises out of and in the course of the employment, locality is often material. When employment is intermittent and to be performed on the employer's works or premises, the place where an accident occurs to a workman when going to, returning to, or leaving his work is often the test whether it arises in the course of his employment, and sometimes whether it arises out of the employment. Before his work begins the workman has generally to get on to his employer's premises, and when it is over it is likewise usually his duty to leave the premises. The exact time when in the course of doing these things the employer's statutory duty to him attaches or ceases is often difficult to ascertain (*t*).

When locality is material.

Coming to the premises.

Though the work is to be done on the employer's premises, the liability may exist before the workman reaches the place where the work is situated, in a case where he is specifically sent to that place to do the work (*u*). But a mere direction as to the

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no legal evidence was given as to how the accident was caused; he died afterwards from blood poisoning of the wound: held, that on those facts the arbitrator could draw the inference that the accident arose out of and in the course of the employment (*Mitchell* v. *Glamorgan Coal Co.* (1907), 23 T. L. R. 588, C. A.; 9 B. W. C. C. (o. s.) 16) GORELL BARNES, P. (at 23 T. L. R. 589), speaks of this as a case where the facts were not equally consistent; for, applying one's knowledge of what happens in ordinary life, the probability was that the accident happened when he was engaged in an occupation in which accidents occur rather than at a time when, in the ordinary course of life, such accidents do not occur. A seaman fell overboard on a fine morning when his duty required him to be on deck; he had previously complained of giddiness: held, that the arbitrator could draw the inference that the accident arose out of the employment (*S.S. Swansea Vale (Owners)* v. *Rice* (1911), 4 B. W. C. C. 298, H. L.). The distinction drawn between this case and the case of *Marshall* v. *S.S. Wild Rose (Owners)*, [1910] A. C. 486; 3 B. W. C. C. 514 (see p. 169, *ante*), was that in this case, the seaman being on duty, his employment brought him into a special position of danger; see also *Wright* v *Kerrigan*, [1911] 2 I. R. 301, C. A., as to which see note (*r*), p. 176, *post*, *Groves* v. *Burroughes and Watts, Ltd* (1911), 4 B. W. C. C. 185, C. A.

(*s*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 4; and see p. 192, *post*. Under the Workmen's Compensation Act, 1897 (61 & 62 Vict. c. 37), s. 7, it was generally necessary to prove that an accident happened "on or in or about" the employer's works.

(*t*) Where the nature of the work itself necessitates the workman being elsewhere than on the employer's premises the protection of the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), exists, *e.g.*, a traveller or carter. A collector and canvasser while riding a bicycle on his employer's business was knocked down and killed in the street; held, he was within the Act (*Pierce* v. *Provident Clothing and Supply Co.*, [1911] 1 K. B. 997, C. A.; 4 B. W. C. C. 242).

(*u*) *E.g.*, an engine cleaner employed at K. was sent by his employers to work at H., four miles away, and directed to travel by their train from the station at K.; held, that the course of employment commenced as soon as the workman got into his employers' train at K. (*Holmes* v. *Great Northern Railway*, [1900] 2 Q. B. 409, C. A.; 2 B. W. C. C. (o. s.) 19; *Hoskins* v. *Lancaster* (1910), 3 B. W. C. C. 476, C. A.; *Nisbet* v. *Rayner and Burn*, [1910] 2 K. B. 689, C. A.; see also *Nolan* v. *Porter & Sons* (1909), 2 B. W. C. C. 106, C. A.).

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way to come to the premises given for the workman's convenience does not fix the employer with liability (*a*).

Where the workman, though the actual work is finished, is leaving the premises by the appointed or usual way, he is within the statutory protection (*b*); but where, purely for the convenience of the workmen, the employers provide them with a means of reaching their homes, they are not within such protection after leaving the premises (*c*).

Leaving the premises.

Temporary cessation of work.

362. The statutory protection may continue during temporary cessation of work, as where a workman who is permitted, but not obliged, to remain on the employer's premises during the dinner hour is injured during such time (*d*).

Where the workman is returning from temporary absence, having been away on his own business, or where the absence is not shown to have been on the employer's business, locality is often most material (*e*).

(*a*) *Holness* v. *Mackay and Davis*, [1899] 2 Q. B. 319, C. A.; 1 B. W. C. C. (o. s.) 13, which case and *Holmes* v. *Great Northern Railway*, [1900] 2 Q. B. 409, C. A.; 2 B. W. C. C. (o. s.) 19, were decided under the earlier Act (see note (*s*), p. 171, *ante*). As to a workman arriving on the employer's premises some time before the time fixed for actually commencing work, see *Sharp* v. *Johnson & Co., Ltd.*, [1905] 2 K. B. 139; 7 B. W. C. C. (o. s.) 28. Employers ran a private train to convey such of their workmen, being colliers, as chose to use it from a village to a colliery; a workman whilst waiting on the platform at the village was knocked down and killed: held, that the accident arose out of and in the course of the employment (*Cremins* v. *Guest, Keen, and Nettlefolds, Ltd.*, [1908] 1 K. B. 469, C. A.; 1 B. W. C. C. 160). In this case the arbitrator found that the right to use the train was part of the contract of service; but, *contra*, where the workman was being conveyed on the first morning of the employment to his employer's premises in the employer's waggon (*Whitbread* v. *Arnold* (1908), 1 B. W. C. C. 317, C. A.).

(*b*) *Gane* v. *Norton Hill Colliery Co.*, [1909] 2 K. B. 539, C. A.; 2 B. W. C. C. 42, *Lowry* v. *Sheffield Coal Co.* (1908), 1 B. W. C. C. 1; *Riley* v. *Holland*, [1911] 1 K. B. 1029, C. A.; 4 B. W. C. C. 155; but see *Phillips* v. *Williams* (1911), 4 B. W. C. C. 143, C. A. (where the workman came on the premises with no intention of working, but to settle a dispute of his own, and where compensation for an accident occurring as he was leaving the premises was refused)

(*c*) *E.g.*, where employers provided a train for the purpose of conveying such workmen as chose to use it to their homes, and the arbitrator found there was no contractual obligation to do so, but that it was done as a matter of pure grace, it was held that during the transit the workmen were not within the protection of the Act (*Davies* v. *Rhymney Iron Co.* (1900), 16 T. L. R. 329, C. A.; 2 B. W. C. C. (o. s.) 22; compare *Cremins* v. *Guest, Keen, and Nettlefolds, Ltd.*, *supra*; *Gilmour* v. *Dorman, Long & Co.* (1911), 4 B. W. C. C. 279, C. A.); see also *Keyser* v. *Burdick & Co.* (1910), 4 B. W. C. C. 87, C. A. (a workman leaving a ship in dock by an unusual way, owing to the gangway having been removed; held, within the Act); *Walters* v. *Staveley Coal and Iron Co., Ltd.* (1911), 105 L. T. 119; 4 B. W. C. C. 303, H. L. (where a workman slipped on the employers' road a mile from the mine: held, not in the course of the employment); *Parker* v. *Pout* (1911), 131 L. T. Jo. 552, C. A. (accident to farm labourer while attempting to get into employer's cart for purpose not within contract); *Kane* v. *Merry and Cunninghame, Ltd.*, [1911] S. C. 533 (miner riding on hutches when leaving work, contrary to rule).

(*d*) *Blovelt* v. *Sawyer*, [1904] 1 K. B. 271, C. A.; 6 B. W. C. C. (o. s.) 16 *Morris* v. *Lambeth Borough Council* (1905), 22 T. L. R. 22, C. A.; 8 B. W. C. C. (o. s.) 1.

(*e*) A ship's steward went ashore for his own amusement in the evening; returning, somewhat under the influence of liquor, he got as far as the

363. Where the workman, though during a time when the course of the employment is subsisting, does something entirely for his own purposes, he loses the statutory protection (*f*).

Act done entirely for workman's own purpose.

cargo skid, and then slipped and fell into the hold of the ship; held, within the Act (*Robertson* v. *Allan Brothers & Co.* (1908), 77 L. J. (K. B.) 1072, C. A.; 1 B. W. C. C. 172). A fireman left his ship and went ashore to procure necessaries; returning, he fell from a ladder fastened to the ship's side and resting on the quay below; held, that the accident arose out of and in the course of the employment (*Moore* v. *Manchester Liners, Ltd.*, [1910] A. C. 498; 3 B. W. C. C. 527, H. L.). In this case the decision of the Court of Appeal, [1909] 1 K. B. 417, was overruled, it being impossible to reconcile it with *Robertson* v. *Allan Brothers & Co.*, *supra*. A workman was employed to watch trawlers as they lay in a harbour, it being occasionally necessary for him to be on the quay to which the trawlers were moored: he left the premises for a short time to obtain refreshments; returning to the quay, and whilst descending a fixed ladder to go on board one of the trawlers, he fell off: held, that the accident arose out of and in the course of the employment (*Low or Jackson* v. *General Steam Fishing Co., Ltd.*, [1909] A. C. 523; 2 B. W. C. C. 51, 56). *Contra* where a seaman, having left his ship for the night, slipped and was injured on the steps of a public quay whilst returning to the ship (*Kelly* v. *Ship Foam Queen (Owners)* (1910), 3 B. W. C. C. 113, C. A.; see *Kitchenham* v. *S.S. Johannesburg (Owners)*, [1911] A. C. 417; 4 B W. C. C. 311, and p. 170, *ante*); and where the engineer of a steam trawler in dock went ashore for dinner, and on returning fell into a dry dock and was killed (*Gilbert* v. *Nizam (Owners)* (1910), 3 B. W. C. C. 455, C. A.).

(*f*) A ticket collector at a station jumped on a train in motion to speak to a friend in one of the carriages. In getting off he fell and was killed: held, not within the Act (*Smith* v. *Lancashire and Yorkshire Railway*, [1899] 1 Q. B. 141, C. A.; 1 B. W. C. C. (o. s) 1); see *Perry* v. *Anglo-American Decorating Co.* (1910), 3 B. W. C. C. 310, C. A. (where the injury happened during a short intervening period between two employments on the same day). An engine-driver went to a signal box on the employers' premises to get information for his own private purposes, and whilst returning was seriously injured: held, not within the Act (*Benson* v. *Lancashire and Yorkshire Rail. Co.*, [1904] 1 K. B. 242, C. A.; 6 B. W. C. C. (o. s.) 20; see also *Smith* v. *South Normanton Colliery Co.*, [1903] 1 K. B. 204, C. A.; 5 B. W. C. C. (o. s.) 14). An engine-driver left his engine and crossed a siding to receive, for his own purposes, a book from a friend; returning, he was knocked down by a waggon which was being shunted and killed: held, not within the Act (*Reed* v. *Great Western Railway*, [1909] A. C. 31; 2 B. W. C. C. 109). "It is not that he violated a rule, but that the accident did not arise out of or take place in the course of the employment at all. It took place while for the moment he quitted his employment" (*ibid., per* Lord LOREBURN, L.C., at p. 33, followed in *Pope* v. *Hill's Plymouth Co.* (1910), 3 B. W. C. C. 339, C. A.; affirmed (1911), 132 L. T. Jo. 31, H. L.). A workman, during meal time, chose for his own convenience to take his meal in an unusual place: held, not within the Act (*Brice* v. *Edward Lloyd, Ltd.*, [1909] 2 K. B. 804, C. A.; 2 B. W. C. C. 26); compare *Blovelt* v. *Sawyer*, [1904] 1 K. B. 271, C. A.; 6 B. W. C. C. (o. s.) 16; *Morris* v *Lambeth Borough Council* (1905), 22 T. L. R. 22, C. A.; 8 B. W. C. C. (o. s.) 1; and see p. 172, *ante*. See *contra Astley* v. *Evans (R.) & Co*, [1911] 1 K. B. 1036, C. A.; 4 B. W. C. C. 209; affirmed on appeal *sub nom Evans (Richard) & Co., Ltd.* v. *Astley* [1911] A. C. 674; 4 B. W. C. C. 319 (brakesman in charge of train fell whilst endeavouring to climb from a truck on one train to a brake van of another train: held, dependants entitled to compensation); *M'Lauchlan* v. *Anderson*, [1911] S. C. 529 (workman fatally injured in attempting to get down from a waggon to recover his pipe: held, an accident arising out of and in the course of the employment); compare the following cases in which claims were disallowed:—*Thomson* v. *Flemington Coal Co.*, [1911] S. C. 823 (workman going, for necessary purpose, to unsuitable place); *M'Laren* v. *Caledonian Rail. Co.* (1911), 48 Sc. L. R. 885 (overseer walking on railway line); *Barnes* v. *Nunnery Colliery Co., Ltd.* (1910), 4 B. W. C. C. 43, C. A. (boy riding in colliery tub contrary to rule).

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If a workman in doing something, not entirely for his own purposes, does it in an obviously dangerous and wholly unnecessary manner, the accident does not arise out of the employment (*g*).

Act done in dangerous manner.

364. If the workman goes outside the sphere of his employment as defined by his employer, he is not generally (*h*), whilst thus acting, within the Act (*i*).

Act done outside sphere of employment.

365. Where the workman may reasonably think that it is his duty to do the act in the course of doing which he is injured, the accident may arise out of and in the course of the employment (*j*).

Act done under sense of duty.

(*g*) *Williams* v. *Wigan Coal and Iron Co.* (1909), 3 B. W. C. C. 65, C. A.; *Barnes* v. *Nunnery Colliery Co.* (1910), 4 B. W. C. C. 43, C. A.; compare *Conway Pumpherston Oil Co., Ltd.*, [1911] S. C. 660; *Astley* v. *Evans (E.) & Co.*, [1911] 1 K. B. 1036, C. A.; 4 B. W. C. C. 209; affirmed *sub nom. Evans (Richard) & Co., Ltd.* v. *Astley*, [1911] A. C. 674.

(*h*) In the following cases the workman was held not to be within the Act:—A boy took upon himself to clean the machinery, knowing that it was no part of his duty to do so (*Lowe* v. *Pearson*, [1899] 1 Q. B. 261, C. A.; 1 B. W. C. C. (o. s.) 5); compare *Prior* v. *Slaithwaite Spinning Co.*, [1898] 1 Q. B. 881, C. A. (a decision as to employment under the Factory and Workshop Act, 1878 (41 & 42 Vict. c. 16), s. 17 (2)). A girl took upon herself to start machinery, it being no part of her duty to do so (*Losh* v. *Evans & Co.* (1902), 19 T. L. R. 142, C. A.; 5 B. W. C. C. (o. s.) 17). An employer may define the sphere of duty of his workmen and divide the labour of his workmen into unintelligent labour and skilled labour (*ibid., per* COLLINS, M.R., at p. 20). A boy whilst wrongfully playing with machinery was thereby injured (*Furniss* v. *Gartside & Co.* (1910), 3 B. W. C. C. 411, C. A.). A message boy injured through using lift contrary to orders (*McDaid* v. *Steel* (1911), 48 Sc. L. R. 765). A boy larking with another lad accidentally started a machine and was injured (*Cole* v. *Evans, Son, Lescher and Webb, Ltd.* (1911), 4 B. W. C. C. 138, C. A.). A woman employed to work one machine, out of curiosity tried another and was injured (*Cronin* v. *Silver* (1911), 4 B. W. C. C. 221, C. A.). A brakesman injured by jumping off a lorry on which he had no business to ride (*Revie* v. *Cumming* (1911), 48 Sc. L. R. 831). A workman dusting a switchboard which he had been expressly forbidden to touch (*Jenkinson* v. *Harrison, Ainslie & Co., Ltd.* (1911), 4 B. W. C. C. 194, C. A.). A miner riding on a hutch in a disused mine contrary to order (*Kane* v. *Merry and Cunninghame, Ltd.*, [1911] S. C. 533). A boy engaged to piece broken yarns injured whilst cleaning machinery in motion (*Naylor* v. *Musgrave Spinning Co., Ltd.* (1911), 4 B. W. C. C. 286, C. A.). A workman left others with whom he was proceeding to work, and was subsequently found in a place where he had no business to be (*Rose* v. *Morrison and Mason, Ltd.* (1911), 4 B. W. C. C. 277, C. A.).

(*i*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58).

(*j*) A boy employed on a railway mistakenly thought the points were against the engine, and began to pull a lever in order to open them; whilst doing so he was injured: held, within the Act (*Harrison* v. *Whitaker Brothers* (1899), 16 T. L. R. 108, C. A.; 2 B. W. C. C. (o. s.) 12). A lad, whose duties were so loosely defined that it might be said to be his duty to obey the orders of anyone in a higher position than himself in the employment, was injured whilst conforming to an order given by a workman possessing no authority to give it: held, within the Act (*Brown* v. *Scott* (1899), 1 B. W. C. C. (o. s.) 11, C. A.); so, too, where a canvasser was injured in the street whilst cycling (*M'Neice* v. *Singer Sewing Machine Co., Ltd.*, [1911] S. C. 12); and where a canvasser, also cycling, was killed in a street accident, a practice known to but not forbidden by his employer (*Pierce* v. *Provident Clothing Supply Co., Ltd.*, [1911] 1 K. B. 997, C. A.; 4 B. W. C. C. 242). The dependants of an unestablished electrical engineer, who was killed when doing an act in the interest of his employers, although outside the scope of his duties, were awarded compensation (*Russell* v. *Postmaster-General* (1911), 46 L. J. 341).

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366. Where the workman at the time of injury, though not performing a duty of his service, is engaged in an act in the mutual interest of himself and his employer in a manner and at a place permitted by the employer, he may be (*k*) within the Act (*l*).

Act not strictly a duty.

367. Where the workman departs from the scope of his duties in an emergency, the accident may be held to arise out of the employment (*m*).

Emergency.

368. Where a workman when performing his duties does them in an improper manner, he may still be within (*n*) the Act (*l*).

Improper performance.

369. It is no defence to a claim under the Act (*l*) that the injury happened from an unexpected and unusual cause, if it arose out of a risk of the employment (*o*).

Injury from unexpected cause.

(*k*) A street watchman whose duties were to look after the tools, and to keep lamps alight in the road at night, went into a shanty where the tools were kept during the night for the purpose of preparing food for himself, and whilst so doing he was injured: held, within the Act, as the preparing and taking food was part of a duty which he owed both to the employer and to himself (*Morris* v. *Lambeth Borough Council* (1906), 22 T. L. R. 22, C. A.; 8 B. W. C. C. (o. s.) 1). A workman who was permitted but not obliged to remain on the premises during the dinner hour was injured by a wall under which he was sitting falling upon him: held, an accident arising out of the employment (*Blovelt* v. *Sawyer*, [1904] 1 K. B. 271, C. A.; 6 B. W. C. C. (o. s.) 16); compare *Brice* v. *Edward Lloyd, Ltd.*, [1909] 2 K. B. 804, C. A.; 2 B. W. C. C. 26 (where the workman had chosen to take his meal in an unusual and unauthorised place). See also *Molloy* v. *South Wales Anthracite Colliery Co.* (1910), 4 B. W. C. C. 65, C. A. (where a workman returned to the premises to fetch his tools); *Curtis* v. *Talbot* (1911), 131 L. T. Jo. 552, C. A. (where a house surgeon suffered from experiments with an X-ray apparatus: held, that accident did not arise in course of his employment); and *Riley* v. *Holland (William) & Sons, Ltd.*, [1911] 1 K. B. 1029 (where a dismissed factory girl returned to the mill for wages due and was injured: held within the Act).

(*l*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58).

(*m*) A workman was riding, against the rules of a colliery, on one of the loaded trucks; the horse drawing the trucks bolted, and the workman jumped off the truck and in trying to stop the horse was killed: held, that the accident arose during an emergency (*Rees* v. *Thomas*, [1899] 1 Q. B. 1015, C. A.; 1 B. W. C. C. (o. s.) 9); see also *Hapelman* v. *Poole* (1908), 25 T. L. R. 155, C. A.; 2 B. W. C. C. 48, which may be upheld on the ground of emergency, though not expressly decided on this point. A workman, who was not allowed to touch the machinery, was trying to replace a machine band which had accidentally come off a pulley; in doing so he was injured: held, an accident arising out of the employment (*Whitehead* v. *Reader*, [1901] 2 K. B. 48, C. A.; 3 B. W. C. C. (o. s.) 40).

(*n*) A workman was injured whilst leaving a shed in an improper manner, but he was so leaving it for the purpose of performing his duty in another part of the works: held, that the accident arose out of the employment (*McNicholas* v. *Dawson & Son*, [1899] 1 Q. B. 773, C. A.; 1 B. W. C. C. 80). Where a miner with a *bonâ fide* idea of facilitating the work he had to do, but against express orders forbidding him so to do, entered a dangerous part of the mine and was killed, held, that in such circumstances his dependants were entitled to compensation, for although he was guilty of serious and wilful misconduct, the risk was one arising out of his employment (*Harding* v. *Brynddu Colliery Co., Ltd.*, [1911] 2 K. B. 747, C. A.; 4 B. W. C. C. 269); see also *Weighill* v. *South Hetton Coal Co.*, [1911] 2 K. B. 757, n., C. A., and cases cited in notes (*h*)—(*j*), p. 174, *ante*, and note (*k*), *supra*.

(*o*) A man employed in stables was bitten by a stable cat: held, arising out of the employment (*Rowland* v. *Wright* (1908), 24 T. L. R. 852, C. A; 10 B. W. C. C. (o. s.) 192); see also *Challis* v. *London and South Western Railway*, [1905] 2 K. B. 154, C. A.; 7 B. W. C. C. (o. s.) 23; *Martin* v.

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370. Injury caused to a workman, whilst in the course of his employment, by the wilful act or tort of another person cannot generally be regarded as arising out of the employment (*p*); but the case is different where the risk of injury at the hands of evil-disposed persons may be regarded as an incident of his employment (*q*).

Injury from tort of third party.

Proof of facts.

371. Facts from which an inference is to be deduced that an accident arose out of and in the course of the employment, must be proved by legal evidence. The statement of a workman to persons unconnected with the employment as to the cause of his injury is inadmissible, even though he afterwards dies (*r*).

Questions for arbitrator.

372. Though the inference to be drawn from proved or admitted facts is a mixed question of fact and law, all questions of credibility of evidence are for the arbitrator to determine, and, if the liability depends upon this, or if it is a pure question of fact, there is no appeal (*s*).

SUB-SECT. 7.—*Conditions Attached to Receipt of the Compensation.*

Time from which compensation is payable.

373. The injury must incapacitate the workman, and such incapacity must continue (*t*) for at least one week (*u*), and if the

Barnett (1910), 3 B. W. C. C. 146); on the other hand, in *Craske* v. *Wigan*, [1909] 2 K. B. 635, C. A.; 2 B. W. C. C. 35, C. A., where a maid serving in her employer's house at night was injured by a cockchafer flying in the window, and in *Amys* v. *Barton* (1911), 28 T. L. R. 9, C. A., where a man died from the effects of a wasp sting, it was held that the accident did not arise out of his employment.

(*p*) A workman maliciously threw a piece of iron at another workman, which accidentally struck a third workman: held, not arising out of the employment (*Armitage* v. *Lancashire and Yorkshire Railway*, [1902] 2 K. B. 178, C. A.; 4 B. W. C. C. (o. s.) 5). The same principle was applied where a workman was injured by a foolish and wicked practical joke perpetrated by his fellow workmen (*Fitzgerald* v. *Clarke* (*W. G.*) *& Son*, [1908] 2 K. B. 796, C. A.; 1 B. W. C. C. 197); and, again, where a workman attempting to commit an unprovoked assault on a fellow workman caused injury to a third (*Shaw* v. *Wigan Coal and Iron Co., Ltd.* (1909), 3 B. W. C. C. 81, C. A.). As to the employer's right of indemnity where he is liable for the act of a fellow servant, see *Lees* v. *Dunkerley Brothers*, [1911] A. C. 5; 4 B. W. C. C. 115.

(*q*) An engine driver was killed by a stone mischievously dropped upon a train whilst it was passing under a bridge, held, that the accident arose out of the employment (*Challis* v. *London and South Western Railway*, [1905] 2 K. B. 154, C. A.; 7 B. W. C. C. (o. s.) 23). COLLINS, M.R. (*ibid*, at p. 157), said "the interpretation of the words 'accident arising out of and in the course of the employment' appears to me necessarily to involve the consideration of the question what risks are commonly incidental to the particular employment in question." See also *Nisbet* v. *Rayne and Burn*, [1910] 2 K. B. 689, C. A.; 3 B. W. C. C. 507.

(*r*) *Wolsey* v. *Pethick Brothers* (1908), 1 B. W. C. C. 411, C. A.; *Gilbey* v. *Great Western Rail. Co.* (1910), 3 B. W. C. C. 135. As to the admissibility of statements made by a deceased workman to his doctor, or other persons, as to the state of his health, his symptoms, or physical condition, or causes of his illness, see *Amys* v. *Barton*, *supra*, where *Wright* v. *Kerrigan*, [1911] 2 I. R. 301, so far as the admissibility of evidence is concerned, was disapproved; title EVIDENCE, Vol. XIII., pp. 438, 439.

(*s*) *Roberts* v. *Benham* (1910), 3 B. W. C. C. 430, C. A.; *White* v. *Sheepwash* (1910), 3 B. W. C. C. 382, C. A.

(*t*) An injury which does not incapacitate but only reveals a pre-existing incapacity does not entitle to compensation (*Ball* v. *Hunt* (*William*) *& Sons, Ltd.*, [1911] 1 K. B. 1048).

(*u*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 1 (2) (a). The injury must disable for at least one week from earning "full wages at the work at which he was employed."

incapacity lasts less than one week no compensation is payable (*v*). If the incapacity lasts less than two weeks, no compensation is payable in respect of the first week, but if the incapacity lasts more than two weeks, compensation is payable from the date of the commencement of the incapacity (*w*) It is submitted that the week which must elapse before compensation becomes payable need not be the week immediately subsequent to the date of the injury, and need not be a successive period of seven days (*a*).

If the wages earned after the injury, though not necessarily at the same class of work, are the same or greater than those earned before it, there is no power to award compensation, though a declaration of liability to meet future incapacity may be registered (*b*). But the wages must be earned, not partly earned or given by the employer *ex gratiâ* (*c*).

SUB-SECT. 8.—*Serious and Wilful Misconduct.*

Effect of misconduct.

374. Except in a case where death or serious and permanent disablement results from the injury, a workman is not entitled to compensation if the injury is attributable to his serious and wilful misconduct (*d*). The burden of proving serious and wilful misconduct rests upon the employer (*e*).

Breach of statutory regulations.

The breach of statutory regulations made in the interest of the safety of workmen may often be, though it is not necessarily, serious and wilful misconduct (*f*).

Misconduct must cause accident.

375. The misconduct must cause the accident (*g*). If it is not sufficiently connected therewith it cannot be relied on by the employer (*h*).

Contributory negligence.

376. A workman may be guilty of contributory negligence (*i*), even of a serious character, and yet may recover under the

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(*v*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 1 (2).

(*w*) Sched. I. (1), provisoes (a), (b).

(*a*) See title TIME.

(*b*) *Irons* v. *Davis and Timmins, Ltd.*, [1899] 2 Q. B. 330, C. A.; 1 B. W. C. C. (o. s.) 26; see note (*i*), p. 207, *post*.

(*c*) *Chandler* v. *Smith*, [1899] 2 Q. B. 506, C. A.; 1 B. W. C. C. (o. s.) 19; and see p. 207, *post*.

(*d*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 1 (2) (c).

(*e*) *Johnson* v. *Marshall, Sons & Co., Ltd.*, [1906] A. C. 409; 8 B. W. C. C. (o. s.) 10. In his judgment in this case Lord LOREBURN, L.C., says, at p. 411, "that the burden of proving serious and wilful misconduct was on the employers is beyond question. We are not dealing with negligence, but with something far beyond it."

(*f*) *Rumboll* v. *Nunnery Colliery Co.* (1899), 80 L. T. 42, C. A.; 1 B. W. C. C. (o. s.) 28 As to what amounts to misconduct under conditions of carriage of goods issued by carrying companies, see title CARRIERS, Vol. IV., p. 34, and *Lewis* v. *Great Western Rail. Co.* (1877), 3 Q. B. D. 195, C. A.; *Forder* v. *Great Western Railway*, [1905] 2 K. B. 532; see also *George* v. *Glasgow Coal Co., Ltd.*, [1909] A. C. 123; 2 B. W. C. C. 125.

(*g*) As to what is an accident, see pp. 161 *et seq.*, *ante*.

(*h*) *Rees* v. *Powell Duffryn Steam Coal Co.* (1900), 64 J. P. 164, C. A.; 4 B. W. C. C. (o. s.) 17, n. The misconduct must be serious and wilful. This amounts to saying that it must in every case be wilful; not, it is believed, in the sense that it is intended to produce the result which follows, but in the sense that the workman knew he was misconducting himself in doing the thing which caused his injury.

(*i*) See title NEGLIGENCE, and p. 138, *ante*.

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Act (*j*) if the negligence does not amount to serious and wilful misconduct (*k*).

Drunkenness.

377. Probably drunkenness in the course of the employment, which renders the workman incapable of consulting his own safety and in consequence of which the injury happened, would be held to constitute serious and wilful misconduct (*l*).

Finding of arbitrator.

378. If there is evidence upon which an arbitrator may find either the presence or the absence of serious and wilful misconduct, the Court of Appeal cannot interfere (*m*), but the finding of an arbitrator has been overruled, the appellate court holding that the facts were not capable of supporting the finding (*n*).

If a finding as to serious and wilful misconduct is arrived at by an arbitrator by a process of misdirecting himself as to the meaning of the words of the Act (*j*), it can be set aside (*o*).

(*j*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58).

(*k*) *Beeks* v. *Kynoch, Ltd.* (1901), 18 T. L. R. 34, C. A.; 4 B. W. C. C. (o. s.) 14.

(*l*) There is no English decision. In Scotland this has been held to be so (*M'Groarty* v. *Brown (John) & Co., Ltd.* (1906), 8 F. (Ct. of Sess.) 809).

(*m*) *Rumboll* v. *Nunnery Colliery Co.* (1899), 80 L. T. 42, C. A.; *John* v. *Albion Coal Co.* (1901), 18 T. L. R. 27, C. A.; 4 B. W. C. C. (o. s.) 15; *Bist* v. *London and South Western Railway*, [1904] A. C. 209; 9 B. W. C. C. (o. s.) 19. Where an engine-driver left his engine and got on the tender to get coal whilst the train was in motion, this being forbidden by the company's rules, of which rules the arbitrator found the workman was aware, the House of Lords refused to interfere with a finding by an arbitrator that this amounted to serious and wilful misconduct (*Bist* v. *London and South Western Railway, supra*). "The only question is, is there any evidence to support the finding" (*ibid., per* Lord ATKINSON, at p. 214); see also *Douglas* v *United Mineral Mining Co.* (1900), 2 B. W. C. C. (o. s.) 15, C. A.; *Traynor* v. *Addie (R.) & Sons* (1911), 48 Sc. L. R. 820.

(*n*) Where a workman who was forbidden to enter a lift, except when taking a load to another part of the works, entered it without a load, and was accidentally killed, the House of Lords overruled the finding of the arbitrator of serious and wilful misconduct, holding that the facts were not capable of supporting such a finding (*Johnson* v. *Marshall, Sons & Co., Ltd.*, [1906] A. C. 409; 8 B. W. C. C. (o. s.) 10). Serious misconduct does not mean that the consequences must prove serious, but that the misconduct itself must be serious (*ibid.*). *Johnson* v. *Marshall, Sons & Co., Ltd., supra*, shows that, although often spoken of as a question of fact, it is really a mixed question of fact and law. The question of law is—are the facts proved capable of supporting the inference which has been drawn from them? It is not a question whether or not the appellate court would have itself drawn the same inference (*Bist* v. *London and South Western Railway, supra*).

(*o*) *Johnson* v. *Marshall, Sons & Co., Ltd., supra; Brooker* v. *Warren* (1906), 23 T. L. R. 201, C. A.; 9 B. W. C. C. (o. s.) 26. Where a workman opened the gate of a shaft in a coal mine, before the cage in its ascent stopped at the mid-working opposite the gate, against the rules of the mine, the House of Lords supported a finding of the Court of Session of serious and wilful misconduct (*George* v. *Glasgow Coal Co., Ltd.*, [1909] A. C. 123; 2 B. W. C. C. 125). In this case the House of Lords expressly disapproved a *dictum* of the Lord President of the Court of Session (Lord DUNEDIN) in *Dobson* v. *United Collieries, Ltd.* (1905), 8 F. (Ct. of Sess.) 241, that a breach of a statutory rule made under the Coal Mines Regulation Acts (see title MINES, MINERALS, AND QUARRIES, pp. 593 *et seq., post*) was necessarily serious and wilful misconduct within the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), and expressed the opinion that this

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379. When the injury results in death or serious and permanent disablement, the defence of serious and wilful misconduct is not open to the employer (*p*).

When defence is not open.

It is sometimes difficult to determine, at the time the proceedings for arbitration are heard, whether the disablement will or will not prove serious and permanent (*q*). The question is one of fact, and, as such, almost entirely a question for the tribunal of first instance (*r*).

SUB-SECT. 9.—*Notice of Accident.*

380. Notice of the happening of the accident must, unless excused, be given to the employer as soon as practicable, and before the workman voluntarily leaves his service (*s*).

To whom given.

The notice must give the name and address of the injured person and the date of the accident, and, in ordinary language, the cause of the injury, and must be served on the employer, or, if there is more than one employer, on one of them (*t*).

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The methods of serving the notice of accident are substantially the same as those provided for service of notice of injury under the Employers' Liability Act, 1880 (*u*), and referred to elsewhere (*v*).

Service.

381. The absence of any notice, or any inaccuracy in the notice, is to be excused if the arbitrator finds that the employer is not, or would not, if a notice or an amended notice were given at the time of the arbitration, and the hearing postponed, be prejudiced in his defence; or, if the want of or defect or inaccuracy therein was occasioned by mistake, absence from the United Kingdom, or other reasonable cause (*w*).

Absence of, or inaccuracy in, notice.

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is a question of fact, not to be determined by any cut and dried rules, or even rules of presumption.

(*p*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 1 (2) (c).

(*q*) There is no power given in the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), to adjourn arbitration proceedings until the full consequences of an injury have been ascertained, but there is nothing which forbids it, and it is thought it may be sometimes a useful course to adopt.

(*r*) Where an arbitrator found that the loss of the top joints of the first and third fingers of the right hand was an injury resulting in serious and permanent disablement, it was held on appeal that the evidence justified such a finding (*Hopwood* v. *Olive and Partington, Ltd.* (1910), 3 B. W. C. C. 357, C. A.). It is thought that the word "permanent" does not necessarily mean life-long, but will probably be held to cover an injury the consequences of which must last a considerable time.

(*s*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 2 (1). Where the claim is in respect of an industrial disease within the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), notice may be given after the workman has voluntarily left the service (*ibid.*, s. 8 (1) (e)). See *Shannon* v. *Banbridge Weaving Co.* (1911), 45 I. L. T. 74, C. A., where the facts could not be excused as "mistake," and *Stevens* v *Insoles, Ltd.*, [1911] W. N. 205, C. A., where a notice of the accident given by a miner to a foreman of a mine and entered by him in a book provided by the owners, for the purpose of recording accidents, was held to be a good notice.

(*t*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 2 (2).

(*u*) 43 & 44 Vict. c. 42; see Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 2 (3).

(*v*) See p. 150, *ante*.

(*w*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 2 (1) (a). Even though the employer is prejudiced by absence of or inaccuracy in

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The employer must be prejudiced in his defence. The fact that the delay has lost the employer his right to indemnity by his insurers does not amount to prejudice in his defence (*a*).

Where no notice is given, or where the notice is imperfect, the onus lies on the workman to satisfy the arbitrator that the employer has not been prejudiced in his defence by the want of, or defect or inaccuracy in, the notice (*b*).

Employer must be prejudiced in his defence.

Notice in writing or verbal.

382. The notice to satisfy the Act (*c*) should be a notice in writing (*d*); but though written notice is required by the Act (*c*), a verbal notice may be held sufficient under the dispensing power given to the arbitrator (*e*). Notice to an officer of a limited company, though not a chief officer, may be a sufficient notice to the company (*f*).

Reasonable excuse.

383. The fact that the injury does not become apparent for some time is a reasonable excuse for want of notice (*g*).

Where an arbitrator found that ignorance of law on the workman's part was the reason for the absence of the notice, and that this was not a reasonable excuse, the Court of Appeal supported the decision (*h*).

Loss of right to object to verbal notice.

384. If an employer, having verbal notice of an accident, pays weekly compensation to the workman under the Act (*c*), he loses his right to object that the notice was not given to him in writing (*i*).

SUB-SECT 10.—*Claim for Compensation.*

How and when made.

385. The notice of accident and the claim for compensation are different things, though they may be given in the same document (*j*).

The claim must be made within six months from the occurrence

the notice, the claim may be maintained if the absence of or inaccuracy in the notice was due to mistake—the words used are disjunctive.

(*a*) *Butt* v. *Gellyceidrim Colliery Co., Ltd.* (1909), 3 B. W. C. C. 44, C. A.; compare *Burrell* v. *Holloway Brothers (London), Ltd.* (1911), 4 B. W. C. C. 239, C. A.; *Leach* v. *Hickson* (1911), 4 B. W. C. C. 153, C. A. (unreasonable delay).

(*b*) *Hughes* v. *Coed Talon Colliery Co., Ltd.*, [1909] 1 K. B. 957, C. A.; 2 B. W. C. C. 159; see *Hancock* v. *British Westinghouse Electric Co.* (1910), 3 B. W. C. C. 210, C. A., in which case the Court of Appeal reversed the finding of an arbitrator who had decided that a workman had satisfied the onus resting upon him of showing that the employer was not prejudiced in his defence by delay in giving, and inaccuracy in, the notice.

(*c*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58).

(*d*) *Hughes* v. *Coed Talon Colliery Co., Ltd., supra*; and see note (*s*), p. 179, *ante*.

(*e*) *I.e.*, by the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 2 (1) (a); *Butt* v *Gellyceidrim Colliery Co., Ltd., supra*.

(*f*) *Butt* v. *Gellyceidrim Colliery Co., Ltd., supra*.

(*g*) *Tibbs* v. *Watts, Blake, Bearne & Co., Ltd.* (1909), 2 B. W. C. C. 164, C. A.

(*h*) *Bramley* v. *Evans & Sons* (1909), 3 B. W. C. C. 34, C. A.; *Roles* v. *Pascall & Sons*, [1911] 1 K. B. 982, C. A.; 4 B. W. C. C. 148 (ignorance of the existence of the Act).

(*i*) *Davies* v. *Point of Ayr Collieries, Ltd.* (1909), 2 B. W. C. C. 157, C. A.

(*j*) *Perry* v. *Clements* (1901), 17 T. L. R. 525; 3 B. W. C. C. (o. s.) 56; compare *Johnson* v. *Wootton* (1911), 4 B. W. C. C. 258, C. A.

of the accident, or, in case of death, within six months from the time of death (*k*).

386. The failure to make a claim within six months is not to bar the right to take proceedings for compensation if the failure was occasioned by mistake, absence from the United Kingdom, or other reasonable cause (*l*). Failure to claim.

A mistake by a workman as to the serious nature of his injuries may be a reasonable ground for excuse, but ignorance of his rights under the Act (*m*) is not a good excuse (*n*).

387. The claim for compensation need not be in writing (*o*), nor need it be the commencement of proceedings to recover compensation. A mere demand of compensation from the employer, by or on behalf of the workman, is a claim for compensation (*p*) within the meaning of the Act (*m*). Mere demand.

The claim need not be for any named or specific sum, a claim for compensation under the Act (*m*) being sufficient (*q*). Form of claim.

388. The burden is on the workman to prove that he made a claim within six months, or, if this was not done, to show that he brings himself within the provision authorising the arbitrator to dispense with such claim (*r*). Burden of proof.

389. The employer may be estopped from setting up the defence that no claim for compensation was made within the statutory time. An employer who had agreed with his workman informally to pay him compensation under the Act (*m*), the amount only of Estoppel.

(*k*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 2 (1).

(*l*) *Ibid.*, s 2 (1) (b). See *Devons* v. *Anderson & Sons*, [1911] S. C. 181 (where the expiration of the six months was held a bar to the claim); and *Moore* v. *Naval Colliery Co., Ltd.* (1911), 56 Sol. Jo. 70, C. A. (where a claim was allowed). Under the Workmen's Compensation Act, 1897 (60 & 61 Vict c. 37), no power was given to dispense with a notice of claim within six months (*Tibbs* v. *Watts, Blake, Bearne & Co., Ltd* (1909), 3 B. W. C. C. 164, C. A.). A claim for compensation under the Act is not a proceeding under the Public Authorities Protection Act, 1893 (56 & 57 Vict c. 61), s 1 (*Fay* v. *Cheltenham* (*Mayor*) (1911), 28 T. L. R. 16, C. A.).

(*m*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58).

(*n*) See note (*h*), p. 180, *ante*; compare *Macandrew* v. *Gilhooley*, [1911] S. C. 448 (gratuitous receipt granted under error as to its effect); *Huckle* v. *London County Council* (1910), 4 B. W. C. C 113, C A.

(*o*) *Lowe* v. *Myers* (*M.*) *& Sons*, [1906] 2 K. B. 265, C. A.; 8 B W. C. C. (o. s.) 22.

(*p*) *Powell* v. *Main Colliery Co.*, [1900] A. C. 366, 2 B. W. C C. (o. s.) 29. A difficulty was suggested in this case that if a mere informal demand of compensation was a claim within the Act, such a claim, having once been made, could be allowed to lie dormant for any undefined period, as no machinery was provided by the Act or rules which enabled an employer to institute arbitration proceedings. Rules to provide for this have now been made; see Workmen's Compensation Rules, 1907—1909, rr. 10, 17, 25. In *Johnson* v. *Wootton* (1911), 4 B. W. C. C. 258, COZENS-HARDY, M.R., at p. 259, said, "A claim must be made in some way which makes it clear to the employer's mind that a claim for compensation under the Act is being made."

(*q*) *Thompson* v. *Goold & Co*, [1910] A. C. 409; 3 B. W. C. C. 393, a decision of the House of Lords reversing the Court of Appeal, which had founded its decision upon the Scottish cases *Bennett* v. *Wordie & Co.* (1899), 1 F. (Ct. of Sess.) 855, and *Kilpatrick* v. *Wemyss Coal Co., Ltd.*, [1907] S. C. 320.

(*r*) See p. 180, *ante*, *Roberts* v. *Crystal Palace Football Club, Ltd.* (1910), 3 B. W. C. C. 51, C. A.

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such compensation being in dispute, was held estopped from saying that the claim was out of time (*s*), but the mere payment of compensation by an insurance company with whom the employer was insured does not apparently amount to an estoppel (*t*).

Inaccuracy.

390. The claim may be inaccurate, and yet valid (*u*).

SUB-SECT. 11.—*Submission to Medical Examination.*

Submission to examination after notice of accident.

391. A workman who has given notice of accident must, if the employer wishes, submit himself for medical examination by a duly qualified medical man provided and paid for by the employer (*a*). If he refuses to do so, or obstructs the examination, his right to receive compensation or to take proceedings to recover it are suspended until he complies (*b*).

Even though the workman commences proceedings without giving notice of the accident, this provision applies, and an arbitrator in such circumstances has no power to make it a condition that the employer shall bear the expense of the attendance of the applicant's medical adviser (*c*).

Submission to examination during receipt of compensation.

392. Whilst receiving weekly payments of compensation the workman must also submit to medical examination from time to time at the request of the employer, subject to a risk if he refuses or obstructs the examination to have the weekly payments suspended (*d*).

Regulations.

393. The times and conditions of such examinations are governed by regulations made by the Secretary of State (*e*).

(*s*) *Wright* v. *Bagnall (John) & Sons, Ltd.*, [1900] 2 Q. B. 240, C. A.; 2 B. W. C. C. (o. s.) 36.

(*t*) *Rendall* v. *Hill's Dry Docks and Engineering Co.*, [1900] 2 Q. B. 245, C. A.; 2 B. W. C. C. (o s.) 40. In this case *Wright* v. *Bagnall (John) & Sons, Ltd., supra*, was distinguished, but the decision is not a very satisfactory one, and, unless the facts are identical, would probably not be followed; see also *Burr* v. *Whiteley* (1902), Ruegg, Employers' Liability and Workmen's Compensation, 8th ed., 469, C. A.

(*u*) A claim for compensation "as per claim in the Employers' Liability Act," was held good; see *Linklater* v. *Webster & Son, Ltd* (1904), 6 B. W. C. C. (o. s.) 50, C. A.; see also *Burr* v. *Whiteley, supra*. It is believed the claim need not be made by the workman himself, if made on his behalf.

(*a*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. I. (4).

(*b*) *Ibid.* As to procedure, see Workmen's Compensation Rules, 1907, r. 55, Form 52; as to time, see Regulations of Secretary of State dated 28th June, 1907. Under the Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37), the examination could be required at the instance also of any person by whom the employer was entitled to be indemnified. As to medical men, see title MEDICINE AND PHARMACY, pp. 305 *et seq.*, *post*.

(*c*) *Osborn* v. *Vickers, Sons and Maxim*, [1900] 2 Q. B. 91, C. A.; 2 B. W. C. C. (o. s.) 130.

(*d*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. I. (14).

(*e*) *Ibid.*, Sched. I. (15). These regulations, dated 28th June, 1907, have been made. By them a workman receiving weekly compensation cannot be required after the first month to submit himself for examination except at the following intervals:—Once a week during the second, and once a month during the third, fourth, fifth and sixth months, and thereafter once in every two months. In addition, when after a period of two months a review of the weekly payment is asked for, he may be required for this purpose to submit himself for one additional examination.

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394. Where a workman has submitted to medical examination at the instance of his employer, or has been examined by his own medical man, and a copy of the medical report has been furnished to the other side, then if the parties cannot agree they may apply to the registrar of a county court to refer the matter of the workman's condition to a medical referee. This course can only be adopted by consent of both parties (*f*). The medical referee gives a certificate as to the workman's condition and fitness for employment, specifying, if necessary, the kind of employment for which he is fit; and this certificate is conclusive between the parties (*g*).

Reference to medical referee.

Certificate.

395. Where the right to compensation is suspended by reason of the workman refusing to submit to medical examination or obstructing it, no compensation is payable in respect of the period of suspension (*h*).

No compensation during suspension of right.

It is believed that where compensation is being paid it may, on the workman's refusal to submit to examination, be stayed as from the date of refusal even when payable under an award or registered agreement (*i*). This should be distinctly asked for in the application (*k*), and if the award or memorandum is registered in the county court, application should be made to the judge to stay execution (*l*).

396. Although the mere fact that a workman refuses to be medically examined except in the presence of his own medical man may not amount to a refusal to be examined, he has no absolute right to impose this condition, and it is a question of fact, in each case, whether a stipulation to this effect is reasonable (*m*). The same principle was applied where the workman insisted on being examined at the surgery of his own medical man, and refused to go for examination to the surgery of the employers' medical man (*n*); but, where the workman refused to be examined, except at his solicitor's office, or in the presence of his solicitor, though the employers agreed

What is a refusal to be examined.

(*f*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. I. (15).

(*g*) *Ibid.*; see *Sapcote & Sons* v. *Hancock* (1911) 4 B. W. C. C. 184, C. A. (where, in an application to review payments, such certificate was held conclusive). For procedure, see Workmen's Compensation Rules, 1907, r. 54, Forms 48, 49, 50, 51. The fee on such an application is calculated at the rate of 1*s.* in the pound on twenty-six times the amount of the weekly payments claimed by or payable to the workman, but cannot exceed £1 (*ibid.*, r. 54 (9)).

(*h*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. I. (20). For procedure where an employer wishes to suspend payment of compensation on this ground, see Workmen's Compensation Rules, 1907, r. 55, Form 52.

(*i*) See *Morton & Co., Ltd.* v. *Woodward*, [1902] 2 K. B. 276, C. A.; 4 B. W. C. C. (o s.) 143.

(*k*) *Upper Forest and Western Steel and Tinplate Co., Ltd.* v. *Thomas*, [1909] 2 K. B. 631, C. A.; 2 B. W. C. C. 414; *Charing Cross, Euston, and Hampstead Railway* v. *Boots*, [1909] 2 K. B. 640, C. A.; 2 B. W. C. C. 385.

(*l*) See Workmen's Compensation Rules, 1907, r. 67.

(*m*) *Morgan* v. *Dixon, Ltd.* (1911), 28 T. L. R. 64, H. L., affirming [1911] S. C. 403 (where such a condition was held to amount to a refusal). As to the reasonableness of such refusal, see *ibid.*, *per* Lord LOREBURN, L.C., and Lord ATKINSON. Compare *Devitt* v. *Steamship Bainbridge (Owners)*, [1909] 2 K. B. 802, C. A.; 2 B. W. C. C. 383.

(*n*) *Harding* v. *Royal Mail Steam Packet Co.* (1910), 4 B. W. C. C. 59, C. A.

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that the examination might take place in the presence of his own medical man, he was held to have refused within the meaning of the Act (*o*).

SUB-SECT. 12.—*Persons who can Claim Compensation.*

Payable to workman.

397. If the injury is not fatal it is the injured workman who receives the compensation, which is a weekly payment (*p*). He can agree the amount with the employer (*q*). He may also agree to accept a lump sum in lieu of weekly compensation (*r*), or to accept a lump sum in redemption of weekly payments (*s*). If he accepts a lump sum in redemption of weekly payments by agreement the registrar of the county court may refuse to register the memorandum of agreement on the ground that the sum is inadequate, or by reason of the agreement having been obtained by fraud, or undue influence, or other improper means (*t*).

Weekly payment or lump sum.

When workmen's receipt essential.

The compensation, if paid under an agreement or award, must, unless paid into court, be paid only on the receipt of the workman himself (*a*).

Infancy.

398. Where the workman is an infant, or under legal disability, the county court may, on application, order that the weekly payment of compensation be paid into court, to be dealt with as the court directs (*b*).

An agreement made by an infant which is not for his benefit is not binding on him (*c*). But a provisional agreement may be made on behalf of an infant with the employer which only becomes valid when it has been approved by the registrar of the county court (*d*).

Residence out of United Kingdom.

399. A workman receiving weekly compensation, who ceases to reside in the United Kingdom, ceases to be entitled to compensation, unless a medical referee certifies that the incapacity resulting from

(*o*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58); see *Warby* v. *Plaistowe & Co.* (1910), 4 B. W. C. C. 70, C. A.

(*p*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. I. (1) (b). An agreement, entered into by a workman who has been injured, to do light work at his former rate of wages, and providing that, in the event of total incapacity recurring, his statutory rights under the Act should revive, comes to an end on the recurrence of the total incapacity, and does not afterwards revive; the workman is relegated to his statutory rights (*Branford* v. *North Eastern Rail. Co.* (1910), 4 B. W. C. C. 84).

(*q*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 1 (3). As to construction of agreement, see *Branford* v. *North Eastern Rail. Co*, *supra*.

(*r*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 1 (3).

(*s*) *Ibid.*, Sched. I. (17). Whether he can do this before the expiration of six months, provided for in *ibid.*, Sched. I. (17) (see p. 229, *post*), has not yet been decided. It is submitted that he may; and see p. 224, *post*.

(*t*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. II. (9) (d); see pp. 186, 226, *post*.

(*a*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. II (14).

(*b*) *Ibid.*, Sched. I. (7). For procedure, see Workmen's Compensation Rules, 1907, r. 57, Form 54.

(*c*) *Stephens* v. *Dudbridge Ironworks Co.*, [1904] 2 K. B. 225, C. A.; 6 B. W. C. C. (o. s.) 48; see title INFANTS AND CHILDREN, Vol. XVII., p. 71.

(*d*) *Rhodes* v. *Soothill Wood Colliery Co., Ltd.*, [1909] 1 K. B. 191, C. A.; 2 B. W. C. C. 377; see Workmen's Compensation Rules, 1909, r. 42 (6).

the injury is likely to be of a permanent nature (*e*). In such a case he may obtain from the registrar of the county court the necessary notice and forms, enabling him to obtain his compensation abroad (*f*).

400. In case of death the compensation is due to the dependants of the workman (*g*), and is a lump sum of money dependent on the earnings of the deceased, whether the dependency is total or partial (*h*). Death.

401. In all cases where dependants exist, the money payable to them must be paid into the county court, to be dealt with by the court, subject to the Act (*i*) and rules, as the court in its discretion thinks fit, for the benefit of the persons entitled under the Act (*i*). Money, payable to dependants, to be paid into court.

The employer must pay the money into court (*j*). Notice is then sent to all the parties or their guardians (*k*).

402. In the absence of agreement any question as to who are dependants, or how the money is to be apportioned between them, is settled by the court by arbitration (*l*). Apportionment by court.

Witnesses may be examined, and the judge may make such order as he thinks right (*m*). Witnesses.

The general rule as to costs applies (*n*). Costs.

The employer is not liable for costs after payment into court of the full amount of compensation (*o*), but may be ordered to pay costs properly incurred before the receipt of the notice that the money has been paid in (*p*).

403. The amounts of compensation due to the dependants when ascertained must be invested or dealt with as the court thinks right (*q*). Investment and applications for investment.

Application for investment or application of the sums allotted

(*e*) Workmen's Compensation Act, 1906 (6 Edw 7, c. 58), Sched. I. (18).

(*f*) For procedure, see Workmen's Compensation Rules, 1907, r. 60, Forms 50, 51, 56, 56A, 57A, 59, 60, 61, 62, 63.

(*g*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. I (1) (a); see *ibid.* s 13, and the text, *infra*.

(*h*) *Ibid.*, Sched. I. (1) (a). If there are no dependants, the reasonable expenses of medical attendance and burial, not exceeding £10, are payable by the employer. This sum is payable either to the legal personal representatives of the deceased workman, or if there are no such persons, then to the person to whom the expenses of medical attendance and burial are due (*ibid*, Sched. I. (5); see *ibid.*, s. 13).

(*i*) *Ibid.*, Sched. I. (5).

(*j*) Workmen's Compensation Rules, 1909, rr. 56A, 56B. If paid under an award, in manner provided by the award (see p 228, *post*). In any other case the money must be paid into the court where the award is made or the agreement is to be recorded (*ibid.*, Form 53).

(*k*) Workmen's Compensation Rules, 1909, r. 56A (5), Form 53B.

(*l*) *Ibid.*, r. 56A (7), (8).

(*m*) *Ibid.*, r. 56A (c), (d).

(*n*) *Ibid.*, r. 56A (10) (e).

(*o*) *Ibid*, r 56A (1)

(*p*) *Ibid.*; see *Rhodes* v. *Soothill Wood Colliery Co., Ltd.*, [1909] 1 K. B. 191, C. A.; 2 B. W. C. C. 377. A dependant entitled to receive weekly payments of compensation may receive them from the registrar, or at his written request and at his risk by crossed cheque or post office order sent by registered post (Workmen's Compensation Rules, 1909, r. 56A (13)).

(*q*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched I. (5).

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may be made immediately after the hearing, or later by application in writing (*r*).

Payment into court of amount admitted by employer.

404. Where the employer admits liability to pay compensation, but not the amount, he may pay the sum he admits into a court in which an agreement could be filed (*s*). The registrar of the court must inquire as to the adequacy of the amount, and the parties must answer his inquiries and give information (*t*).

Inquiry as to adequacy.

If the registrar thinks the sum adequate, he sends notice of the payment to the parties or their guardians (*a*). If he thinks it inadequate he must report in writing his grounds to the judge, who, if he thinks it adequate, directs the notice to be given (*b*). If he thinks further inquiry necessary, all parties are summoned before him and he makes such order as he thinks just (*c*). If the judge finds the money sufficient the employer (if he has given all proper information) is not liable for costs after the receipt of notice of payment into court, but the judge may order him to pay costs properly incurred before (*d*).

Costs.

Jurisdiction of judge and registrar.

405. The registrar has to approve or disapprove the adequacy of the money paid into court (*e*), and the judge has no jurisdiction till the matter is referred to him by the registrar (*f*). If the registrar is satisfied with or does not express dissent from the sum paid in, the judge has no power to require the appearance of the employer in any further proceedings necessary for the purpose of dealing with the money (*g*).

"Dependants."

406. "Dependants" are such members of the workman's family as were wholly or in part dependent upon the earnings of the workman at the time of his death, or would but for the incapacity due to the accident (*h*) have been so dependent (*i*).

"Member of a family."

407. "Member of a family" means wife or husband, father, mother, grandfather, grandmother, stepfather, stepmother, son, daughter, grandson, granddaughter, stepson, stepdaughter, brother, sister, half-brother, half-sister (*k*).

(*r*) Workmen's Compensation Rules, 1909, r. 56A (9), (10), Form 53C.
(*s*) *Ibid.*, r. 56B (1), (2), Form 53A.
(*t*) *Ibid.*, r. 65 (1)
(*a*) *Ibid*, r. 56B (4), Form 53B (ii.).
(*b*) *Ibid*, r. 56B (5), (6).
(*c*) *Ibid*, r. 56B (7), Form 53AA. Similar procedure is provided for ascertaining who are dependants, and what is the amount payable to each, as exists where the full money is paid into court (*ibid.*, r. 56B (8)).
(*d*) *Ibid.*, r. 56 (9).
(*e*) As to approving a provisional agreement on behalf of an infant, see p 184, *ante*; *Rhodes* v. *Soothill Wood Colliery Co., Ltd.*, [1909] 1 K. B. 191, C. A.
(*f*) *Rhodes* v. *Soothill Wood Colliery Co., Ltd., supra.*
(*g*) Workmen's Compensation Rules, 1909, r. 56B (5), (6), (7).
(*h*) The latter words were inserted to meet the case of injury not resulting in death for a considerable period.
(*i*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 13.
(*k*) *Ibid.* The definition is wider than in the Fatal Accidents Act, 1846 (9 & 10 Vict. c. 93), as amended by the Fatal Accidents Act, 1864 (27 & 28 Vict. c. 95). These statutes do not apply to brother or sister either of the whole or half blood, or to those associated by an illegitimate tie.

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408. Where a workman, being the parent or grandparent of an illegitimate child, leaves the child dependent on his earnings at the time of death, or, being an illegitimate child, leaves a parent or grandparent so dependent, the Act (*l*) applies.

Illegitimacy.

409. Any reference to a workman who has been injured, where the workman is dead, includes a reference to his legal personal representative, or to his dependants or other person to whom or for whose benefit compensation is payable (*m*).

Reference to a workman who is dead.

410. The dependency must exist at the time of the death (*n*). Where the claim for compensation is made by a wife the words "at the time of his death" were at one time construed liberally in her interest, and the principle laid down that where the husband had abandoned his wife, but the wife had not abandoned her legal right to support, she was dependent on his earnings at the time of his death, though not being actually supported by him at the time (*o*).

Dependency existing at time of death.

If the wife had means of subsistence irrespective of her husband, upon which she had a right to rely, and upon which she was relying at the time of her husband's death, she was not dependent on his earnings at the time of his death (*p*).

Construction of words as to wife's dependency.

The fact that husband and wife were separated for a long period before the husband's death, and that the wife had been supporting herself, was held immaterial if the facts showed that she had never relinquished her legal right to her husband's support, but the principle that a wife is dependent upon her husband's earnings merely because of his legal obligation to support her has been greatly modified (*q*).

(*l*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 13. An illegitimate child who has been adopted by another person without any substantial payment is not a dependant (*Briggs* v. *Mitchell*, [1911] S. C. 705). As to illegitimate members of an employer's family, see note (*b*), p. 156, *ante*.

(*m*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 13. In these somewhat vague words is the right to receive compensation conferred upon the dependants. The intention is more clearly expressed, *ibid.*, Sched. I. (1), (5); see p. 185, *ante*.

(*n*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 13. Where a workman left an estate worth £190 which came to his wife on his death, but she was wholly dependent on his earnings at the time of his death, it was held that the £190 could not be taken into account (*Pryce* v. *Penrikyber Navigation Colliery Co.*, [1902] 1 K. B. 221, C. A.; 4 B. W. C. C. (o. s.) 115). Where a son had contributed to his father's support, but previous to the time of his death from accident had not helped him for many months, but had allowed him to go to the workhouse, it was held that the father was not a dependant upon the son's earnings at the time of the death (*Rees* v. *Penrikyber Navigation Colliery Co.*, [1903] 1 K. B. 259, C. A.; 5 B. W. C. C. (o. s.) 117). Under the Fatal Accidents Act, 1846 (9 & 10 Vict. c. 93), a reasonable expectation of pecuniary assistance in the future is sufficient; see title NEGLIGENCE. The words "at the time of death" appeared in the Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37), s. 7.

(*o*) *Coulthard* v. *Consett Iron Co.*, [1905] 2 K. B. 869, C. A.; 8 B. W. C. C. (o. s.) 87. In a subsequent case (*Williams* v. *Ocean Coal Co., Ltd.*, [1907] 2 K. B. 422, C. A.; 9 B. W. C. C. (o. s.) 44), the Court of Appeal reversed the decision of an arbitrator who found, on facts similar to those in *Coulthard* v. *Consett Iron Co.*, *supra*, that the wife was not so dependent.

(*p*) *Coulthard* v. *Consett Iron Co.*, *supra*, *per* COLLINS, M.R., at p. 872.

(*q*) By the recent decision of the House of Lords in *New Monckton*

SECT. 3. Workmen's Compensation Act, 1906.

411. The amount payable in cases of partial dependency is a question of fact for the arbitrator. He has to say, within the prescribed limits (*r*), what is reasonable and proportionate to the injury (*s*).

Partial dependency. Function of arbitrator.

412. A posthumous child may be dependent on the earnings of the father at the time of his death (*t*); and even a posthumous illegitimate child may be wholly or partly dependent on the earnings of the father at the time of his death, if there is evidence to support a finding that if the father had lived till the birth of the child it would in fact have been dependent on his earnings (*u*).

Posthumous children.

Test of financial dependency.

413. It is not necessary that the applicant for compensation should have been dependent on the earnings of the deceased for the necessaries of life (*a*). The standard of living in the neighbour-

Collieries, Ltd. v. *Keeling*, [1911] A. C. 648; 4 B. W. C. C. 332, in which the House of Lords laid it down that the existence of the husband's legal obligation, and the probability that it might be discharged, either voluntarily or under compulsion, were all matters which the arbitrator should take into consideration, but no presumption of dependency arises from the fact of the husband's legal obligation to support his wife; see, as to dependency at time of death *Main Colliery Co.* v. *Davies*, [1900] A. C. 358; 2 B. W. C. C. (o. s.) 108; *Hodgson* v. *West Stanley Colliery*, [1910] A. C. 229; 3 B. W. C. C. 260; *Lee* v. *S.S. "Bessie" (Owners)*, [1911] W. N. 220, C. A.

(*r*) See p. 199, *post*.

(*s*) *Littleford* v. *Connell* (1910), 3 B. W. C. C. 1, C. A. For the principle upon which compensation in cases of "partial dependency" was calculated under the Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37), see *Osmond* v. *Campbell and Harrison, Ltd.*, [1905] 2 K. B. 852, C. A.; 8 B. W. C. C. (o. s.) 95, which, so far as it held that, upon a question of partial dependency, the arbitrator is not entitled to deduct, from the earnings of the deceased, his cost of maintenance, is overruled by *Tamworth Colliery Co., Ltd.* v. *Hall*, [1911] A. C. 665; 4 B. W. C. C. 313.

(*t*) *Williams* v. *Ocean Coal Co., Ltd.*, [1907] 2 K. B. 422, C. A.; 9 B. W. C. C. (o. s.) 44. A child *en ventre sa mère* is deemed to be born, so far as is necessary for the benefit of the child (*Villa* v. *Gilbey*, [1907] A. C. 139).

(*u*) *Orrell Colliery Co.* v. *Schofield*, [1909] A. C. 433; 2 B. W. C. C. 294, H. L., where there was evidence that the father meant to marry the mother and to support the child: he had taken steps towards the marriage, but he never had supported the mother of the child either wholly or in part up to the time of his death.

(*a*) *Main Colliery Co.* v. *Davies*, *supra*. The father of a boy who had been killed by accident claimed compensation: the boy earned 8*s*. a week and lived at home and gave his earnings into the family fund; the father was earning the full wages of a miner in the district. The House of Lords decided that these facts justified a finding of fact that the father was in part dependent on the son's earnings at the time of the son's death. In another case a boy worked at a colliery and also in the evenings assisted his father in his trade as barber, the whole of his wages going into the family purse, he receiving no wages for his work as barber, but being entirely supported out of the common fund; he was killed by accident and his father claimed compensation. Held, that if the voluntary service rendered by the boy reduced the cost of the boy's keep so that in fact all his wages were available for family support, there was evidence upon which the father might be found to be a dependant, but (reversing the Court of Appeal, [1911] 1 K. B. 341, C. A.) that the expenses of the maintenance of the boy must be taken into account (*Tamworth Colliery Co., Ltd.* v. *Hall*, *supra*). A seaman had regularly for some time assisted

hood or amongst the class to which the applicant belongs is not the test. What the family was in fact earning, what the family was in fact spending, for the purposes of its maintenance as a family, are the only things the county court judge can properly regard (*b*).

Contributions to family fund.

414. Where several members of a family contribute to a family fund, any diminution of this fund by withdrawal of the contribution of one of its members, owing to death by accident, gives a right to the head of the family to compensation (*c*).

A wife who is being supported by her husband at the time of his death is not necessarily to be deemed solely dependent upon his earnings, if in supporting his wife and family the husband receives contributions from the members of his family (*d*).

Where the applicant for compensation is dependent on the earnings of several relatives who are killed at or about the same time, the compensation recoverable may exceed the sum which might be recovered for a single death (*e*).

When compensation vests.

415. It is submitted that the right to compensation in the workman himself vests as soon as each weekly payment of compensation falls due: under an award or agreement the compensation vests in the dependants on the death of the workman in respect of whose death it is payable (*f*).

Devolution of right.

It is not even necessary that the workman in his lifetime or his dependants after his death should have taken any steps towards securing compensation, as by giving notice of a claim, or otherwise. The right to compensation is vested in the dependants by the death of the workman, so that in case of their death before the compensation has been paid, the right passes to their legal personal representatives (*g*).

his father with money from his earnings; he had not given his father assistance during the year of his death, but there was evidence that during this time he earned very little and could not probably afford to do so. The arbitrator held that the father was partly dependent on his son's earnings at the time of the son's death, and the Court of Appeal held that there was evidence to support this finding as a finding of fact (*Robertson* v. *Hall Brothers Steamship Co.* (1910), 3 B. W. C. C. 368, C. A.; see *Turner* v. *Miller and Richards* (1910), 3 B. W. C. C. 305, C. A.).

(*b*) *Main Colliery Co.* v *Davies*, [1900] A. C. 358; 2 B. W. C. C. (o. s.) 108, *per* Lord HALSBURY, L.C.

(*c*) *Ibid.*; followed in *Howells* v. *Vivian & Sons* (1901), 85 L. T. 529, C. A.; 4 B. W. C. C. (o. s.) 106, and *French* v. *Underwood* (1903), 19 T. L. R. 416, C. A.; 5 B. W. C. C. (o. s.) 119.

(*d*) *Hodgson* v. *West Stanley Colliery*, [1910] A. C. 229; 3 B. W. C. C. 260. Thus, where a father and his two sons, who had all contributed their earnings to a family fund from which the whole family derived support, were all killed in the same accident, the mother was held to be entitled to claim as dependent upon the earnings of each (*ibid.*). *McLean* v. *Moss Bay Iron and Steel Co., Ltd.*, [1909] 2 K. B. 521, C. A.; 2 B. W. C. C. 282, and *Senior* v. *Fountains and Burnley, Ltd.*, [1907] 2 K. B. 563, C. A.; 9 B. W. C. C. (o. s.) 116, which was followed by the first-named case, are now overruled by *Hodgson* v. *West Stanley Colliery*, *supra*.

(*e*) *Hodgson* v. *West Stanley Colliery*, *supra*; see p. 199, *post*.

(*f*) *Darlington* v. *Roscoe & Sons*, [1907] 1 K. B. 219, C. A.; 9 B. W. C. C. (o. s.) 1. The contrary was decided in Ireland (*Re O'Donovan and Cameron, Swan & Co.*, [1901] 2 I. R. 633, C. A.).

(*g*) *United Collieries, Ltd.* v. *Simpson*, [1909] A. C. 383; 2 B. W. C. C.

SECT. 3. Workmen's Compensation Act, 1906.

416. The right of the dependants to receive compensation under the Act (*h*) is an independent right given by the statute itself, and they cannot generally be deprived of this right by any bargain made between the workman and his employer during his lifetime (*i*).

Effect of bargain by workman.

Deduction of sums received by workman.

417. Weekly payments made under the Act (*h*) to the workman himself, or any lump sum paid in redemption of such weekly payments (*j*), are to be deducted from the compensation due to the dependants who otherwise would be entitled to the statutory compensation (*k*).

No transmission of right to recover.

418. The right to recover is not transmitted by the injured workman to the dependants; therefore the burden is on the dependants to prove their right to recover. The fact that the workman during his lifetime was being paid compensation does not estop the employers from setting up against a claim by the dependants that death was not occasioned by the accident (*l*).

SUB-SECT. 13.—*Persons who Pay Compensation.*

Who usually pays.

419. It is usually the employer (*m*) who pays the compensation to the injured workman or his dependants (*n*).

308 In this case the workman was injured on 9th July, 1907, and died on 14th July. His mother, who was a dependant upon his earnings, died on 16th October of the same year without making any claim for compensation. Her executrix made the claim on behalf of the estate of the mother, on 10th December, 1907, and was held entitled to recover.

(*h*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58).

(*i*) *Williams* v. *Vauxhall Colliery Co., Ltd.*, [1907] 2 K. B. 433, C. A.; 9 B. W. C. C. (o. s.) 120. In this case the workman was alleged to have entered into a contract with his employers not to claim any further compensation than he had already received; held, that if he had done so, the contract could not take away the right of the dependants after his death resulting from the accident to recover compensation; see also *Howell* v. *Bradford & Co.* (1911), 4 B. W. C. C. 203, C. A.

(*j*) The question has not yet been decided whether this lump sum must be a sum assessed, or arrived at by agreement under the authority of the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. I. (17), or whether any sum which the workman even before the expiration of six months agrees to accept in satisfaction of his weekly payments must be deducted.

(*k*) *Ibid.*, Sched. I., 1 (a) (i.).

(*l*) *Cleverley* v. *Gas Light & Coke Co.* (1907), 24 T. L. R. 93; 1 B. W. C. C. 82, H. L.; compare *M'Ginty* v. *Kyle*, [1911] S. C. 589.

(*m*) "Employer" includes any body of persons, corporate or unincorporate, and the legal personal representative of a deceased employer, and, where the services of a workman are temporarily lent or let on hire to another person by the person with whom the workman has entered into a contract of service or apprenticeship, the latter shall, for the purposes of the Act, be deemed to continue to be the employer of the workman whilst he is working for that other person (Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 13). As to the existence of a contract of service, see *ibid.*, s. 13; and p. 154, *ante*. As to when a contract subsisting between a person or persons who select and pay another for performing services is or is not a contract of service, see p. 149, *ante*; and compare note (*p*), p. 205, *post*. As to the liability for accident of managing owners of a ship, who are merely agents of the registered owners, see *M'Lauchlan* v. *Hogarth*, [1911] S. C. 522.

(*n*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 1 (1).

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420. The maxim *actio personalis moritur cum personâ* does not apply to a claim under the Act (*o*). The statutory right to compensation is not an *actio* (*p*), and as the statutory definition of employer includes the legal personal representatives of a deceased employer, the claim does not abate upon the employer's death (*q*).

No abatement upon employer's death.

421. The question who is the employer is usually a question of fact (*r*). The employer who has temporarily lent or let on hire his workman's services to another remains liable to pay the compensation whilst the workman is doing the work for which he was lent or hired (*s*). In such case the workman cannot claim compensation from the person to whom he is lent or hired, though such person for the time may exercise over him all the rights of master (*t*).

Temporary employer.

422. The exercise and performance of the powers and duties of a local or other public authority is, for the purposes of the Act (*o*), to be treated as the trade or business of the authority (*u*).

Local authority as employer.

Local and public authorities are employers within the Act (*o*), and consequently, if such bodies employ casual labour, they become liable to pay compensation (*w*).

423. If an employer has entered into a contract with any insurers in respect of any liability under the Act (*o*) and afterwards becomes bankrupt, or arranges with his creditors, or, if a company, commences to be wound up, the right of the employer against the insurers with respect to his liability is transferred to and vests in the workman. The insurers have the same rights and remedies and are subject to the same liabilities as though they were the employer, but they incur no greater liability to the workman than they were under to the employer (*x*).

Subrogation with regard to rights against insurers.

The workman can generally have no greater rights against the insurer than belonged to the employer (*y*). The terms of the

Extent of rights.

(*o*) Workmen's Compensation Act, 1906 (6 Edw. 7, c 58)

(*p*) *Darlington* v. *Roscoe & Sons*, [1907] 1 K. B. 219, C. A.; 9 B. W. C. C. (o. s) 1

(*q*) In *In the Goods of Byrne* (1910), 44 I L T. 98, where the employer died and the next of kin refused to administer his estate, a grant was made to the nominee of a workman who had been injured, for the purpose of his proceeding to recover damages

(*r*) *Pollard* v. *Goole and Hull Steam Towing Co*, *Ltd.* (1910), 3 B. W. C. C. 360, C. A

(*s*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 13; see note (*n*), p. 190, *ante*

(*t*) *Richards* v. *Payne* (1908) (unreported), 27th November, 2nd December, C. A. No right to indemnity is reserved against the temporary employer; see *Cory & Son, Ltd.* v *France, Fenwick & Co*, *Ltd*, [1911] 1 K B 114, C. A As to the employer's right to indemnity as against a workman through whose negligence the accident was caused, see *Lees* v. *Dunkerley Brothers*, [1911] A. C. 5; 4 B. W. C C. 115, and p. 134, *ante*.

(*u*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 13.

(*w*) *Ibid.*; see *Mulrooney* v. *Todd*, [1909] 1 K. B. 165, C. A.; 2 B. W. C. C. 191.

(*x*) Workmen's Compensation Act, 1906 (6 Edw. 7, c 58), s. 5 (1); and see title INSURANCE, Vol XVII., p. 571. If the liability of the insurers to the workman is less than the liability of the employer to the workman, the workman may prove for the balance in the bankruptcy or liquidation (Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 5 (2)). The provision as to liquidation does not apply to a voluntary winding up merely for the purpose of reconstruction or amalgamation with another company (*ibid*, s. 5 (6)).

(*y*) *Kniveton* v. *Northern Employers' Mutual Indemnity Co.*, [1902]

SECT. 3. Workmen's Compensation Act, 1906.

contract between the employer and the insurer must be observed. Where it provides that disputes as to liability thereunder shall be submitted to arbitration, if a dispute exists, the workman cannot recover compensation until such dispute has been settled as provided by the contract (*a*).

Settlement of questions.

All questions as to liability to pay compensation arising between the workman and the insurer must be settled by the statutory arbitration (*b*).

SUB-SECT. 14.—*Liability of Principal for Contractor.*

Principal and contractor. Liability of principal.

424. A person (called in the Act (*c*) "the principal") who in the course of, or for the purpose of, his trade or business contracts with any other person (called "the contractor") for the execution, by or under the contractor, of work undertaken by the principal, is liable to pay compensation to any workman employed in the execution of the work where he would have been liable to pay such compensation if the workman had been immediately employed by him (*d*).

The amount of compensation recoverable from the principal is calculated with reference to the earnings of the workman under the employer by whom he is immediately employed (*e*).

Exceptions.

425. There are, however, two exceptions to this principle: (1) where the contract relates to threshing, ploughing or other agricultural work, and the contractor provides and uses machinery driven by mechanical power, the contractor alone, and not the principal, is liable to pay the compensation to a workman employed by the contractor (*f*); (2) where the accident occurred elsewhere than on, or in, or about premises on which the principal has undertaken to execute the work, or which are otherwise under his control or management (*g*).

1 K. B. 880; 4 B. W. C. C. (o. s.) 37; *Morris* v. *Northern Employers Mutual Indemnity Co.*, [1902] 2 K. B. 165, C. A.; 4 B. W. C. C. (o. s.) 38.

(*a*) *King* v. *Phœnix Assurance Co.*, [1910] 2 K. B. 666, C. A.; 3 B. W. C. C. 442. To enable a workman to discover whether a contract of insurance exists he is entitled to apply to the county court for an order for the examination of the employer (Workmen's Compensation Rules, 1907, r. 35 (2)). Subject to the special terms of the contract between the employer and the insurer, the provisions of the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), and Rules apply to the settlement by arbitration of any question between the workman and the insurer (Workmen's Compensation Rules, 1907, r. 35 (3); Rule of 1911).

(*b*) Workmen's Compensation Rules, 1907, r. 35 (3).

(*c*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58).

(*d*) *Ibid*, s. 4 (1). The marginal note to the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 4, is the word "sub-contracting," but the operation of *ibid.*, s. 4, is not so limited; see note (*l*), p. 193, *post*.

(*e*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 4 (1).

(*f*) *Ibid.* "Mechanical power" does not include hand or horse power aided by mechanical contrivance, but power derived from steam, water, gas, electricity etc.; see *Wrigley* v. *Whittaker*, [1901] 1 K. B. 780; 3 B. W. C. C. (o. s.) 61.

(*g*) *Ibid.*, s. 4 (4). The words "on" or "in" or "about" appeared in the Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37), as a general limitation of the employer's liability. They were interpreted to mean either on the land or premises of the employer, or the land or premises where he was engaged with his workmen in doing the work, or in close

The premises on which the principal has undertaken to execute the work may include the whole area of the land on which the work or any part of it is to be performed (*h*), but it does not include the public streets through which, as incident to and in the course of the work, the workman may have to pass (*i*).

Recovery from contractor.

426. The workman may, if he chooses, recover compensation from his employer instead of the principal (*j*).

Who may be a "principal."

427. Where a person, who has undertaken by contract to do work, sub-lets the work or part of it to another who provides his own workmen, such first-named person is a "principal" in the sense of the Act (*k*), as also is one who is doing for himself work of the same description as that which he holds himself out as generally undertaking to do for other persons (*l*); but a person is not a

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proximity to such places; see *Powell* v. *Brown*, [1899] 1 Q. B. 157, C. A.; 1 B. W. C. C. (o. s.) 44; *Lowth* v. *Ibbotson*, [1899] 1 Q. B. 1003, C. A.; 1 B. W. C. C. (o. s.) 46; *Chambers* v. *Whitehaven Harbour Commissioners*, [1899] 2 Q. B. 132, C. A.; 1 B. W. C. C. (o. s.) 47; *Fenn* v. *Miller*, [1900] 1 Q. B. 788, C. A.; 2 B. W. C. C. (o. s.) 55; *Pattison* v. *White & Co.* (1904), 20 T. L. R. 775, C. A.; 6 B. W. C. C. (o. s.) 61; *Spacey* v. *Dowlais Gas and Coke Co.*, [1905] 2 K. B. 879, C. A.; 8 B. W. C. C. (o. s.) 29; *Back* v. *Dick Kerr & Co., Ltd.*, [1906] A. C. 325; 8 B. W. C. C. (o. s.) 40. The scope of this provision is that the principal shall not be liable to pay compensation to the contractor's workman who may be working on the premises of his own employer, over which the "principal" has no control, or in the public street.

(*h*) *Atkinson* v. *Lumb*, [1903] 1 K. B. 861, C. A.; 5 B. W. C. C. (o. s.) 106; *Rogers* v. *Cardiff Corporation*, [1905] 2 K. B. 832, C. A.; 8 B. W. C. C. (o. s.) 51.

(*i*) *Andrews* v. *Andrews and Mears*, [1908] 2 K. B. 567, C. A.; 1 B. W. C. C. 264. In the case of a public authority the public streets within the area of its authority will probably be held to be under its control or management within the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 4 (4).

(*j*) *Ibid.*, s. 4 (3).

(*k*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58).

(*l*) *Skates* v. *Jones & Co.*, [1910] 2 K. B. 903, C. A.; 3 B. W. C. C. 460. The interpretation of the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 4, has created great difficulty, which even now is only partially removed. The appearance of the word "sub-contracting" in the margin of the Act, against *ibid.*, s. 4, and the words "undertaken by the principal" seemed to point only to a contractor entering into a contract with a sub-contractor, but the proviso to *ibid.*, s. 4 (1), clearly shows that *ibid.*, s. 4, cannot be so restricted; see the text, *infra*. This was decided in *Mulrooney* v. *Todd*, [1909] 1 K. B. 165, C. A.; 2 B. W. C. C. 191, and in *Skates* v. *Jones & Co.*, *supra*. In Scotland, apparently, no judicial agreement exists as to the meaning of the section; see *Zugg* v. *Cunningham (J. & J.), Ltd.*, [1908] S. C. 827. It was on the wording of the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 13, "the exercise and performance of the powers and duties of a local or other public authority shall, for the purposes of this Act, be treated as the trade or business of the authority," that the case of *Mulrooney* v. *Todd*, *supra*, was decided. The corporation of Bradford had contracted for the pulling down of an old building on its land, and in the course of the work one of the contractor's men was killed. Held, that the corporation was liable to pay compensation to the widow under the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s 4, as the contract was for the execution of work undertaken by the corporation. The court left open the question of the position of the private trader entering

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"principal" in the above sense merely because, for the purposes of his trade or business, he contracts for certain necessary work, not usually performed or undertaken by himself, and *a fortiori* if the contract is for private purposes (*m*).

Nature of contract.

428. The contract must be entered into by the principal in the course of or for the purpose of his trade or business (*n*).

Nature of work.

Though the work may be within the scope of the general purposes of the business of the principal, he is not liable if it is not a part of the trade or business which he undertakes (*o*). The fact that the work contracted for is unusual and not often required does not exclude the operation of the Act (*p*) if such work can be fairly said to be work of the description which the alleged principal undertakes (*q*).

Position of principal.

429. Where no claim could be maintained under the Act (*p*) against the contractor, there can be no claim against the principal (*r*).

Indemnity.

The principal who has to pay compensation has a right to be

into such a contract, and later decided it in *Skates* v. *Jones & Co.*, [1910] 2 K. B. 903, C. A.; 3 B. W. C. C. 460.

(*m*) *Skates* v. *Jones & Co.*, *supra*; *Cooper and Crane* v. *Wright*, [1902] A. C. 302; 4 B. W. C. C. (o. s.) 75.

(*n*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 4 (1). The words are disjunctive. Under a like provision in the Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37), s. 4, the "undertaker," as he was there called, did not incur liability if the contract was for work merely ancillary or incidental to, and no part of or process in, the trade or business carried on by such undertaker. The following cases decided under that Act may be referred to as showing what may or may not be fairly described as work undertaken by persons in the ordinary course of following their trade or business:—*Pearce* v. *London and South Western Railway*, [1900] 2 Q. B. 100, C. A.; 2 B. W. C. C. (o. s.) 152 (the building of a railway station by a railway company held not to be a part of or process in the trade or business carried on by the railway company); *Knight* v. *Cubitt & Co.*, [1902] 1 K. B. 31, C. A.; 4 B. W. C. C. (o. s.) 42 (builders who often contracted for the demolition of buildings and erection of new ones on the same site, but who habitually entered into sub-contracts for the demolition of the buildings, held to be liable to the sub-contractor's workman on the grounds that the work of demolition was a part of, or process in, their trade or business); compare *Bush* v. *Hawes*, [1902] 1 K. B. 216, C. A.; 4 B. W. C. C. (o. s.) 33 (where a builder, who had contracted to erect a building with an iron roof, and had sub-contracted for the roof, was held not liable to the sub-contractor's workman on the finding of the arbitrator that such work was no part of the ordinary business carried on by him).

(*o*) *Waites* v. *Franco-British Exhibition* (1909), 25 T. L. R. 441, C. A.; 2 B. W. C. C. 199.

(*p*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58).

(*q*) *Dittmar* v. *Ship V.* 593 (*Owners*), [1909] 1 K. B. 389, C. A.; 2 B. W. C. C. 178 (a firm of coal merchants and lightermen, who carried on business in several countries, contracted with one G. for a lump sum to take a lighter they had purchased in England to Cape Verd; held, that this contract was within the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 4, and that the coal merchants were "principals" liable to pay compensation to the contractor's workmen).

(*r*) *Marks* v. *Caine*, [1909] 2 K. B. 516, C. A.; 2 B. W. C. C. 186. In this case the workman could not have sued the contractor as he was a member of his family; see the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 13, and p. 156, *ante*.

indemnified by any person who would otherwise have been liable to pay compensation to the workman (*s*).

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All questions as to the right to and amount of such indemnity are settled by arbitration under the Act (*a*), and the statutory rules (*b*) prescribe the course to be adopted for the settlement of such a claim. Full discretion is given to the judge or arbitrator over the costs (*c*).

Settlement by arbitration.

It is submitted that the workman may join both his own employer and the principal in the same arbitration proceedings and claim from them alternatively, this course apparently being sanctioned by the Rules (*d*).

Joinder of parties.

SUB-SECT. 15.—*Workmen's Right of Election of Remedies.*

430. Alternative rights of election of remedies are given to the workman under the Act (*e*). The Act (*f*) does not (*g*) deprive him of any previously existing rights at common law or under the Employers' Liability Act, 1880 (*h*), though he cannot recover compensation twice, or recover both compensation and damages (*i*).

Effect of Act on previous remedies.

431. If the workman is injured by the personal negligence or wilful act of the employer, or of some person for whose act or default the employer is responsible, he has a right either to claim compensation or to take such proceedings as are open to him irrespective of the Act (*f*); but the employer is not to be liable both independently of and under the Act (*j*).

Workman's right of election.

The workman is thus given an option to elect the remedy he will pursue, and is bound by his election (*k*). In one case only is there

General rule as to election.

(*s*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 4 (2). This person is either the contractor or sub-contractor for the work which the principal has undertaken. It is quite distinct from the right to indemnity given against a stranger who has caused or is responsible for the accident under *ibid.*, s. 6; see pp. 196 *et seq.*, *post*.

(*a*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 4 (2).

(*b*) Workmen's Compensation Rules, 1907, rr. 19—23, Form 23.

(*c*) *Ibid*, r. 23. It is often a course attended by some danger for a "principal" who proposes to claim indemnity to pay voluntarily; see *Thompson & Sons* v. *North-Eastern Marine Engineering Co.* (1903), 114 L. T. Jo. 335; 5 B. W. C. C. (o. s.) 71.

(*d*) Workmen's Compensation Rules, 1907, r. 2 (2). This point was expressly left an open question in *Mulrooney* v. *Todd*, [1909] 1 K. B. 165, C. A.; 2 B. W. C. C. 191; see p. 193, *ante*.

(*e*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), ss. 1 (2) (b), 6.

(*f*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58).

(*g*) *Ibid.*, s. 1 (2) (b).

(*h*) 43 & 44 Vict. c. 42.

(*i*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 6; see *Vivash* v. *Grounds and Newton* (1911), 46 L. J. 556.

(*j*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 6. *I.e.*, he can sue the employer at common law in respect of his wilful or negligent act (see pp. 128 *et seq.*, *ante*), or under the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), if the person causing the injury is a person for whom under the statute the employer is liable; see pp. 134 *et seq.*, *ante*.

(*k*) *Edwards* v. *Godfrey*, [1899] 2 Q. B. 333, C. A.; 1 B. W. C. C. (o. s.) 32, which decided that a plaintiff who had unsuccessfully sued his employer under the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), could not subsequently take proceedings to recover compensation from him; followed in *Cribb* v. *Kynoch, Ltd.* (No. 2), [1908] 2 K. B. 551, C. A.; 1 B. W. C. C. 42.

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a *locus pœnitentiæ*. This is where, if within the time limited for taking proceedings under the Act (*l*), the workman sues his employer for damages independently of the Act (*l*), and fails. In this case, if the court (*m*) thinks the facts disclose a liability to pay compensation, the action is dismissed, but the court at the plaintiff's option must proceed to assess his compensation (*n*). Hence this option is exercisable only by an unsuccessful plaintiff (*o*).

Locus pœnitentiæ.

Option of unsuccessful plaintiff

The penalty for suing the employer in such a case is that the court when assessing the compensation is at liberty to deduct therefrom all or part of the costs incurred through the workman bringing an action instead of proceeding for compensation under the Act (*p*). An appeal on this question of deduction of costs lies to the Court of Appeal (*q*).

Deduction of costs.

Appeal.

It is submitted that the application to assess compensation must be made at the time of the trial or immediately afterwards (*r*).

Dependants' right.

432. The dependants' right is an independent one, and election by the workman to take a sum in satisfaction under the Employers' Liability Act, 1880 (*s*), or at common law, does not prevent them from recovering compensation if death ensues (*t*).

Injury caused by third party.

Election.

433. Where the injury is caused by some third party, the workman can elect to sue such third party, or to claim compensation from his employer. In these circumstances he may take proceedings against both, but cannot recover both damages and compensation (*u*).

(*l*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58).

(*m*) "The court" here means the judge who tries the action; see *Quinn* v. *Brown (John) & Co., Ltd.* (1906), 8 F. (Ct. of Sess.) 855.

(*n*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 1 (4). This is the duty of any court in which such an action is brought by a workman, whether it be county court, High Court, or other court. When this is done the court must give a certificate of the compensation awarded, and the costs ordered to be deducted, which certificate has the force and effect of an award under the Act (*ibid.*). Where such a certificate is given in the county court it is registered in that court; if given in another court it may be registered in the county court in which it is to be enforced (Workmen's Compensation Rules, 1907, r. 51, Form 44).

(*o*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 1 (4); see *M'Ginty* v. *Kyle*, [1911] S. C. 589 (claim by other dependants, more than six months after death by accident, disallowed).

(*p*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 1 (4) The whole costs of the unsuccessful action may be ordered to be deducted (*Cohen* v. *Seabrook Brothers* (1908), 25 T. L. R. 176; 2 B. W. C. C. 155).

(*q*) *Williams* v *Army and Navy Auxiliary Co-operative Society, Ltd.* (1907), 23 T. L. R. 408; 9 B. W. C. C. (o. s.) 134.

(*r*) The point has not been decided in England. In Scotland applications to assess compensation, under the Workmen's Compensation Act, 1906 (6, Edw. 7, c. 58), s. 1 (4), seven months, and fourteen days respectively, after the trial of the actions, were held to be too late; see *Baird* v. *Higginbotham & Co.* (1901), 3 F. (Ct. of Sess.) 673; *M'Gowan* v. *Smith*, [1907] S. C. 548.

(*s*) 43 & 44 Vict. c. 42.

(*t*) *Howell* v. *Bradford & Co.* (1911), 104 L. T. 433; 4 B. W. C. C. 203, C. A. This appears to be the effect of this decision, but the judge found in the case that the settlement obtained from the workman was not a *bonâ fide* one.

(*u*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 6. Under the like provision in the Workmen's Compensation Act, 1897 (60 & 61

The term "recover" does not necessarily mean that the workman recovers by legal process. If he claims compensation from his employer, and the employer recognises the claim by payment, the workman has recovered compensation within the meaning of the Act (*a*).

Employer's right of indemnity.

434. Where the workman has recovered compensation in respect of an injury caused by a third party, the employer or principal who has paid the compensation can claim indemnity from such third party (*b*). This question of indemnity may be settled by arbitration under the Act, but this can only be done by consent (*c*).

Against third person.

Against fellow workmen.

Indemnity can be claimed by an employer from fellow workmen of the injured workman, if the injury was caused by their negligence or legal default (*d*), but before indemnity can be recovered it is necessary to prove that the third person would have been legally responsible in damages to the workman (*e*).

Extent of indemnity.

The right to indemnity may cover the cost to the employer of defending the arbitration proceedings to recover compensation (*f*), but it is believed this largely depends upon the reasonableness or otherwise of defending the proceedings (*g*).

Nature of election.

435. There must be a clear intention shown on the part of the workman to accept compensation, or to take legal proceedings against the employer or the third party, as the case may be, before he can be said to have made his election. A receipt is only *primâ facie* evidence of election (*h*).

Clear intention necessary.

Cases where election not exercised.

436. Where a workman unsuccessfully sued his employer, and on the action being dismissed applied for compensation, which was refused by the court, it was held that he could appeal both from the judgment in the action and the refusal to award compensation (*i*);

Vict. c. 37) s. 6, the workman could not sue the third party and his employer, though where he accepted compensation from the employer "without prejudice to his rights against the third party," it was held he had not exercised his option of election (*Oliver* v. *Nautilus Steam Shipping Co.*, [1903] 2 K. B. 639, C. A.; 5 B. W. C. C. (o. s.) 65).

(*a*) *Page* v. *Burtwell*, [1908] 2 K. B. 758, C. A.; 1 B. W. C. C. 267; see *Thompson & Sons* v. *North Eastern Engineering Co.*, [1903] 1 K. B. 428, C. A.; 5 B. W. C. C. (o. s.) 71).

(*b*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 6 (2); but the employer cannot do so if the accident was caused by his negligence jointly with that of the third party (*Cory & Son, Ltd.* v. *France, Fenwick & Co., Ltd.*, [1911] 1 K. B. 114, C. A.). The mere breach by the third party of regulations made under the Motor Car Act, 1903 (3 Edw. 7, c. 36), is not necessarily evidence of negligence (*Lankester* v. *Miller, Hetherington third party* (1910), 4 B. W. C. C. 80, C. A.).

(*c*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 6 (2). For procedure, see Workmen's Compensation Rules, 1907, r. 24, Form 23.

(*d*) *Lees* v. *Dunkerley Brothers*, [1911] A. C. 5; 4 B. W. C. C. 115.

(*e*) *Lankester* v. *Miller, Hetherington third party, supra.*

(*f*) *Great Northern Rail. Co.* v. *Whitehead & Co.* (1902), 18 T. L. R. 816; 4 B. W. C. C. (o. s.) 39; but see note (*b*), *supra.*

(*g*) As to indemnity between "principal" and contractor, see p. 194, *ante.*

(*h*) *Huckle* v. *London County Council* (1910), 26 T. L. R. 539; 3 B. W. C. C. 536; affirmed (1910), 27 T. L. R. 112, C. A.; 4 B. W. C. C. 113; and see *Macandrew* v. *Silhooley*, [1911] S. C. 448.

(*i*) *Isaacson* v. *New Grand (Clapham Junction), Ltd.*, [1903] 1 K. B. 539; 5 B. W. C. C. (o. s.) 35.

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and a workman who had filed a request for arbitration under the Act (*j*), and withdrawn it after seeing the employer's answer, was held not to have exercised his right of election, so as to preclude him from suing under the Employers' Liability Act, 1880 (*k*).

Cases where election exercised.

437. Where a workman, however, had unsuccessfully sued his employer, and after such failure had applied for and had been awarded compensation (*l*), it was held he could not appeal from the judgment in the action (*m*).

Where the workman has contracted to accept the benefits of a certified scheme in place of the Act (*j*) he has exercised the option. Neither he nor his dependants, if death subsequently ensues, can take proceedings against the employer at common law or under the Employers' Liability Act, 1880 (*n*).

Apprentices.

438. Although the term workman includes an apprentice (*o*), and the obligation to exercise the right of election in the cases named is imposed on every workman, the Act (*j*) does not alter the general law governing the contracts of infants, namely, that, unless generally for his benefit, he is not bound thereby (*p*). Where, however, an action is regularly instituted by a next friend on behalf of an infant, and fails, and the infant elects through his next friend to ask for compensation, such election cannot be treated as revocable (*q*); and where an infant, having sued the employer at common law more than a year after the accident and failed, subsequently takes proceedings against him for compensation under the Act (*j*) founded on a notice of the accident given to the employers within six months of its occurrence, the option has been exercised, and the second proceedings therefore cannot be maintained (*r*).

Election by infant.

Where the infant is one of a body of workmen between whom and the employer an agreement to refer industrial disputes to a committee exists, and arbitration proceedings are taken before such

(*j*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58).

(*k*) 43 & 44 Vict. c. 42; and see *Rouse* v. *Dixon*, [1904] 2 K. B. 628; 6 B. W. C. C. (o. s.) 44.

(*l*) See p. 196, *ante*.

(*m*) *Neale* v. *Electric and Ordnance Accessories Co., Ltd.*, [1906] 2 K. B. 558, C. A.; 8 B. W. C. C. (o. s.) 6.

(*n*) 43 & 44 Vict. c. 42. See *Taylor* v. *Hamstead Colliery Co.*, [1904] 1 K. B. 838, C. A.; 6 B. W. C. C. (o. s.) 34; and see pp. 214 *et seq.*, *post*.

(*o*) See p. 154, *ante*.

(*p*) *Stephens* v. *Dudbridge Ironworks Co.*, [1904] 2 K. B. 225, C. A.; 6 B. W. C. C. (o. s.) 48

(*q*) *Neale* v. *Electric and Ordnance Accessories Co., Ltd.*, *supra*.

(*r*) *Cribb* v. *Kynoch, Ltd.* (No. 2), [1908] 2 K. B. 551, C. A.; 1 B. W. C. C. 43, where BUCKLEY, L.J., at p. 561, differentiates the case from *Stephens* v. *Dudbridge Ironworks Co.*, *supra*, in these words: "In *Stephens* v. *Dudbridge Ironworks Co., Ltd.*, the applicant, being an infant, had contracted or purported to contract by a contract which was not for his benefit, and the court did but apply the ordinary rules in such a case. In the present case the litigation, duly commenced in the name of the infant by a next friend, was prosecuted to judgment. In such case an infant is just as much bound by the proceedings as if he were an adult." See title INFANTS AND CHILDREN, Vol. XVII., p. 138.

committee (*s*), the decision of the committee is binding on the infant (*t*).

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SUB-SECT. 16.—*The Compensation.*

439. In case of death the compensation payable is a lump sum of money payable to the dependants (*a*) and calculated in most cases upon the earnings of the workman in the employment in which he met with the fatal accident (*b*). In case of death.

440. Where death results from the injury and the workman leaves dependants wholly dependent on his earnings, the amount is a sum equal to the workman's earnings in the employment of the same employer (*c*) during the three years next preceding the injury, or the sum of £150, whichever is the larger, but not exceeding £300 (*d*). If the workman has not worked for the employer for these three years, then it is 156 times his average weekly earnings (*e*) during the period of his actual employment, but not exceeding £300 (*f*). How calculated. Dependants left wholly dependent.

441. If the workman does not leave dependants wholly dependent upon his earnings at the time of death, but leaves dependants in part dependent upon his earnings, the compensation (*g*) is such sum (not exceeding the sum which could be paid in case of dependants wholly dependent) as may be agreed, or in default adjudged in arbitration proceedings (*h*), to be reasonable and proportionate to the injury to such dependants (*i*). Dependants not wholly dependent.

442. The dependency on the earnings must exist "at the time of the death" (*k*). These words (*l*) have been construed strictly (*m*). Dependency.

(*s*) As provided by the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. II (1); see pp 210 *et seq*, *post*

(*t*) *Mulholland* v. *Whitehaven Colliery Co* (1910), 3 B. W. C. C. 317, C. A.

(*a*) As to who are dependants, see p 186, *ante*.

(*b*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. I. (1) (a); see *Babcock and Wilcox, Ltd* v. *Young*, [1911] S C. 406.

(*c*) As to the meaning of "earnings," see pp. 201 *et seq*, *post*

(*d*) Workmen's Compensation Act, 1906 (6 Edw. 7, c 58), Sched. I. (1) (a) (i.).

(*e*) As to the meaning of "average weekly earnings," see pp. 205 *et seq.*, *post*.

(*f*) Workmen's Compensation Act, 1906 (6 Edw. 7, c 58), Sched. I. (1) (a) (i.). If dependants wholly dependent are left there is no power to award less than the maximum sum As to the deduction of weekly payments paid to the workman before his death, or a lump sum paid in redemption thereof, see p 190, *ante*. Where the weekly payments have been redeemed by the payment of a lump sum, there is usually little or nothing for the dependants to receive.

(*g*) In assessing a claim by a partial dependant the arbitrator may take into account the funeral expenses, if paid by such dependant (*Bevan* v. *Crawshaw Brothers* (*Cyfartha*), *Ltd.*, [1902] 1 K. B. 25, C. A.; 4 B. W. C. C. (o. s.) 110). As to compensation where no dependants are left, see note (*h*), p. 185, *ante*.

(*h*) See pp. 209 *et seq.*, *post*.

(*i*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. I. (1) (a) (ii.). As to taking into account the cost of the keep of the deceased, see note (*a*), p. 188, *ante*.

(*k*) See p. 187, *ante*.

(*l*) As to the former exception to the rule of strict construction in the case of the wife, see pp. 187 *et seq*, *ante*.

(*m*) See *ibid*. A reasonable expectation of future assistance is not sufficient, for the words of the statute are imperative. Under the

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Origin of cause of death.

443. The death of a workman results from the injury if the injury in fact causes it at the time at which it occurs, and if this is so in fact, it is not necessary to show that death was a natural or even probable consequence (*n*), but if the chain of causation is broken by a *nova causa interveniens*, so that the old cause goes and a new one is substituted for it, that is a break which gives a fresh origin to the after consequences (*o*).

Compensation in case of non-fatal injury.

444. When the injury does not result in death, but in total or partial incapacity for work, the compensation is a weekly payment, during the incapacity, not exceeding 50 per cent. of the workman's average weekly earnings during the previous twelve months, if he has been so long employed, but, if not, then for any less period during which he has been in the employment of the same employer, such weekly payment not to exceed £1 (*p*). In fixing the weekly payment, the arbitrator must take into account any payment, allowance, or benefit which during the period of incapacity the workman receives from his employer (*q*).

Period of incapacity.

445. The period of incapacity means the period during which compensation is payable (*r*).

Limit of weekly payment in case of partial incapacity.

446. In a case of partial incapacity the weekly payment cannot exceed the difference between the amount of the average weekly earnings of the workman before the accident and the average weekly amount which he is earning or able to earn in some suitable

Fatal Accidents Act, 1846 (9 & 10 Vict. c. 93), incorporated with the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), by s. 1, such a reasonable expectation of future assistance is sufficient to support an action under either of these statutes (*Hetherington* v. *North Eastern Rail. Co.* (1882), 9 Q. B. D. 160; *Franklin* v. *South Eastern Rail. Co.* (1858), 3 H. & N. 211).

(*n*) *Dunham* v. *Clare*, [1902] 2 K. B. 292, C. A.; 4 B. W. C. C. (o. s.) 102.

(*o*) *Ibid.*, *per* COLLINS, M.R., at p. 296.

(*p*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. I. (1) (b). The arbitrator may award any proportion of the wages, not exceeding 50 per cent., in cases of partial as well as of total disablement; see *Calico Printers' Association, Ltd.* v. *Higham* (1911), 28 T. L. R. 53, C. A. (permanent incapacity); *Blake* v. *Rhodes & Sons* (1911), 46 L. J. 536 (partial incapacity). No compensation at all is payable in respect of an accident which does not disable for one week (Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 1 (2) (a)). The effect of this provision and *ibid.*, Sched. I. (1) (b) and proviso (a), is that where the incapacity lasts less than one week no compensation is payable; if less than two weeks only one week's compensation is payable; if two weeks or more, compensation is paid from the time of the happening of the accident causing the incapacity; see p. 176, *ante*.

(*q*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58). Sched. I. (3). Wages paid during incapacity could not be taken into account under the Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37). Now all payments must be taken into account. A payment made to a workman in settlement of a claim where the agreement is afterwards set aside must be taken into account (*Horsman* v. *Glasgow Navigation Co., Ltd.* (1909), 3 B. W. C. C. 27, C. A.). Where an injured seaman was fifteen weeks in hospital after his discharge from the ship, during which time the shipowners paid sums for his maintenance, which they were not legally bound to pay, equal to the full compensation for which they were liable; held, regard must be had to such payments (*Kempson* v. "*Moss Rose*" (*Owners*) (1910), 4 B. W. C. C. 101).

(*r*) *McDermott* v. *S.S. Tintoretto* (*Owners*), [1911] A. C. 35; 4 B. W. C. C.

employment or business after the accident (*s*), but must bear such relation to the amount of that difference as may be proper under the circumstances (*a*).

The expression "able to earn" does not necessarily mean at the same class of work as formerly or by manual labour (*b*).

The incapacity.

447. The incapacity must be due to the injury rendering the workman unable to do the work. An injury which only causes incapacity for work by rendering a previous injury apparent does not entitle to compensation (*c*).

Limit in case of total incapacity of workman under twenty-one.

448. The compensation which may be awarded during total incapacity to a workman under twenty-one years of age (*d*), whose average weekly earnings are less than 20*s*., is 100 per cent. of such wages instead of 50 per cent., but the compensation is not to exceed 10*s*. weekly (*e*).

Basis of compensation.

449. Wherever possible the compensation is based upon the earnings, or the average weekly earnings, of the workman, whether the claim is made by his dependants or by himself (*f*).

"Earnings."

450. "Earnings" includes not only money payments, but other things the value of which are capable of being estimated in money, such as board and lodging, clothes, or other articles or advantages by which the workman is in fact remunerated (*g*).

Gratuities.

Gratuities habitually received by virtue of the employment, and

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123. The fact that the payments were made under a statutory obligation was in this case held to be immaterial.

(*s*) Notwithstanding this provision the arbitrator may in a proper case give the maximum compensation allowed by the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. I. 1 (b), even where a capacity to earn wages exists, provided the earnings and compensation do not together amount to more than the earnings before the injury occurred; see *Illingworth* v. *Walmsley*, [1900] 2 Q. B. 142, C. A.; 2 B. W. C. C. (o. s.) 118; *Jones* v. *London and North Western Rail. Co.* (1901), 4 B. W. C. C. (o. s.) 140, C. A. As to an infant workman, see the text, *infra*, and p. 236, *post*.

(*a*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. I. (3); see *Blake* v. *Rhodes & Sons* (1911), 46 L. J. 536. Where it was proved in the case of a miner who had practically recovered from incapacity and was doing light work, that since the accident miners' wages had greatly fallen, it was held that this circumstance was a proper one to take into account in assessing the compensation (*Bevan* v. *Energlyn Colliery Co.* (1911), 28 T. L. R. 27, C. A.).

(*b*) *Norman and Burt* v. *Walder*, [1904] 2 K. B. 27, C. A.; 6 B. W. C. C. (o. s.) 124; *Cammell, Laird & Co., Ltd.* v. *Platt* (1908), 2 B. W. C. C. 368, C. A. The first of these cases was decided under the corresponding section of the Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37), where the words were not so explicit.

(*c*) *Ball* v. *Hunt* (*William*) *& Sons, Ltd.*, [1911] 1 K. B. 1048, C. A.; 4 B. W. C. C. 225. See *Noden* v. *Galloways, Ltd.* (1911), 131 L. T. Jo. 553.

(*d*) For review of weekly payments of compensation to an infant under Sched. I. (16), see pp. 236 *et seq.*, *post*. It is only in cases of total incapacity that 100 per cent. can be substituted for 50 per cent.

(*e*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. I. (1) (b), proviso (b).

(*f*) *Ibid.*, Sched. I. (1).

(*g*) *Noel* v. *Redruth Foundry Co.*, [1896] 1 Q. B. 453; *Great Northern Railway* v. *Dawson*, [1905] 1 K. B. 331, C. A.; 7 B. W. C. C. (o. s.) 114 (where the use of the uniform of a railway guard was held to be a part of his earnings).

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as part of a well-known source of income, may be earnings, though they are not received from the employer (*h*). Where such gratuities are merely casual and trifling they cannot be taken into account as earnings (*i*).

Deductions.

The expression "earnings" is not limited to the net earnings which the workman receives to be expended at his own pleasure. It may have the same meaning as the wages payable to the workman under his contract with his employer, though some small part of such wages is deducted for articles supplied to the workman to enable him to do the work (*k*).

Sums paid to cover special expenses.

Sums given to the workman for expenses connected with his duties are earnings for the purposes of assessing compensation, for example, a railway guard's expenses when his duties required him to be away from home for a night (*l*). But where the employer has been accustomed to pay to the workman a sum to cover any special expenses entailed on him by the nature of his employment the sum so paid must not be reckoned as part of the earnings (*m*).

Tuition.

Tuition of the description given by a master to his apprentice is of too vague and uncertain a value to be considered as "earnings" (*n*)

Purposes for which earnings are considered.

451. The court has to consider the question of what are earnings, both for the purpose of assessing the proper compensation and for the purpose of seeing whether the workman is excluded from the Act on the ground that his remuneration exceeds £250 a year (*o*).

Principle of calculation.

The principle on which the value to a workman of things other than money, coming to him from his employer under the contract existing between them, is to be calculated, is not by ascertaining what the workman saves in expense to himself by the arrangement, but what is the actual value to the workman of the things provided for him (*p*). The cost to the employer of providing such things is not the true test (*q*), though where no other

(*h*) *Penn* v. *Spiers and Pond, Ltd.*, [1908] 1 K. B. 766, C. A.; 1 B. W. C. C. 401; *Knott* v. *Tingle Jacobs & Co.* (1911), 4 B. W. C. C. 55, C. A.

(*i*) *Penn* v. *Spiers and Pond, Ltd.*, *supra*.

(*k*) In *Abram Coal Co.* v. *Southern*, [1903] A. C. 306; 5 B. W. C. C. (o. s.) 125, the employers deducted from a man's wages a small sum for cleaning lamps, supply of oil, sharpening picks, and checking weights. Held, that his "earnings" were his full wages without taking these deductions into account; see also *Houghton* v. *Sutton Heath and Lea Green Collieries Co.*, [1901] 1 K. B. 93, C. A.; 3 B. W. C. C. (o. s.) 173 (where a sum of sixpence was deducted from a miner's wages for lamp oil).

(*l*) *Midland Railway* v. *Sharpe*, [1904] A. C. 349; 6 B. W. C. C. (o. s.) 119.

(*m*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. 1. (2) (d). This clause prevents the decision of *Midland Railway* v. *Sharpe*, *supra*, being followed; but it does not, it is thought, interfere with the decisions in *Houghton* v. *Sutton Heath and Lea Collieries Co.*, *supra*, and *Abram Coal Co.* v. *Southern*, *supra*.

(*n*) *Pomphrey* v. *Southwark Press*, [1901] 1 K. B. 86, C. A.; 3 B. W. C. C. (o. s.) 194.

(*o*) See p. 154, *ante*.

(*p*) *Dothie* v. *Robert Macandrew & Co.*, [1908] 1 K. B. 803, C. A.; 1 B. W. C. C. 308; see *Skailes* v. *Blue Anchor Line, Ltd.*, [1911] 1 K. B. 360, C. A.; 4 B. W. C. C. 16, where the same principle was applied.

(*q*) *Ibid.*

test is practicable the arbitrator's finding based on such a principle cannot be disturbed (*r*).

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452. The basis of calculation of earnings for the purpose of assessing compensation is the length of the employment, and the expressions in the Act (*s*) "period of employment" and "if he has been so long employed" mean the period of continuous employment, or if he has been so long employed continuously (*a*). If the employment is continuous the calculation of the earnings is a mere question of calculation. If the workman has been employed continuously the compensation in case of death is the total earnings during three years, not exceeding in any case the sum of £300; if less than three years the total sum earned is divided by the number of weeks during which the continuous employment has existed (*b*), and thus the amount of the average weekly earnings is arrived at (*c*).

Basis of calculation of earnings.

In assessing compensation, the court will take extraneous matters which have happened since the date of the accident into consideration, so that the compensation may be reduced by reason of a general fall of wages in the district before the compensation proceedings are heard (*d*).

453. If a break occurs in the employment, during which the relation of master and servant cannot be said to exist in fact, the period

Break in employment.

(*r*) *Rosenqvist* v. *Bowring & Co., Ltd.*, [1908] 2 K. B. 108, C. A.; 1 B. W. C. C. 395.

(*s*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58).

(*a*) *Ibid.*, Sched. I. (1) (a) (i.); *Keast* v. *Barrow Hematite Steel Co.* (1899), 15 T. L. R. 141, C. A.; 1 B. W. C. C. (o. s.) 99. This case is not very satisfactory. It was decided on the finding of the county court judge that the employment was continuous.

(*b*) *Perry* v. *Wright etc.*, [1908] 1 K. B. 441, C. A.; 1 B. W. C. C. 351, *per* COZENS-HARDY, M.R., at p. 454.

(*c*) In construing the expression "average weekly earnings" in the Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37), Sched. I. (1), the Court of Appeal held that as earnings in two weeks at least was necessary, before an average of earnings could be arrived at, workmen who had not worked for at least some part of two weeks continuously for the employer had no average weekly earnings, and were thus outside the Act (*Lysons* v. *Knowles (Andrew) & Sons, Ltd.*, [1900] 1 Q. B. 780, C. A.; 2 B. W. C. C. (o. s.) 101; *Stuart* v. *Nixon and Bruce*, [1900] 2 Q. B. 95, C. A.; 2 B. W. C. C. (o s.) 104). These decisions were reversed in the House of Lords (see [1901] A. C. 79; 3 B. W. C. C. (o. s.) 1), on the ground that the intention of the Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37), to give compensation in such cases was so clearly manifested that, if the materials suggested by the Act to enable the arbitrator to arrive at the average earnings were insufficient, he must still give compensation, estimating the average earnings of the workman in the best manner available to him. In the subsequent cases of *Ayres* v. *Buckeridge*, *Wheale* v. *Rhymney Iron Co.*, *Jones* v. *Rhymney Iron Co.*, [1902] 1 K. B. 57, C. A.; 4 B. W. C. C. (o. s.) 120, the Court of Appeal had to apply the rule laid down by the House of Lords where the facts showed intermittent employment for a short time only. In the first case there was evidence that a workman killed on the fourth day had been promised employment for sixty hours a week. The court held that an estimate of earnings on this basis could be supported. In the second case the workman had worked eight days at 5*s.* 2*d.* a day. An award based on wages of 31*s.* a week was supported. In the third case the facts and decision were similar.

(*d*) *Bevan* v. *Energlyn Colliery Co.* (1911). 28 T. L. R. 27, C. A., distinguishing *James* v. *Ocean Coal Co.*, [1904] 2 K. B. 213, C. A.; 6 B. W. C. C. (o. s.) 128, which was decided under the Workmen's Compensation Act, 1897 (61 & 62 Vict. c. 37).

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to be considered, for the purpose of ascertaining the average weekly earnings, is that which has intervened since the break occurred. Thus, where a break occurs through a strike, the period between the end of the strike and the date of the accident is that over which the average is to be taken (*e*).

Where there is a serious break of the relation of master and servant in fact though not in law, the period since the break is still the period to be regarded though the break was brought about by a previous accident and the workman had not been dismissed (*f*).

A change in the grade occupied by the workman in the employment was, at one time, held to be not equivalent to a break in the employment (*g*), but must now be regarded as such (*h*). Whether or not a workman has altered his grade in the industrial hierarchy is a question of fact (*i*).

The expression "period of employment" cannot be read as meaning "periods of employment" (*j*).

Concurrent contracts.

454. Where the workman has entered into concurrent contracts of service with two or more employers, his total earnings under all the contracts are to be deemed his earnings in the employment of the employer for whom he was working at the time of the accident (*k*).

No matter how many contracts of service are subsisting, the combined earnings in all are the workman's earnings for the purposes of compensation (*l*).

(*e*) *Jones* v. *Ocean Coal Co.*, [1899] 2 Q. B. 124, C. A.; 1 B. W. C. C. (o. s.) 94, where the court declared that the employment must be substantially continuous, pointing out that practically no employment exists in which it can be said there is no break in time, ROMER, L.J. (*ibid.*, at p. 131), adding that he agreed that holidays, for instance, would not necessarily prevent employment being continuous, or if the workman, though willing to work, could not through slackness of trade get continuous employment from the employer, he should not let that circumstance weigh with him.

(*f*) *Appleby* v. *Horseley Co.*, [1899] 2 Q. B. 521, C. A.; 1 B. W. C. C. (o. s.) 103; see *Hathaway* v. *Argus Printing Co.*, [1901] 1 K. B. 96, C. A. 3 B. W. C. C. (o. s.) 177.

(*g*) *Price* v. *Marsden (J.) & Sons*, [1899] 1 Q. B. 493, C. A.; 1 B. W. C. C. (o. s.) 108.

(*h*) See the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. I. (2) (c), where it is declared that, "for the purposes of ascertaining 'earnings' and average weekly earnings, employment by the same employer shall be taken to mean employment by the same employer in the grade in which the workman was employed at the time of the accident." See also *Perry* v. *Wright etc.*, [1908] 1 K. B. 441, C. A.; 1 B. W. C. C. 351.

(*i*) *Williams* v. *Wynnstay Collieries, Ltd.* (1910), 3 B. W. C. C. 473, C. A.

(*j*) Thus, where a workman had worked for the employer in most of the weeks in one year, except when in hospital, but was not employed between the 2nd and 10th November, and he returned to work on the 11th November, and was injured on the 28th November, the period between the last two dates was held to be the only one which could be regarded (*Giles* v. *Belford, Smith & Co.*, [1903] 1 K. B. 843, C. A.; 5 B. W. C. C. (o. s.) 136; see *Hewlett* v. *Hepburn & Co.* (1899), 16 T. L. R. 56, C. A.; 2 B. W. C. C. (o. s.) 123).

(*k*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. I. (2) (b).

(*l*) *Ibid.* *I.e.*, contracts, existing at the same time, which it is

In a case of death where the workman has worked for the same employer continuously for three years, the earnings from concurrent contracts of service cannot be taken into account (*m*).

A workman who receives a yearly sum from the Admiralty, for keeping himself efficient to act as a member of the Naval Reserve, has entered into a contract of service with the Admiralty, and when injured in another employment such sum must be taken into account (*n*).

The contract must be one of service (*o*); earnings under other forms of contract cannot be taken into account (*p*).

Average weekly earnings.

455. In computing average weekly earnings, where from the shortness of time of service, or the casual nature or terms of the employment, it is not practicable to compute the rate of remuneration, regard may be had to the average earnings of a workman of like grade employed during the preceding twelve months at the same work by the same employer, or if no such person exists, then to the average weekly earnings of a workman of the same grade in the same district (*q*).

Employment by the same employer means employment in the grade in which the workman was employed at the time of the accident, uninterrupted by absence from work due to illness, or any other unavoidable cause (*r*).

The dominant principle.

The dominant principle is that earnings are to be ascertained in such a way as is best calculated to give the rate per week at which the workman was being remunerated (*s*). It is only where this

believed must be existing at the time of the accident. Only earnings in the service of the employer in whose service the workman was injured could be taken into account under the Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37) (*Hathaway* v. *Argus Printing Co., Ltd.*, [1901] 1 K. B. 96, C. A.; 3 B. W. C. C (o. s.) 177), and the arbitrator could not under that Act take into consideration the average wages of the class of workman to which the applicant belonged (*Bartlett* v. *Tutton & Sons*, [1902] 1 K. B. 72, C. A.; 4 B. W. C. C. (o. s.) 133).

(*m*) *Buckley* v. *London and India Docks* (1909), 2 B. W. C. C. 327, C. A. The words of the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. I. (2) (b), refer to "average weekly earnings" only. Apparently, if the workman at the date of death has not worked three years for the same employer, the earnings under concurrent contracts of service must be taken into account.

(*n*) *S.S. Raphael (Owners)* v. *Brandy*, [1911] A. C. 413; 4 B. W. C. C. 307. In this case the fact that persons in the naval and military service of the Crown are excluded from the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), by *ibid.*, s. 9 (1), was held to make no difference; as to such exclusion, see p. 157, *ante*.

(*o*) See p. 154, *ante*.

(*p*) *Simmons* v. *Heath Laundry Co.*, [1910] 1 K. B. 543, C. A.; 3 B. W. C. C. 200. In this case a girl earned, in addition to her wages at a laundry, 3*s*. a week by giving lessons in music to children at their parent's house; held, that these latter contracts were not contracts of service, and the money so earned could not be taken into account in assessing compensation.

(*q*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. I. (2) (a).

(*r*) *Ibid.*, Sched. I. (2) (c); see also *Babcock and Wilcox, Ltd.* v. *Young*, [1911] S. C. 406.

(*s*) *Perry* v. *Wright etc.*, [1908] 1 K. B. 441, C. A.; 1 B. W. C. C. 351, *per* COZENS-HARDY, M.R., where he attempted to explain fully the

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cannot be discovered that the arbitrator may have regard to analogous cases (*t*).

Meaning of "grade."

The word "grade" means rank in the industrial hierarchy, and whether a grade exists is a question of fact. A step up or down in a grade is the commencing of a fresh employment, though an increase of wages does not necessarily mean a change of grade (*a*).

Wages earned not the sole test.

456. Wages earned at the time of the accident are not the sole test; an adequate length of time must be considered (*b*).

Holidays and days off work.

457. Holidays and days when work is customarily stopped must be taken into account in assessing compensation, but not casual and unusual stoppages (*c*). If the period over which the computation extends embraces more holidays and customary stoppages than the usual stoppages bear to the year's work, only a proper proportion is to be taken into account (*d*).

In a case (*e*) where a workman worked thirty-three weeks in one year, and the arbitrator found that the remaining period of nineteen weeks was composed of sixteen weeks' stoppages and holidays which were normal and recognised incidents of the employment, two weeks' absence from illness, and one week when the workman took a voluntary holiday, it was held that the method of ascertaining the average weekly earnings for the purpose of compensation was to take the total sum earned, and divide it by 33, and from the result to deduct $\frac{16}{52}$, the difference between the full weeks of the year and the number of working weeks in that employment (*f*).

How long weekly payments continue.

458. The weekly payments of compensation are, unless redeemed, to continue as long as the incapacity for work resulting from the injury continues (*g*).

provisions of the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. I. (2), as to the meaning of "earnings" and "average weekly earnings."

(*t*) *Perry* v. *Wright etc.*, [1908] 1 K. B. 441, 451, 458, C. A.

(*a*) *Ibid.*

(*b*) *Ibid.*

(*c*) *Perry* v. *Wright etc.*, [1908] 1 K. B. 441, C. A.; 1 B. W. C. C. 351.

(*d*) *Ibid.* The statement (*ibid.*, *per* COZENS-HARDY, M.R., at p. 452), that "days in which no work is done and no wages are earned must be disregarded," is apparently too general to be a safe principle of application to the assessment of compensation; see judgment of COZENS-HARDY, M.R., in *Anslow* v. *Cannock Chase Colliery Co., Ltd.*, [1909] 1 K. B. 352, C. A.; 2 B. W. C. C. 361, where he apparently retracts what he said in *Perry* v. *Wright etc.*, *supra*.

(*e*) *Anslow* v. *Cannock Chase Colliery Co., Ltd.*, [1909] A. C. 435; 2 B. W. C. C. 365.

(*f*) *Ibid.* The statement of Lord LOREBURN, L.C., in S. C., [1909] A. C. 435, at p. 437, that if a workman takes a holiday and forfeits his wages for a month that does not interfere with what he can earn, it is only that for a month he did not choose to earn, is in a sense true, but appears likely to cause difficulty in the assessment of compensation where the workman has in law worked continuously for the employer for a year or more.

(*g*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. I. (1) (b).

459. If the injury, though serious, does not cause incapacity for work or interfere with the wages, no compensation can be awarded (*h*). A practice exists, where the injury may at a future time interfere with the workman's wage-earning capacity, to make a nominal award of 1*d.* per week, or to order a declaration of liability to be filed in the county court (*i*).

Injury not causing incapacity.

The wages earned need not be at the same description of work, or work *ejusdem generis* with that in which the workman was engaged at the time of the accident (*j*).

460. To deprive the arbitrator of jurisdiction to make an award of compensation an equivalent wage must have been earned (*k*) by the workman since the time of the injury. It is not sufficient that he has received as much owing to the benevolence of his employer (*l*).

When arbitrator deprived of jurisdiction.

461. Where the injury is permanent, and there is any probability of its incapacitating effects being recurrent, it is the duty of the arbitrator to make a nominal award, or an award of a declaration of liability (*m*). But, though the injury may be in its nature permanent, an arbitrator need not make either a nominal award or a declaration of liability if he is satisfied that the injury does not at present, and is not likely to in the future, incapacitate the workman, and this question is one of fact (*n*).

Declaration of liability.

462. An arbitrator has no power to make an award of weekly payments of compensation to terminate at a future fixed time (*o*); nor an award on a sliding scale (*p*).

No award to terminate at fixed time.

SUB-SECT. 17.—*Protection of Compensation.*

463. In cases of death the compensation payable to dependants is protected by being paid into court and dealt with by the judge (*a*).

Payment into court.

(*h*) *Irons* v. *Davis and Timmins, Ltd*, [1899] 2 Q. B. 330, C. A.; 1 B. W. C. C. (o. s.) 26; *Pomphrey* v. *Southwark Press*, [1901] 1 K. B. 86, C. A., 3 B. W. C. C. (o. s.) 194.

(*i*) This course was first adopted in *Irons* v. *Davis and Timmins, Ltd.*, *supra*, by consent of all parties, and has since been repeatedly followed. The practice has never yet received the sanction of the House of Lords (see *Nicholson* v. *Piper*, [1907] A. C. 215; 9 B. W. C. C. (o. s.) 128); but has continually been recognised by the Court of Appeal (see *Vessel Tynron (Owners)* v. *Morgan*, [1909] 2 K. B. 66, C. A.; 2 B. W. C. C. 406). As to declarations of liability, see the text, *infra*; and see also p. 231, *post*.

(*j*) *Irons* v. *Davis and Timmins, Ltd.*, *supra*.

(*k*) As to the meaning of "earned," see p. 206, *ante*.

(*l*) *Chandler* v. *Smith*, [1899] 2 Q. B. 506, C. A.; 1 B. W. C. C. (o. s.) 19. In this case the arbitrator refused an award, or even a declaration of liability, on the ground that for the whole period since the accident the workman had worked for the same employers and received as much as his former wages: it was admitted that the workman had not been able to do quite all the work he had previously done; consequently, not having "earned" his wages, he was held entitled to an award of a nominal sum or a declaration of liability; see also p. 177, *ante*.

(*m*) *Vessel Tynron (Owners)* v. *Morgan*, *supra*, followed in *Griga* v. *Ship Harelda (Owners)* (1910), 26 T. L. R. 272, C. A.; 3 B. W. C. C. 116; *Birmingham Cabinet Manufacturing Co.* v. *Dudley* (1910), 102 L. T. 619, C. A.; 3 B. W. C. C. 169; *Braithwaite and Kirk* v. *Cox* (1911), 56 Sol. Jo. 69, C. A.

(*n*) *Goodall and Clarke* v. *Kramer* (1910), 3 B. W. C. C. 315, C. A.

(*o*) *Baker* v. *Jewell* (1910), 3 B. W. C. C. 503, C. A.

(*p*) *Newhouse & Co.* v. *Johnson* (1911), 56 Sol. Jo. 69, C. A.

(*a*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. I. (5); Workmen's Compensation Rules, 1909, r. 56A, Forms 53, 53B, 53C.

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Where a weekly payment of compensation is payable to a person under disability it may, in the interest of such person, be ordered to be paid into court (*b*).

Money agreed to be paid in lieu of weekly payments, or in redemption of weekly payments, to a person under any disability must, for such person's protection, be paid into court (*c*).

Money paid in redemption of weekly payments, as the result of arbitration proceedings, may be protected by being ordered to be paid into court (*d*).

Preference in bankruptcy and winding up.

464. In bankruptcy (*e*) or winding-up proceedings, compensation, the liability for which accrued before the date of the receiving order, or winding-up order (*f*), is (to the extent of £100 in any one case) a preferential debt (*g*). Where the compensation is a weekly payment the amount taken to be a preferential debt is the lump sum for which the weekly payments could be redeemed (*h*).

Arrears of compensation are not a preferential debt when the employer has entered into a contract with insurers against responsibility under the Act (*i*).

Variation.

465. Compensation apportioned by the court between dependants can, on account of neglect of children or other sufficient reason, be varied by the court (*k*).

Compensation inalienable.

466. A weekly payment of compensation, or a sum paid in redemption thereof, cannot be assigned, charged, or attached, nor does it pass to any other person by operation of law, and no claim can be set off against the same (*l*).

(*b*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. I. (7); Workmen's Compensation Rules, 1909, r. 57, Form 54.

(*c*) *Ibid.*, r. 50A.

(*d*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. I. (17); Workmen's Compensation Rules, 1907, r. 59.

(*e*) As to the position of the workman when the person liable for compensation is insured, see pp. 191 *et seq.*, *ante*.

(*f*) See Companies Consolidation Act, 1908 (8 Edw. 7, c. 69), s. 209 (1); title COMPANIES, Vol. V., pp. 517, 518.

(*g*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 5 (3). *I.e.* (*ibid.*) a preferential debt under the Preferential Payments in Bankruptcy Act, 1888 (51 & 52 Vict. c. 62), s. 1; Preferential Payments in Bankruptcy (Ireland) Act, 1889 (52 & 53 Vict. c. 60), s. 4; and the Preferential Payments in Bankruptcy Amendment Act, 1897 (60 & 61 Vict. c. 19); see titles BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 217 *et seq.*; COMPANIES, Vol. V., p. 518, note (*l*). The same protection is given, and to the same amount, to miners or their dependants, when a company within the meaning of the Stannaries Act, 1887 (50 & 51 Vict. c. 43), s. 9, is being wound up (Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 5 (4).

(*h*) *Ibid.*, s. 5 (3). *I.e.*, redeemed under *ibid.*, Sched. I. (17). Apparently a county court judge cannot order payment, by the receiver of a company in voluntary liquidation, of a lump sum assessed in lieu of a weekly payment, and if such an order be made, an appeal lies to the tribunal dealing with the winding up and not to the Court of Appeal (*Homer* v. *Gough* (1911), 132 L. T. Jo. 6, C. A.).

(*i*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 5 (5). As to such contracts, see p. 191, *ante*.

(*k*) *Ibid.*, Sched. I. (9). For procedure, see Workmen's Compensation Rules, 1907, r. 58, Form 55.

(*l*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. I. (19),

A sum which has been overpaid, in respect of compensation, cannot be deducted from, nor set off against, compensation subsequently becoming due (*m*).

Where a workman assents to the employer deducting from the compensation the rent of a cottage tenanted by him, this does not amount to an assignment, charge, or set-off within the above provision (*n*).

Set-off.

467. Any fine or part of a fine received by the workman under the Factory and Workshop Act, 1901 (*o*), or any other statute does not interfere with the workman's right to compensation, nor is the amount received by him to be deducted from the compensation (*p*).

Fines received by workman.

SUB-SECT. 18.—*The Arbitration.*

468. Any questions as to liability to pay compensation under the Act (*q*), including the question whether the injured person is a workman to whom the Act (*q*) applies, or as to the amount or duration of the compensation, if not settled by agreement, must be settled by arbitration proceedings (*r*).

Questions to be settled.

Arbitration proceedings under the Act (*q*) are judicial proceedings, and false evidence on oath given therein is perjury (*s*).

469. Until a dispute has arisen between the workman and the employer as to one of the matters mentioned above, no arbitration proceedings can be taken (*t*).

Condition precedent to arbitration.

If no dispute exists either as to liability or amount of compensation, arbitration proceedings are incompetent, even though the employer may refuse to sign a formal agreement (*u*). It is not necessary that a memorandum of agreement to pay compensation for registration in the court (*v*) should be signed by both parties, for an implied agreement is binding and may be registered (*a*).

470. Arbitration proceedings under the Act (*q*) are regulated by

Regulation of proceedings.

(*m*) *Hosegood & Sons* v. *Wilson*, [1911] 1 K. B. 30, C. A.; 4 B. W. C. C. 30.

(*n*) *Brown* v. *South Eastern and Chatham Rail. Co.* (*Managing Committee*) (1910), 3 B. W. C. C. 428, C. A. This deduction was made with the full concurrence of the workman. The court in effect found that it was not necessary that the compensation money should be actually handed to the workman, and then a part of it handed back again by way of rent.

(*o*) 1 Edw. 7, c. 22, s. 136; see title FACTORIES AND SHOPS, Vol. XIV., p. 531.

(*p*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 1 (5).

(*q*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58).

(*r*) *Ibid.*, s. 1 (3). All arbitrations are to be conducted in accordance with *ibid.*, Sched. II., and subject to the provisions of *ibid.*, Sched. I. (*ibid.*, s. 1 (3)). No action at law can be brought to recover compensation under any circumstances. The procedure laid down by *ibid*, s. 1 (3), and the Rules, is the only procedure.

(*s*) *R.* v. *Crossley*, [1909] 1 K. B. 411, C. C. A.; 2 B. W. C. C. 451; see Perjury Act, 1911 (1 & 2 Geo. 5, c. 6), s. 1 (this Act comes into force on 1st January, 1912).

(*t*) *Field* v. *Longden & Sons*, [1902] 1 K. B. 47, C. A.; 4 B. W. C. C. (o. s.) 20.

(*u*) *Mercer* v. *Hilton* (1909), 3 B. W. C. C. 6, C. A.

(*v*) *I.e.*, registration under Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. II. (9).

(*a*) *Jones* v. *Great Central Rail. Co.* (1901), 4 B. W. C. C. (o. s.) 23, C. A.; see note (*i*), p. 227, *post*.

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Act (*b*) itself, and, except where the tribunal is one selected by the parties themselves, by the Rules framed thereunder (*c*).

The Arbitration Act, 1889 (*d*), does not apply to arbitrations under the Act (*b*), but the judge of the county court or an arbitrator appointed by him has power to procure the attendance of witnesses and production of documents as in an ordinary action in the county court (*e*).

Questions which may be settled.

471. Arbitration proceedings may be taken under the Act (*b*) not only as to original liability to pay compensation, or the amount thereof, but on any of the following matters:—Who are the dependants and as to the amounts payable to each (*f*); the revision of awards with the view of either ending, diminishing, or increasing the compensation (*g*); the redemption of compensation by the award of a lump sum (*h*); the liability of a contractor to indemnify the "principal" (*i*); (by consent) the liability of a third party to indemnify an employer who has paid compensation (*k*); a claim by a respondent for indemnity against another respondent (*l*); (in case of industrial disease) the right of an employer to contribution from another employer (*m*).

Proceedings by employer.

472. An employer may, when a claim has been made upon him, institute arbitration proceedings (*n*) under the Act (*b*).

SUB-SECT. 19.—*The Arbitration Tribunals.*

Committee.

473. If a committee exist, representing the employer and his workmen, and with power to settle matters (*o*) under the Act (*b*), the matter in dispute is decided by such committee, unless either

(*b*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58).

(*c*) The power to frame rules for the regulation of arbitration proceedings in the county court (see pp. 216 *et seq.*, *post*), or before an arbitrator appointed by a county court judge (see p. 213, *post*), is derived from various sections and clauses of the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58); see Sched. I. (5), (6), (8), (9), (15), (18); Sched. II. (2), (6), (7), (9), (11), (12), (14). The Workmen's Compensation Rules at present in force are the Rules of 1907, as amended by the Rules of 1908, 1909, and 1911. The Interpretation Act, 1889 (52 & 53 Vict. c. 63), applies to the interpretation of the Rules, and they are to be read and construed with the County Court Rules, 1903—1906.

(*d*) 52 & 53 Vict. c. 49; see title ARBITRATION, Vol. I., pp. 437 *et seq.*

(*e*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. II. (4).

(*f*) *Ibid.*, Sched. I. (8).

(*g*) *Ibid.*, Sched. I. (16).

(*h*) *Ibid.*, Sched. I. (17).

(*i*) *I.e.*, under *ibid.*, s. 4 (2), and Workmen's Compensation Rules, 1907, rr. 19—23, Form 23.

(*k*) *I.e.*, under Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 6 (2); Workmen's Compensation Rules, 1907, r. 24, Form 23.

(*l*) Workmen's Compensation Rules, 1907, r. 26.

(*m*) *I.e.*, under Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 8 (1); Workmen's Compensation Rules, 1907, r. 39, Forms 19—23; see p. 167, *ante*.

(*n*) *Powell* v. *Main Colliery Co.*, [1900] A. C. 366; 2 B. W. C. C. (o. s.) 29; for procedure when proceedings are instituted by the employer, see Workmen's Compensation Rules, 1907, rr. 10, 14 (2), 17 (5), 18 (8), 25.

(*o*) Such committees can be formed under the Conciliation Act, 1896

party objects by notice in writing sent to the other before the committee meet to consider the matter (*p*). Wkmn. s. Workmen's Compensation Act, 1906.

The committee may hear the matter themselves or refer it to the arbitration of some other person (*q*).

The committee are bound by the Act (*r*), and cannot (*s*) award a lump sum in compensation, except in the circumstances allowed by the Act (*r*). They have not the powers of the county court; neither can they summon the attendance of witnesses nor compel production of documents (*t*). Powers.

The committee may submit any question of law for the decision of the judge of the county court (*u*). The judge has no power to alter the findings of fact, where a question of law is thus submitted to him (*a*). They can also submit to a medical referee for report any matter which seems material to any question arising in the arbitration (*b*). Submission of questions.

The committee may require the registrar of the county court in which a memorandum of their award is registered to tax the costs of the proceedings (*c*). Taxation.

474. If there is no committee, or if their jurisdiction is objected to, or if they do not settle the matter in six months, or if they do not refer the claim, the tribunal is that of a single arbitrator selected by the parties (*d*). Single arbitrator selected by the parties.

The arbitrator in this case owes his jurisdiction to the consent of both parties. He cannot compel attendance of witnesses or production of documents (*e*) He is not entitled to the assistance of the

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(59 & 60 Vict c. 30), for the purpose of deciding disputes between employers and workmen. Though voluntary bodies, they can be registered with the Board of Trade; see title TRADE AND TRADE UNIONS.

(*p*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. II. (1).

(*q*) *Ibid*

(*r*) Workmen's Compensation Act, 1906 (6 Edw. 7, c 58).

(*s*) *Mulholland* v. *Whitehaven Colliery Co* (1910), 3 B. W. C. C. 317, C A.

(*t*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. II (4). Some of the powers of a county court have, in pursuance of the power given to the Secretary of State, by *ibid.*, Sched II. (16), of the Act, been conferred on the committee representing the Durham Colliery Owners Mutual Protection Association, and the Durham Miners' Association; see Order dated 25th June, 1907. A committee or lay arbitrator may administer an oath to such witnesses as come voluntarily before them; see the Evidence Act, 1851 (14 & 15 Vict. c. 99), s. 16, and title EVIDENCE, Vol. XIII, p. 591.

(*u*) Workmen's Compensation Act, 1906 (6 Edw. 7, s. 58), Sched. II. (4). Such a submission is to be in the form of a special case. For procedure, see Workmen's Compensation Rules, 1907, r. 32, Form 25. It is believed that neither a committee nor a lay arbitrator can be compelled to submit a case for the opinion of the county court judge.

(*a*) *Ferguson* v. *Green*, [1901] 1 K. B. 25, C. A.; 3 B. W. C. C. (o. s.) 113.

(*b*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. II. (15). This jurisdiction may be exercised even if the workman is dead; see *Carolan* v. *Harrington*, [1911] 2 K. B. 733, C. A, 4 B. W. C. C. 253. The regulations made by the Secretary of State and the Treasury as to the duties and remuneration of medical referees under the Act are dated 24th June, 1907; see Ruegg's Employers' Liability and Workmen's Compensation, 8th ed., 838 *et seq*

(*c*) Workmen's Compensation Rules, 1907, r. 61.

(*d*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. II. (2).

(*e*) *Ibid.*, Sched. II. (4).

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county court, but may submit a question of law to the judge in the same way as a committee (*f*). He must send a memorandum of his award for registration in the county court (*g*) and determine the scale of county court costs upon which the costs are to be taxed (*h*).

An arbitrator cannot lay down any general rule as to the amount of compensation he will award, but must regard the circumstances of each case (*i*).

Judge of the county court.

475. In the absence of agreement, arbitrations under the Act (*j*) take place before the county court judge, who is made the tribunal to exercise arbitration jurisdiction under the Act (*k*). No fees are payable in the county court before award (*l*). The jurisdiction is given to the county court of the district in which all the parties concerned reside (*m*). If they reside in different districts, the district is prescribed by rules of court, without prejudice to right to transfer (*n*).

Meaning of "district."

The term "district" is not used in the technical sense of meaning county court district only. Where the workman resides in England and the employer in Scotland they reside in different districts within the meaning of the Act (*o*).

Position of judge.

476. The judge, although possessing all his general powers, is, notwithstanding this, an arbitrator, and when he has made an

(*f*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. II. (4); see p. 211, *ante*.

(*g*) *Ibid.*, Sched. II. (9); Workmen's Compensation Rules, 1907, rr. 41—47, Forms 36—39. The memorandum for registration in the county court must be in accordance with Form 36, and signed by the arbitrator (*ibid.*, r. 42).

(*h*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. II. (7); Workmen's Compensation Rules, 1907, r. 61. For allowance of special costs, see r. 61 (1).

(*i*) *Webster* v. *Sharp & Co., Ltd.*, [1905] A. C. 284; 7 B. W. C. C. (o. s.) 118.

(*j*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58).

(*k*) *Ibid.*, Sched. II. (2). The judge sits as an arbitrator, but has all the powers of a judge (*ibid.*, Sched. II. (12)), and has the help of the court officials.

(*l*) *Ibid.*, Sched. II. (13). A fee is payable to a medical referee when he is appealed to under Sched. I. (15).

(*m*) *Ibid.*, Sched. II. (11); Workmen's Compensation Rules, 1907, r. 73.

(*n*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. II. (11). By the Workmen's Compensation Rules, 1907, r. 73, if parties reside in different districts the court is that of the district in which the accident occurred. In a case of industrial disease (see pp. 164 *et seq.*, *ante*), if parties reside in different districts, the court is that of the district in which the workman was last employed in the employment to the nature of which the disease was due. If the accident occurred at sea and the parties reside in different districts, the court is that of the district in which the ship is when the matter is to be done, or the district of the port of registry of the ship; or the district in which the workman, or the dependants, by whom or on whose behalf the matter is to be done, or some or one of them reside or resides (Workmen's Compensation Rules, 1907, r. 73); and see *ibid.*, r. 73 (3), as to the court in which proceedings can be taken where security is given for the release of a ship under Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 11, or the Shipowners' Negligence (Remedies) Act, 1905 (5 Edw. 7, c. 10), s. 11.

(*o*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 11; *R.* v. *Owen*, [1902] 2 K. B. 436; 4 B. W. C. C. (o. s.) 150.

award is *functus officio*, and cannot grant a new trial (*p*), nor can he order discovery by interrogatories or otherwise (*q*).

477. A county court judge in England, instead of holding the arbitration himself, may, with the consent of the Lord Chancellor, appoint a substitute, who, when so appointed, has all the powers of a county court judge (*r*), and is bound by the rules in the same manner as the judge (*s*). Substitute.

Such an arbitrator is paid by the Treasury (*t*). His duties are part of the duties of the county court, and he has the aid of the court officials (*a*). His position

478. If the parties agree to an award before the time fixed for the arbitration, the functions of the arbitrator are at an end and an award may be made by the judge of the court (*b*). Award prior to time for proceedings

479. Subsequent proceedings on an award made by an arbitrator appointed by a judge are taken before the judge (*c*). Subsequent proceedings.

Such an arbitrator can, apparently, submit a question of law arising in the arbitration to the judge by special case for his decision (*d*). Special case.

There is no appeal direct to the Court of Appeal from his award (*e*). Appeal.

480. When an arbitrator appointed by the parties dies, or refuses to act, or becomes incapable of acting, the county court judge may, on the application of any party, appoint a new arbitrator, who derives jurisdiction from his appointment and has the full powers of an arbitrator appointed by a judge (*f*). Appointment of new arbitrator.

481. A certificate given by the court, showing the compensation awarded and the sum, if any, deducted for costs of an abortive Certificate of court.

(*p*) *Mountain* v. *Parr*, [1899] 1 Q. B. 805, C. A.; 1 B. W. C. C. (o. s.) 110; see p. 229, *post*.

(*q*) *Sutton* v. *Great Northern Rail. Co.*, [1909] 2 K. B. 791, C. A.; 2 B. W. C. C. 428. As to general procedure in an arbitration in the county court, see pp. 216 *et seq.*, *post*.

(*r*) Workmen's Compensation Act, 1906 (6 Edw 7, c. 58), Sched. II. (3). This is generally done when the business of the court is congested. A substitute may be appointed for a particular case or for all such cases as the county court judge is unable to try himself (Workmen's Compensation Rules, 1907, r. 29 (a)). For procedure, see *ibid.*, rr. 29—31.

(*s*) *Ibid.*, r. 31.

(*t*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 10 (2).

(*a*) *Ibid.*, Sched. II. (12).

(*b*) Workmen's Compensation Rules, 1907, r. 31 (2) (a).

(*c*) *Ibid.*, r. 31 (2).

(*d*) For procedure, see *ibid.*, r. 32, Form 25.

(*e*) *Gibson* v. *Wormald and Walker, Ltd.*, [1904] 2 K. B. 40, C. A.; 6 B. W. C. C. (o. s.) 155; compare *Howarth* v. *Samuelson (Sir B.) & Co., Ltd.* (1911), 104 L. T. 907, C. A.; 4 B. W. C. C. 287; and as to appeals, see pp. 238 *et seq*, *post*.

(*f*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. II. (8). For procedure, see Workmen's Compensation Rules, 1907, r. 40, Forms 34, 35.

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action (*g*), in the circumstances already referred to (*h*), has the force and effect of an award (*i*).

Medical referee.

482. Though not entirely in the position of an arbitrator, a medical referee may, by consent of both parties, have referred to him the question of a workman's condition or fitness for employment (including the question whether or to what extent the incapacity of the workman is due to the accident), and his certificate thereon is conclusive (*k*).

SUB-SECT. 20.—*Contracting out of the Act.*

By approved scheme.

483. The only manner of contracting out of the operation of the Act is by the substitution of a benefit scheme between the workmen and an employer, approved by the Registrar of Friendly Societies (*l*). Such a scheme may include other employers and their workmen (*m*).

The scheme must be at least as beneficial to the workman as his rights under the Act (*n*); it may not contain an obligation upon the workmen to join it as a condition of hiring, and it must contain provisions enabling a workman to withdraw from it (*o*).

Term of operation.

484. The Registrar's certificate of approval of a scheme is given to expire at a fixed time, not less than five years from the time at which it is granted, and may be renewed with or without modifications (*p*).

Substitution for provisions of Act.

485. Whilst such a certificate is in force an employer may contract with his workmen that the provisions of the scheme shall

(*g*) It is only the court which tries such an action that can assess compensation. The appeal court has no power to do so; see Scottish decision in *Quinn* v. *Brown* (*John*) *& Co., Ltd.* (1906), 8 F. (Ct. of Sess.) 855.

(*h*) See pp. 196 *et seq*, *ante*.

(*i*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 1 (4).

(*k*) *Ibid.*, Sched. I. (15). For procedure, see Workmen's Compensation Rules, 1907, r. 54, Forms 48—51.

(*l*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 3 (1). As to the registrar, see title FRIENDLY SOCIETIES, Vol. XV., p. 129.

(*m*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 3 (1); see, however, *Rees* v. *Owen* (1909), 9 B. W. C. C. (o. s.) 35.

(*n*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 3 (1). The Registrar must ascertain the views of the employer and workmen and be satisfied (by ballot) that a majority of the workmen to whom the scheme is applicable are in favour of it. He must also be satisfied that the scheme provides scales of compensation not less favourable to the workmen and their dependants than the scales of compensation given by the Act, and that, where the workmen contribute, the benefits of the scheme are equivalent to such contributions in addition to the benefits given by the Act.

(*o*) *Ibid.*, s. 3 (3).

(*p*) *Ibid.*, s. 3 (2). The Registrar has power to revoke the scheme if it is not kept up, or if its provisions are violated, or if it is not fairly administered, or for other satisfactory reasons (*ibid.*, s. 3 (4)). If a scheme is revoked or expires, its funds are to be distributed as may be agreed between the employer and workmen, or, failing agreement, as determined by the Registrar (*ibid.*, s. 3 (5)). The employer must answer all inquiries and furnish accounts relating to the scheme as may be required by the Registrar (*ibid.*, s. 3 (6)).

be substituted for the provisions of the Act (*q*), and thereupon the employer is to be liable only in accordance with the scheme, but otherwise the Act (*q*) applies (*r*), notwithstanding (*r*) any contract to the contrary made after the commencement of the Act (*q*).

A contract between the employer and workman to accept the benefits of a certified scheme in place of the Act (*q*) need not be in writing (*s*).

Regulations.

486. The Registrar (*t*) may make regulations for carrying the Act (*q*) into effect (*u*).

Continuance of contracts for relinquishment of compensation.

487. Any contract (other than a certified scheme made under the Workmen's Compensation Act, 1897 (*v*)) existing at the commencement of the Act (*q*), by which a workman relinquishes any right to compensation for injury arising out of and in the course of his employment, is not, for the purposes of the Act (*q*), to continue after the time at which the workman's contract of service would determine if notice of the determination were given at the time of commencement of the Act (*a*).

Schemes certified under the Workmen's Compensation Act, 1897.

488. With regard to schemes certified under the Workmen's Compensation Act, 1897 (*b*), in force at the time of the commencement of the Act of 1906 (*c*), they, if re-certified by the Registrar, have the effect of certified schemes under the Act of 1906 (*c*), but unless they were so re-certified within six months from the 1st July, 1907, the certificate is considered revoked (*d*).

Effect of joining scheme.

489. By entering into a certified scheme in substitution for the Act (*c*) the workman binds his dependants as well as himself, for the employer is henceforth to be liable only in accordance with the scheme (*e*).

By joining a certified scheme the workman exercises the option given to him by the Act (*c*) either to take compensation or to

(*q*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58).

(*r*) *Ibid.*, s. 3 (1). An agreement by a workman to accept compensation, and to forfeit the same if he did not comply with certain conditions of the agreement, was held to amount to contracting out of the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), contrary to *ibid.*, s. 3 (1) (*British and South American Steam Navigation Co., Ltd.* v. *Neil* (1910), 3 B. W. C. C. 413, C. A.).

(*s*) *Berry* v. *Canteen and Mess Co-operative Society, Ltd.* (1910), 3 B. W. C. C. 449, C. A.

(*t*) See note (*l*), p. 214, *ante*.

(*u*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 3 (8). These regulations have been made and are dated 1st July, 1907; see Ruegg, Employers' Liability and Workmen's Compensation, 8th ed., 897 *et seq.*

(*v*) 60 & 61 Vict. c. 37, s. 3.

(*a*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 15 (1). The effect of this is that all such contracts become void, for the purposes of the Act, at the expiration of a time which would legally determine the employment if notice were given on 1st July, 1907, the day the Act came into force (*ibid.*, s. 16 (1)).

(*b*) 60 & 61 Vict. c. 37, s. 3.

(*c*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58).

(*d*) *Ibid.*, s. 15 (2), (4).

(*e*) *Ibid.*, s. 3 (1).

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sue his employer under the Employers' Liability Act, 1880 (*f*), or at common law (*g*), and such joining is, therefore, a bar to any action either by the workman or by his representatives (*h*).

Right of action.

490. A workman who has joined a certified scheme may bring an action to recover what he alleges are the rights secured to him by the scheme, except, perhaps, where he agrees that the interpretation of the rules, and his rights thereunder, shall be finally decided by the managers of the fund (*i*).

Proof of acceptance of scheme.

491. The burden is on the employer, where a new scheme is substituted for an old one, to prove that the workman accepted the new scheme, otherwise he can sue under the Act (*j*).

Crown workmen.

492. The Treasury may enter into a certified scheme with the workmen of the Crown (other than those in the naval or military service to whom the Act (*k*) does not apply) (*l*) in the same way as a private employer (*m*). Where such a scheme has been approved, a workman who has agreed to accept its benefits in the place of the Act (*k*) is confined to the rights conferred on him by the scheme (*n*).

SUB-SECT. 21.—*Procedure in a County Court.*

General rules as to procedure.

493. The general arbitration procedure in the county court is the same whether the judge or an arbitrator appointed by him hears the proceedings. It is regulated by the Act (*k*) and rules made thereunder (*a*).

(*f*) 43 & 44 Vict. c. 42.

(*g*) See pp. 195 *et seq.*, *ante*.

(*h*) *Taylor* v. *Hamstead Colliery Co.*, [1904] 1 K. B. 838, C. A.; 6 B. W. C. C. (o. s.) 34.

(*i*) *Haworth* v. *Knowles* (*Andrew*) *& Sons, Ltd., Accident Society* (1903), 19 T. L. R. 658, C. A.

(*j*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58); *Wilson* v. *Ocean Coal Co.*, *Treharne* v. *Ocean Coal Co.* (1905), 21 T. L. R. 621, C. A.; 7 B. W. C. C. (o. s.) 34. Where, under a certified scheme, payment is to be made by a friendly society, the Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), ss. 8 (1), proviso, 16, 41, which limit the power of such societies to grant annuities and the amount of such annuities, do not apply to such a society in respect of the scheme (Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. I. (21)); see title FRIENDLY SOCIETIES, Vol. XV., pp. 126 *et seq.*

(*k*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58).

(*l*) *Ibid.*, s. 9; see p. 157, *ante*.

(*m*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 9 (2).

(*n*) *Horn* v. *Lords Commissioners of the Admiralty*, [1911] 1 K. B. 24, C. A.; 4 B. W. C. C. 1.

(*a*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 1 (3), Sched. II., 2; see Workmen's Compensation Rules, cited as "The Workmen's Compensation Rules, 1907," dated 1st June, 1907, as amended by Rules of 1908, 1909, and 1911. The Interpretation Act, 1889 (52 & 53 Vict. c. 63), applies to the interpretation of the rules, and they are construed with the general County Court Rules, 1903—1911 (Workmen's Compensation Rules, 1907, rr. 1 (4), (5)). The proceedings are judicial proceedings (see p. 209, *ante*), and, although instituted against a public authority after the expiration of six months from the accident, they are competent; the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), is no answer to the claim (*Fry* v. *Cheltenham Corporation* (1911), 28 T. L. R. 16, C. A.). As to the appointment of arbitrator and the nature of the proceedings, see, further, pp. 209 *et seq.*, *ante*, 217 *et seq.*, *post*.

Subject to the special procedure laid down in the Rules, the general procedure follows that in an ordinary county court action (*b*).

"Applicant." "Respondents."

494. The person applying for arbitration proceedings is "the applicant," and all other persons whose presence may be necessary to enable the judge to settle all the questions involved are called "respondents" (*c*).

"Request for arbitration."

495. The proceedings commence with a "request for arbitration" (*d*). The workman or his dependants are generally the "applicants" and the employer the "respondent," but the employer may commence arbitration proceedings (*e*).

Joinder of applicants.

496. More persons than one may be joined as "applicants" (*f*). The application on behalf of dependants may be made by the legal personal representative of the deceased workman, or by the dependants themselves (*g*), or, if there is a conflict of interests or some refuse to join in the proceedings, by any of them, the others in such case being made respondents (*h*). The term "dependants" includes persons claiming to be dependants (*i*).

When the dependant or dependants die, arbitration proceedings may be taken by his or their legal personal representatives (*k*); and such proceedings may also be taken by persons claiming to be entitled to the compensation for medical attendance and burial (*l*).

Parties in representative capacity.

497. Persons may claim or defend on behalf of others having the same interest, and persons under disability, and partners, may sue and be sued in all respects as in the county court (*m*).

(*b*) Workmen's Compensation Rules, 1907, rr. 1 (5), 27; see title COUNTY COURTS, Vol. VIII, pp. 448 *et seq.*

(*c*) Workmen's Compensation Rules, 1907, r. 2 (1).

(*d*) *Ibid.*, r. 8 (1). For the purposes of procedure generally the "applicant" and "respondent" are deemed to be plaintiff and defendant respectively, but the burden of proving facts not admitted is the same, whoever the party may be by whom the request for arbitration is filed (*ibid.*, r. 27 (2)).

(*e*) *Ibid.*, r. 10 (1), (2); see p. 210, *ante*.

(*f*) Workmen's Compensation Rules, 1907, r. 3. All persons can be joined who could be co-plaintiffs in an action under the County Court Rules, Ord. 3, r. 1, and Ord. 44, rr. 18, 19. As to joining the principal and contractor in the same proceedings, see p. 210, *ante*. In such a case the County Court Rules, Ord 3, r. 2, applies.

(*g*) Workmen's Compensation Rules, 1907, r. 4 (1). It is not necessary to take out administration (*Clatworthy* v. *Green* (*R. & H.*), *Ltd.* (1902) 18 T. L. R. 641, C. A.; 4 B. W. C. C. (o. s.) 152). As to the nature of the right of dependants, see pp. 185 *et seq.*, *ante*.

(*h*) Workmen's Compensation Rules, 1907, r. 4 (2). If total and partial dependants exist, the compensation may be allotted between them (*ibid.*, r. 5; Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. I. (8)).

(*i*) Workmen's Compensation Rules, 1907, r. 4 (3).

(*k*) *United Collieries, Ltd.* v. *Simpson*, [1909] A. C. 383; 3 B. W. C. C. 308; *Darlington* v. *Roscoe & Sons*, [1907] 1 K. B. 219, C. A.; 9 B. W. C. C. (o. s.) 1.

(*l*) Workmen's Compensation Rules, 1907, r. 6, Form 4; see Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. I. (1) (a) (ii.).

(*m*) Workmen's Compensation Rules, 1907, r. 7, incorporating, for all

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Entry of request for arbitration.

498. The request for arbitration is entered as a plaint with a separate number in a special register (*n*). Particulars have to be attached (*o*). The nature of the injury only need be stated in the particulars, not its effects (*a*).

The request and particulars must be in accordance with forms set out, and a copy of the notice of the accident appended or annexed, or if not possible, the reason of the omission furnished (*b*).

Fixing the time and place of hearing.

The court fixes the time for hearing the arbitration, allowing twenty clear days after service of the request and particulars on the respondents (*c*). The arbitration is held at the court-house, unless a party applies that it be held elsewhere in the district and undertakes to pay the expense occasioned (*d*).

Service.

499. Service may be effected out of the jurisdiction by means of a registered letter in the same manner as notice of accident is required to be served (*e*).

Respondents' "answer." Contents.

500. The respondents file the "answer" at least ten days before the day of hearing (*f*). An answer must be filed by any respondent who wishes to disclaim interest in the arbitration, or objects to the particulars, or wishes to bring any fact or document to the notice of the arbitrator, or intends to rely on irregularity of service of the notice of accident or death, disablement, or suspension, or the fact that the claim is out of time, or disputes, wholly or in part, his liability to pay compensation (*g*). The answer must set these matters out concisely and contain the respondent's name and address, and that of his solicitor (*h*).

purposes of the Act, the County Court Rules, Ord. 3, rr. 7, 8. The next friend of an infant may make a provisional agreement on his behalf; see *Rhodes* v. *Soothill Wood Colliery Co., Ltd.*, [1909] 1 K. B. 191, C. A.; 2 B. W. C. C. 377, though it must subsequently be approved by the registrar of the county court (Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. II. (9) (d)). As to approval of memorandum of agreement sent to the county court for registration, see pp. 226 *et seq.*, *post*.

(*n*) Workmen's Compensation Rules, 1907, r. 8 (2).

(*o*) As to what the particulars should contain, see *ibid.*, r. 8 (3).

(*a*) *Sidney* v. *Collins* (*W.*), *Son & Co.* (1910), 3 B. W. C. C. 433, C. A.

(*b*) Workmen's Compensation Rules, 1907, r. 9 (1), (2); for forms, see *ibid*, Forms 1—11. A copy of the particulars must be provided for the judge or arbitrator, and for each of the respondents (*ibid.*, r. 11).

(*c*) *Ibid.*, r. 13. This time may be abridged (Workmen's Compensation Rules, 1911, r. 26A).

(*d*) Workmen's Compensation Rules, 1907, rr. 13 (2), (3). The registrar gives notice to all the respondents of the place, day, and hour at which the arbitration will be proceeded with, stating that if respondents do not attend in person, or by solicitor, such order will be made and proceedings taken as the judge may think just and expedient (*ibid*, r. 14). As to methods of service of copies of request and particulars on respondents, see *ibid.*, r. 15.

(*e*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 2 (3), (4); Workmen's Compensation Rules, 1907, r. 77; see *R.* v. *Owen*, [1902] 2 K. B 436; 4 B. W. C. C. (o. s.) 150; see pp. 179, 180 *et seq.*, *ante*.

(*f*) Workmen's Compensation Rules, r. 17 (1). The time may be abridged for good cause; see Workmen's Compensation Rules, 1911, r. 26A.

(*g*) Workmen's Compensation Rules, 1907, r. 17 (1).

(*h*) *Ibid.* Copies are delivered for the arbitrator, the applicant, and the

How far respondent bound by answer.

501. The respondent is bound by the matters of defence set up in his answer (*i*), but if no answer is filed, or it is wished to rely on some ground of defence not stated, the judge may allow the respondent to avail himself of the ground of defence, or adjourn the proceedings; but he is not, apparently, bound to adopt either course, but may rule out the ground of defence entirely (*k*).

The same rule applies where the employer is applicant; but in this case a respondent who fails to file an answer is not to be taken to admit the truth of any statement in the particulars, in which the liability to pay compensation is denied (*l*).

Application by respondent for test case.

502. Where several requests for arbitration arising out of the same accident are made in the same court, the respondent may have a test case heard, and the other proceedings stayed, on filing an undertaking to be bound by the decision in the test case (*m*).

Notice by respondent of submission to award.

503. A respondent may, at any time before the day of trial, give notice that he submits to an award for a weekly payment of compensation, or, if the claim is by dependants, may bring into court such sum of money as he considers sufficient to cover his liability (*n*).

Procedure on submission.

When all parties accept the sum offered or paid into court, and agree as to its division, the judge may make an award in or out of court, and proceedings against the respondent, except a request for costs (*o*), are stayed (*p*). If the parties accept, but do not agree as to division of the money, the arbitration proceeds, but only as between the parties entitled to the amount offered, or paid into court (*q*). The parties may accept the weekly payment offered or the sum paid into court, at any time before the arbitration commences, subject to the liability to pay the costs allowed by the judge to the respondent, incurred by him since the offer or payment into court (*r*). If the parties or any of them do not accept, the arbitration may proceed. If the parties do not recover more than is offered or paid into court, they run the risk of having to pay the employer's costs subsequent to his offer or payment into court (*s*).

other respondents as in the case of the request for arbitration (Workmen's Compensation Rules, 1907, r 17 (2)); see note (*b*), p. 218, *ante*.

(*i*) Workmen's Compensation Rules, 1907, r. 17 (4).

(*k*) *Silvester* v. *Cude* (1899), 15 T. L. R. 434, C. A.; 1 B. W. C. C. (o. s.) 120.

(*l*) Workmen's Compensation Rules, 1907, r. 17 (5).

(*m*) *Ibid*, r. 16. In such a case the County Court Rules, Ord. 8, rr. 2—6, apply.

(*n*) Workmen's Compensation Rules, 1907, r. 18 (1), Form 15. For procedure in such a case, see *ibid.*, r. 18 (2), Forms 15, 16, 17, 18.

(*o*) The judge may order respondent to pay such costs as the applicant and other respondents have properly incurred before the submission or payment into court, including costs incurred in relation to the notice of submission and to the notice of acceptance, and including items which the judge might have allowed at the hearing (*ibid.*, r 18 (5) (c)). Notice of intention to ask for costs must be given in the notice of acceptance (*ibid.*, r. 18 (5) (d), Form 18).

(*p*) *Ibid.*, r. 18 (5) (a), (b).

(*q*) *Ibid.*, r. 18 (6), (7).

(*r*) *Ibid.*, r. 18 (6).

(*s*) *Ibid.*, r. 18 (7).

SECT. 3. Workmen's Compensation Act, 1906.

Those who refuse may also have to pay the costs of those who were willing to accept, and such costs may be set off against costs due to them or deducted from their compensation (*t*). The employer may offer, instead of making a weekly payment, to submit to an award for a lump sum, and may pay such money into court (*a*). He may also pay money into court in satisfaction of the claim or claims, accompanied by a denial of liability (*b*).

Claim of indemnity.

504. Where indemnity is claimed against a contractor by a principal who has paid compensation (*c*), or against a stranger by an employer, where the workman had a cause of action against such stranger (*d*), the party upon whom the claim is made is called a "third party."

"Third party."

Any dispute as to a claim for indemnity against a contractor must be settled by arbitration under the Act (*e*).

When consent necessary.

An award cannot be made against a stranger liable to an action unless he consents to arbitration; he must be proceeded against by action (*f*). The indemnity claimed against such stranger may include the costs of the arbitration proceedings (*g*).

Appearance of third party.

505. The "third party" may appear before or at the time of the hearing of the arbitration, and resist the claim, or take such part in the proceedings as the judge allows (*h*). If he takes part or resists the claim he may be ordered to pay costs (*i*).

Power of judge in proceedings against stranger.

506. In proceedings for indemnity against a third party, a stranger, alleged to be under a legal liability to the workman in respect of his injury (*k*), the power of the judge, in the absence of consent, is confined to making an order that such third party shall not in future proceedings dispute the validity of the award between the applicant and the respondent as to any matter which he has jurisdiction to entertain (*l*).

If such third party admits a liability to indemnify, the judge may, by consent, make an award in favour of the respondent against the third party (*m*). Execution is not to issue on this without leave, until after the respondent has satisfied the award made against him (*n*).

(*t*) Workmen's Compensation Rules, 1907, r. 18 (7).

(*a*) *Ibid.*, r. 18 (9). In this case the provisions of *ibid.*, r 18, are to apply.

(*b*) Workmen's Compensation Rules, 1909, r. 18 (10). In this case *ibid.* r. 18, applies. It is possible that *ibid.*, r. 18 (9), (10), may be held to be *ultra vires* (Workmen's Compensation Rules, 1911, r. 56 (c)).

(*c*) See pp. 194 *et seq.*, *ante*.

(*d*) See p. 197, *ante*.

(*e*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 4 (2). For procedure, see Workmen's Compensation Rules, 1907, rr. 19—23, Form 23.

(*f*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 6 (2); Workmen's Compensation Rules, 1907, r. 24 (5). For procedure, see *ibid.*, r. 24, Form 23.

(*g*) *Great Northern Rail. Co.* v. *Whitehead & Co.* (1902), 18 T. L. R. 816, C. A.; 4 B. W. C. C. (o. s.) 39.

(*h*) Workmen's Compensation Rules, 1907, rr. 20—24 (3).

(*i*) *Ibid.*, rr. 20—23.

(*k*) See p. 197, *ante*, and Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 6.

(*l*) Workmen's Compensation Rules, 1907, r. 24 (5).

(*m*) *Ibid.*, r. 24 (6).

(*n*) *Ibid* On an application for directions the judge may order that the liability

507. An applicant may join two or more respondents in his request for arbitration, and claim against them alternatively (*o*).

If one respondent claims indemnity from another respondent, the procedure is the same as if such other respondent were a third party (*p*).

Joinder of respondents.

The mere fact of the judge having before him two respondents does not justify him in making an award that one shall indemnify the other, unless a notice claiming indemnity has been given, even where he has jurisdiction (*q*).

Medical referee. Assessor.

508. A judge or arbitrator (*r*) may summon a medical referee to sit with him as an assessor (*s*) on the request of the parties or one of them (*t*). The judge is not obliged to grant this request; on the other hand, he may do it on his own motion (*a*).

Submission for report.

Any committee, arbitrator, or judge may (*b*) submit to a medical referee for report any matter which seems material to any question arising in the arbitration (*c*). Such a report (*d*) is for the assistance of the arbitrator, but is not binding upon him (*e*). Where any matter is so submitted the judge may order the injured workman to submit himself for examination by such medical referee, and it is the duty of the workman, on being served with the order, so to submit himself (*f*).

Examination of workman.

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of a third party to indemnify a respondent may be settled by arbitration after the arbitration between the applicant and respondent is settled. He may also decide all questions of costs between them (Workmen's Compensation Rules, 1907, r. 24 (6)).

(*o*) *Ibid*, r. 26 (2) As to joinder of principal and contractor, see p. 195, *ante*.

(*p*) Workmen's Compensation Rules, 1907, r. 26 (1). It is thought that in a proper case the judge may, if he thinks fit, order an unsuccessful respondent to pay the costs of a successful respondent; see *Sanderson* v. *Blyth Theatre Co.*, [1903] 2 K. B. 533, C. A.; *Bullock* v. *London General Omnibus Co*, [1907] 1 K. B. 264, C. A.

(*q*) *Appleby* v. *Horseley Co*, [1899] 2 Q. B. 521, C. A.; 1 B. W. C. C. (o. s.) 103.

(*r*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. II. (3).

(*s*) *Ibid.*, Sched. II. (5).

(*t*) Workmen's Compensation Rules, 1907, r. 52 Forms 45–47.

(*a*) *Ibid.*, r. 52 (3), (4). Medical referees are appointed by the Secretary of State under the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 10 (1). No medical referee can act in a case in which he is interested (*ibid.*)

(*b*) Subject to rules and regulations, dated 27th June, 1907, made by the Secretary of State and the Treasury.

(*c*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. II. (15); Workmen's Compensation Rules, 1907, r. 53 (1); see *Henricksen* v. *S.S. Swanhilda (Owners)* (1911), 4 B. W. C. C. 233, C. A. This power extends to a case where death has resulted from the injury in respect of which a claim is made (*Carolan* v. *Harrington & Son*, [1911] 2 K. B. 733, C. A.; 4 B. W. C. C. 253; *Jackson* v. *Scotstoun Estate Co.*, [1911] S. C. 561).

(*d*) This "report" must not be confused with the "certificate" given by a medical referee, where the parties have under the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. I. (15), agreed to refer to him the question of the workman's condition and power of work, and which certificate is conclusive evidence. As to this, see p. 214, *ante*.

(*e*) *Bowden* v. *Barrow Brothers* (in county court) (1901), 3 B. W. C. C. (o. s.) 215; compare *R.* v. *Wilkins, Smallwood and Jones* (1910), 26 T. L. R. 581, C. C. A. (judge not bound to act on report of prison governor).

(*f*) Workmen's Compensation Rules, 1907, r. 53 (2) This is subject to the rules and regulations cited note (*b*), *supra*.

SECT. 3. Workmen's Compensation Act, 1906.

Appearance of parties.

509. Any party to an arbitration may appear in person, or by counsel or solicitor (*g*).

By leave of the judge or arbitrator, he may also appear by (1) a member of his family; (2) a person in his permanent and exclusive employment; (3) in the case of corporations by a director, secretary, or other officer, or person in the permanent and exclusive employment of the corporation; (4) by an officer or member of a society or body of persons of which the party is a member or with which he is connected, or, in case of death, by the same persons, if the deceased workman was a member of or connected with such society or body of persons; (5) in special circumstances by any other person (*h*).

Only a solicitor can recover costs in respect of his own advocacy, or the expense of employing counsel (*i*).

Duties of judge.

510. The judge must take a note of any point of law raised, and the facts in relation thereto, and of his decision thereon, and of his decision of the arbitration, or on the special case (*k*).

It is an absolute duty of the judge to take a note, whether requested to do so or not (*l*).

Transfer of proceedings.

511. Arbitration proceedings may be transferred by a judge to any other county court (*m*) in England, Ireland, or Scotland, if any party can satisfy him that the proceedings can be more conveniently dealt with there (*n*).

Compensation money paid into one court may also be transferred to a more convenient court in the United Kingdom, to be there dealt with (*o*).

Preparing and settling the award.

512. The award is prepared and settled by the registrar, signed by the judge, and sealed and filed (*p*). Sealed copies are served

(*g*) Workmen's Compensation Rules, 1907, r. 33 (1). This rule gives the same rights to the same parties to appear before a committee, or an agreed arbitrator, or an arbitrator appointed by the judge; see the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. II. (6). As to these tribunals, see pp. 210 *et seq.*, *ante*.

(*h*) Workmen's Compensation Rules, r. 33 (1). The rule applies to all proceedings under the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58); see Workmen's Compensation Rules, 1908, r. 78A.

(*i*) Workmen's Compensation Rules, 1907, r. 33 (2). Travelling expenses may be allowed to other parties who have a right or are allowed to appear, and (in the case of a workman or a member of his family) the judge or arbitrator may give an allowance for time (*ibid.*).

(*k*) *Ibid.*, r. 34.

(*l*) *Rayman* v. *Fields* (No. 1) (1910), 102 L.T. 154, C.A.; 3 B.W.C.C. 119; *Turner* v. *Miller and Richards* (1910), 3 B.W.C.C. 305, C.A. Any party can obtain a signed copy of the judge's notes, whether notice of appeal from his decision has or has not been given (Workmen's Compensation Rules, 1907, r. 34); and see note (*m*), p. 239, *post*.

(*m*) County court means in Scotland the sheriff court (Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 13).

(*n*) Workmen's Compensation Rules, 1907, r. 75. The County Court Rules, Ord. 8, r. 9, is then to apply (Workmen's Compensation Rules, 1907, r. 75).

(*o*) *Ibid.*, r. 76; see the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. I. (6).

(*p*) Workmen's Compensation Rules, 1907, r. 28. For forms of award, see *ibid.*, Form 24.

on all persons affected by it, and it is enforceable in the same manner as a judgment or order of the court (*q*).

The award having been once made, the arbitrator is *functus officio*, and cannot alter the substance of it (*r*).

Special provisions. Crown servants.

513. The Act (*s*) applies to workmen employed by or under the Crown (except persons in the naval or military service) (*t*) in the same way as in the case of a private employer (*u*).

A person employed in the private service of the Crown is for the purposes of the Act (*s*) deemed to be employed by the head of his department in the Royal Household (*v*).

Seamen.

514. Special procedure (*a*) applies to seamen (*b*). The locality of the forum also is not a fixed one (*c*).

Detention of ship.

515. A judge of a court of record (*d*) can detain a ship found in a port of England or Ireland, or within three miles of the coast, where a claim for compensation is made against owners who do not reside in the United Kingdom, and if the judge is of opinion that the owners are probably liable (*e*). The ship is detained until the compensation is paid, or security given to the satisfaction of the judge, to abide the event of proceedings that may be instituted to recover such compensation, and to pay such compensation and costs as may be awarded (*f*).

(*q*) Workmen's Compensation Rules, 1907, r. 28 (1). Clerical mistakes or errors arising from any accidental slip or omission may be corrected at any time by the judge (*ibid.*, r. 28 (2)). As to the enforcement of the award, see pp. 227 *et seq.*, *post*.

(*r*) See *Mountain* v. *Parr*, [1899] 1 Q. B. 805, C. A.; 1 B. W. C. C. (o. s.) 110; and p. 213, *ante*, but see p. 229, *post*.

(*s*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58).

(*t*) See p. 157, *ante*.

(*u*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 9 (1); but see *S.S. Raphael* v. *Brandy*, [1911] A. C. 413; 4 B. W. C. C. 307.

(*v*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 11 (1). Where the employer is a necessary party, the head of the department where the workman was employed, or where the department is administered by a board or by commissioners, the board or commissioners, are made a party under their official title as representing the Crown (Workmen's Compensation Rules, 1907, r. 79 (1)). Proceedings, documents, and notices may be served on the permanent secretary of the department, or where the department acts by a solicitor, on such solicitor (*ibid.*, r. 79 (2)).

(*a*) See Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 7; see pp. 157 *et seq.*, *ante*.

(*b*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 7; see note (*n*), p. 212, *ante*.

(*c*) See Workmen's Compensation Rules, 1907, r. 73 (3), and p. 212, *ante*.

(*d*) A county court is a court of record; see title COUNTY COURTS, Vol. VIII., p. 411.

(*e*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 11 (any judge has jurisdiction (Workmen's Compensation Rules, 1907, r. 73 (2)). Appeals lie to the Divisional Court, not to the Court of Appeal (*Panagotis* v. *S.S. "Pontiac"* (*Owners*) (1911) 28 T. L. R. 63, C. A.

(*f*) See p. 160, *ante*; Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 11 (1). The owner, if a corporation, is deemed to reside in the United Kingdom, if he has an office in the United Kingdom at which writs can be served (*ibid.*, s. 11 (3)). For procedure, see Workmen's Compensation Rules, 1907, r. 37, Forms 8, 26—30, 30A. For the court in which proceedings can be taken against the person giving security, see *ibid.*, r. 73 (3).

SECT. 3. Workmen's Compensation Act, 1906.

516. An employer who has paid, or on whom a claim for compensation is made, may, if he alleges that the injury was caused by another ship, and that the owners of that ship are liable to indemnify him (*g*), obtain an order for the detention of such ship (*h*).

Detention of other ships. Procedure.

517. The proceedings are generally the same as where the application is made by or on behalf of a workman (*i*). The employer may, where proceedings to recover compensation are taken against him, bring in the persons giving security as third parties (*j*).

Industrial disease.

518. Special procedure applies to claims made in respect of industrial disease (*k*).

SUB-SECT. 22.—*Memorandum of Agreement etc.*

(i.) *In General.*

Right to contract and redeem.

519. After a right to compensation under the Act (*l*) has accrued to a workman he is free to contract as to the amount of compensation he will receive where the same is not fixed by the Act (*m*). He can also agree for what sum he will redeem his right to weekly payments (*n*).

Binding agreement.

520. In order that an agreement as to compensation may be binding there must not only be an accord, but also a satisfaction (*o*).

Receipts.

A receipt is never conclusive of an agreement, though it is evidence of it (*p*). A person is not estopped by giving a receipt "in full satisfaction and discharge" of a claim, if he was imposed upon by the person obtaining it, or if he was not aware of the effect of it at the time of signing (*q*).

Agreement with dependants.

521. When an agreement which is registered (*r*), or capable of registration, is made with dependants *sui juris* (*s*), or a provisional

(*g*) *I.e.*, under the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 6; see p. 159, *ante*.

(*h*) Workmen's Compensation Rules, 1907, r. 38, Forms 23, 31, 32, 33. This rule is made to give effect to the power to detain a ship under the Shipowners Negligence (Remedies) Act, 1905 (5 Edw. 7, c. 10), which gives power to any judge of a court of record to detain a ship, where the owners are liable to pay damages for personal injury caused by the ship or its officers; see titles ADMIRALTY, Vol. I., p. 71; SHIPPING AND NAVIGATION.

(*i*) Workmen's Compensation Rules, 1907, r. 38.

(*j*) *Ibid.*, r. 38 (ii.). The third party procedure then applies (*ibid.*, r. 24), but the shipowner cannot be made a third party against his will (*ibid.*, r. 24 (5)).

(*k*) See pp. 166 *et seq.*, *ante*; Workmen's Compensation Rules, 1907, r. 39; Forms 9, 10, 19, 20—23; Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 8.

(*l*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58).

(*m*) *Ibid.*, s. 1 (3); Sched. I. (16).

(*n*) *Ibid.*, Sched. I. (17). As to his power to redeem before the expiration of the six months limited by *ibid.*, Sched. II. (17), see note (*s*), p. 184, *ante*.

(*o*) *Hawkes* v. *Coles* (*Richard*) *& Sons* (1910), 3 B. W. C. C. 163, C. A. and see title CONTRACT, Vol. VII., pp. 441 *et seq.*

(*p*) *Huckle* v. *London County Council* (1910), 3 B. W. C. C. 536; affirmed, 4 B. W. C. C. 113, C. A.; *Macandrew* v. *Gilhooley*, [1911] S. C. 448.

(*q*) *Lee* v. *Lancashire and Yorkshire Rail. Co.* (1871), 6 Ch. App. 527; and see title EVIDENCE, Vol. XIII., p. 562.

(*r*) See p. 225, *post*.

(*s*) As to such agreements, see pp. 225 *et seq.*, *post*.

agreement with such dependants as are under disability (*t*), and the employer pays the money into court (*u*), and the registrar assents to the agreement or does not dissent from it, the employer cannot be made liable for further costs (*v*).

Liability for costs.

Where the employer admits liability and the amount of compensation is not agreed and the employer pays into court such sum as he deems sufficient, he can only, after such payment into court, be made to pay such costs as may have been incurred owing to his action in reference to the registrar's report (*a*), or when a question arises as to the adequacy of the amount and the question is decided adversely to him (*b*). The same procedure with the same results may be adopted by an employer where, though he denies liability, he is willing to pay money into court and the dependants who are *sui juris* are willing to accept it (*c*).

Where amount not agreed.

(ii.) *Registration.*

522. Where compensation under the Act (*d*) is ascertained or a weekly payment varied or any other matter decided under the Act (*d*), either by a committee, arbitrator, or by agreement, a memorandum must be sent (*e*) to the registrar of the county court (*f*). On being satisfied as to its genuineness, he records it without fee, and it is for all purposes enforceable as a county court judgment (*g*).

Memorandum.

Record.

523. The memorandum is not to be recorded until seven days after notice given by the registrar to the parties interested (*h*). If the employer proves that the workman has returned to work, and is earning the same wages as before the accident, it is only, if at all, to be recorded on such terms as the judge thinks just (*i*).

When recorded.

The judge may rectify the register (*k*).

Rectification.

(*t*) As to such agreements, see p. 184, *ante*.

(*u*) Workmen's Compensation Rules, 1909, r. 56A. For procedure, see *ibid.*, and pp. 219 *et seq*, *ante*.

(*v*) *Rhodes* v. *Soothill Wood Colliery Co., Ltd.*, [1909] 1 K. B. 191, C. A.; 2 B. W. C. C. 377.

(*a*) See note (*o*), p. 226.

(*b*) Workmen's Compensation Rules, 1909, r. 56B. For procedure, see *ibid.*, Forms 53A, 53B, 53AA; and p. 226, *post*.

(*c*) Workmen's Compensation Rules, 1907, r. 56C, Form 53D (Workmen's Compensation Rules, 1911, r. (5)); and see p. 220, *ante*.

(*d*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58).

(*e*) By the committee or arbitrator, or any party interested (*ibid*, Sched. II. (9)). If the proceeding is before the judge, or arbitrator appointed by him, it is registered in the special register of the court (Workmen's Compensation Rules, 1907, r. 81 (3), (5)), and becomes at once enforceable as an award or order of the court itself.

(*f*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. II. (9).

(*g*) *Ibid.* For general procedure, see Workmen's Compensation Rules, 1907, rr. 41—49, Forms 36—41, 36A. As to county court judgments, see title COUNTY COURTS, Vol. VIII., pp. 533 *et seq.* As to the approval of agreements on behalf of infants by the official solicitor, see *Coulson* v. *Drapers Co.* (1911), 56 Sol. Jo. 70, C. A.

(*h*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. II. (9), proviso (a).

(*i*) *Ibid.*, Sched. II. (9), proviso (b).

(*k*) *Ibid.*, Sched. II. (9), proviso (c). For procedure, see Workmen's Compensation Rules, 1907, r. 48, Form 40.

SECT. 8. Workmen's Compensation Act, 1906.

Agreements which the registrar may refuse to record.

Removal from register.

524. Where the memorandum purports to settle by agreement the sum payable for redemption of weekly payments (*l*), or the sum payable to a person under legal disability (*m*), or to dependants (*n*), the registrar may, owing to the inadequacy of the sum, or by reason of the agreement having been obtained by fraud, or undue influence, or other improper means, refuse to register it (*o*) and refer it to the judge, who makes such order as is just (*p*).

The judge may order any such memorandum of agreement for payment of a lump sum to be removed from the register within six months on being satisfied that the agreement was obtained by fraud, or undue influence, or other improper means (*a*).

Agreements which, if not registered, do not exempt from liability to pay compensation.

525. An agreement for redemption of a weekly payment by a lump sum, or an agreement as to amount of compensation to be paid to a person under disability, or to dependants, if not registered, does not, neither does payment of the agreed sum, exempt the party liable from his obligation to pay compensation, unless the failure to register was not due to neglect or default on his part (*b*).

Adequacy.

A provisional agreement made on behalf of a person under disability may be submitted for registration, and, if approved by the registrar, becomes binding (*c*).

Duty of judge.

526. On an application to the court for an order that a memorandum of agreement shall be registered there is no power to order the employer to pay such a sum as the judge thinks just. The judge must either order the agreement to be registered or refuse to

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(*l*) See pp. 229 *et seq.*, *post*.

(*m*) See p. 224, *ante*.

(*n*) See pp. 199 *et seq.*, *ante*.

(*o*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. II. (9), proviso (d). The memorandum is to be sent to the registrar in accordance with the Workmen's Compensation Rules, 1907, Form 36A. Before recording it, it is the duty of the registrar to make inquiries and obtain information to satisfy himself as to whether it ought to be recorded (*ibid.*, r. 49). The parties must answer his inquiries and give information (*ibid.*, r. 49 (1)). The registrar, if he thinks the memorandum ought not to be recorded, reports his reasons in writing to the judge (*ibid.*, r. 49 (2)). The judge may order it to be recorded, or direct further inquiry before himself (*ibid.*, r. 49 (3), (4)), and notice is sent to the parties ten clear days before the day fixed for the inquiry (*ibid.*, r. 49 (4), Form 41). Witnesses may be examined, and the judge makes such order or gives such directions as may be just (*ibid.*, r. 49 (6), (7)). He has control of costs, and may order a party who has rendered the registrar's report necessary by refusal to give information and answer inquiries to pay such costs (*ibid.*, r. 49 (8)). Unless it is clear that the parties are in agreement as to the terms of the memorandum, it should not be recorded (*M'Geown* v. *Workman, Clark & Co., Ltd.* (1911), 45 L. T. 165, C. A.; and see *Turner* v. *Bell & Sons, Ltd.* (1910), 4 B. W. C. C. 63, C. A.). Where the agreed compensation is less than 50 per cent. of the wages, the registrar should not on that account alone refuse to register the agreement on the ground that it is not a genuine agreement (*Fox* v. *Battersea Borough Council* (1911), 4 B. W. C. C. 261, C. A.).

(*p*) For procedure, see Workmen's Compensation Rules, 1907, r. 48, Form 40.

(*a*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. II. (9), proviso (e). For procedure, see Workmen's Compensation Rules, 1907, r. 50, Forms 42, 43; see p. 229, *post*.

(*b*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. II. (10).

(*c*) *Rhodes* v. *Soothill Wood Colliery Co., Ltd.*, [1909] 1 K. B. 191, C. A.; 2 B. W. C. C. 377; see Workmen's Compensation Rules, r. 42 (6), and p. 218, *ante*.

do so (*d*). The agreement can only be registered in the terms in which it is in fact made between the parties, and this need not be in the statutory form (*e*).

It is the registrar who has to approve the memorandum of agreement; the judge has jurisdiction only when the matter is referred to him by the registrar (*f*).

Function of registrar.

Where the lump sum payable for redemption has been fixed by a committee it becomes in reality an award, and the registrar cannot refuse to register it on the ground of inadequacy of the amount (*g*).

Sum fixed by committee.

A judge may refuse to record a memorandum of agreement on the ground of inadequacy, and on a subsequent application for review find in favour of the employer (*h*).

Inadequacy of agreement.

527. Although an agreement to pay compensation may be implied from the conduct of the employer, and such an implied agreement may be registered (*i*), an agreement to pay full compensation during total incapacity does not justify the filing of a memorandum to pay during total or partial incapacity (*k*).

Implied agreement.

528. A registrar cannot refuse to register a memorandum of agreement to pay weekly compensation merely because the circumstances have changed and no compensation at the time is payable thereunder (*l*).

Change of circumstances.

529. The duty of a county court judge in considering whether a memorandum of agreement shall or shall not be registered is a judicial duty, and an appeal lies from his decision (*m*) to the Court of Appeal (*n*).

Appeal.

(iii) *Enforcement.*

530. The memorandum of agreement, when registered, is, in the same way as an award, enforceable as a county court judgment (*o*).

Memorandum of agreement and award.

(*d*) *Halls* v. *Furness, Withy & Co.* (1909), 3 B. W. C. C. 72, C. A.; *Mortimer* v. *Secretan*, [1909] 2 K. B. 77, C. A.

(*e*) *Shore* v. *S.S. Hyrcania (Owners)* (1911), 4 B. W. C. C. 207, C. A.; *Lunt* v. *Sutton Heath and Lea Green Collieries, Ltd.* (1911), 4 B. W. C. C. 219, C. A.; *McGeown* v. *Workman, Clark & Co., Ltd.* (1911), 45 I. L. T. 165, C. A.

(*f*) *Rhodes* v. *Soothill Wood Colliery Co., Ltd.*, [1909] 1 K. B. 191, C. A.; 2 B. W. C. C. 377. The judge must decide upon the adequacy of the amount, not merely whether the agreement has been made (*Ship Segura (Owners)* v. *Blampied* (1911), 4 B. W. C. C. 192, C. A.).

(*g*) *Mulholland* v. *Whitehaven Colliery Co.* (1910), 3 B. W. C. C. 317, C. A.

(*h*) *Beech* v. *Bradford Corporation* (1911), 4 B. W. C. C. 236, C. A.

(*i*) See note (*a*), p. 209, *ante*; and see *Phillips* v. *Vickers, Sons and Marim*, [1911] W. N. 193, C. A. (in which case the court held that there was no valid implied agreement).

(*k*) *Maundrell* v. *Dunkerton Collieries Co., Ltd* (1910), 4 B. W. C. C. 76, C. A.; *M'Carthy* v. *Stapleton-Bretherton* (1911), 4 B. W. C. C. 281, C. A. Nor does an agreement to pay on a condition justify the registration of an unconditional agreement to pay (*Phillips* v. *Vickers, Sons & Maxim, supra*).

(*l*) *Blake* v. *Midland Railway*, [1904] 1 K. B. 503, C. A.; 6 B. W. C. C. (o. s.) 163. As to registering, where the employer alleges that the workman has returned to work, and is earning his former wages, see p. 225, *ante*.

(*m*) *Johnston* v. *Mew, Langton & Co., Ltd.* (1907), 98 L. T. 517, C. A.; 1 B. W. C. C. 133.

(*n*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. II. (4); see p. 238, *post*.

(*o*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. II (9);

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Where the agreement after registration is not carried out it cannot be sued upon, but can only be enforced in the various ways in which a county court judgment may be enforced (*p*).

Execution.

531. Both an award and memorandum (*q*) may be enforced by execution (*r*). Where the money is payable into court, execution issues without leave when default is made (*s*). Where the money is not payable into court the person applying for execution must satisfy the registrar that default has been made (*t*).

Judgment summons.

532. An award or memorandum may also be enforced by judgment summons (*a*), but the court cannot alter the terms or mode of payment of any sum to become payable in future under an award, memorandum, or certificate except by consent or where the compensation is reviewed (*b*).

Other proceedings.

533. All other proceedings may be taken for the enforcement of an award, memorandum, or certificate which can under the County Court Rules be taken to enforce or recover money due under judgments or orders of the county court (*c*).

An award, memorandum, or certificate recorded in a county court may be enforced in another county court (*d*).

Application to enforce or stay.

534. An application to enforce or stay proceedings on an award made by an arbitrator appointed by a county court judge is made to the county court judge (*e*).

Workmen's Compensation Rules, 1907, r. 28 (1), and, as to county court judgments, see title COUNTY COURTS, Vol. VIII., pp. 533 *et seq.*

(*p*) This has been so decided in Scotland (*Laurie* v. *Brown & Co., Ltd.*, [1908] S. C. 705); even where the agreement is unregistered but capable of registration, the Scottish Court held that no proceedings, other than for the enforcement of the agreement as a judgment, are competent (*Dunlop* v. *Rankin and Blackmore* (1901), 4 F. (Ct. of Sess.) 203; *Lochgelly Iron and Coal Co., Ltd.* v. *Sinclair*, [1907] S. C. 1071).

(*q*) And a certificate under the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 1 (4), which is the same as an award.

(*r*) Workmen's Compensation Rules, 1907, r. 67, Form 65; see title COUNTY COURTS, Vol. VIII., pp. 550 *et seq.*

(*s*) Workmen's Compensation Rules, 1907, r. 67 (1).

(*t*) *Ibid.*, r. 67 (2). Notwithstanding the words of this rule, it was held in *Ibrahim Said* v. *Welsford (J. H.) & Co., Ltd.* (1910), 3 B. W. C. C. 233, C. A., that where an application for leave to issue execution came before the judge, he was bound to hear the evidence tendered to show that execution ought not to issue on the registered memorandum. This case was a peculiar one. The agreement to pay was in special form, and it was not clear how the matter ever got before the judge. The Court of Appeal left open the question whether execution can issue on a memorandum *ex parte*, and contented itself with deciding that in the case before the court the applicant was not entitled to execution until he proved default.

(*a*) *Bailey* v. *Plant*, [1901] 1 K. B. 31, C. A.; 3 B. W. C. C. (o. s.) 209; see Workmen's Compensation Rules, 1907, r. 68, which incorporates the County Court Rules for the time being relating to the commitment of judgment debtors; see title COUNTY COURTS, Vol. VIII., pp. 577 *et seq.*

(*b*) Workmen's Compensation Rules, 1907, r. 68 (1). For procedure, see *ibid.*, r. 68 (2), (3), (4), Form 66.

(*c*) *Ibid.*, r. 69.

(*d*) For procedure, see *ibid.*, r. 71.

(*e*) *Ibid.*, r. 31 (2) (b).

(iv.) *Varying or Setting Aside Award.*

Varying or setting aside award.

535. Though a judge has generally no power to alter his award, and cannot grant a new trial (*f*), or even, on a review, alter his award if the circumstances are the same (*g*), he may, where the award or order as to the application of the compensation has been made by himself, or by the arbitrator appointed by him, and he is satisfied that it was obtained by fraud or improper means, vary it or set it aside (*h*). He may also vary such an award or order if satisfied that a person has been improperly included or excluded as a defendant (*i*).

SUB-SECT. 23.—*Redemption of Weekly Payments.*

By payment of lump sum.

536. Weekly payments of compensation may be redeemed as of right by the employer, after the same have been paid for not less than six months, by payment of a lump sum (*k*). If the amount of such lump sum cannot be arrived at by agreement, it is settled (*l*) by arbitration under the Act (*m*).

Amount in case of permanent incapacity.

537. Where the incapacity is permanent (*n*), the amount for which the weekly payments are to be redeemed is such a sum as will, if invested in the purchase of an immediate life annuity from the National Debt Commissioners through the Post Office Savings Bank (*o*), purchase an annuity for the workman equal to 75 per cent. of the annual value of the weekly payment (*p*).

In case of incapacity not permanent.

In a case where the incapacity is not permanent the amount is settled by arbitration (*q*) under the Act (*m*), but it is always open to the parties to agree the sum which shall be paid for redemption (*r*).

(*f*) *Mountain* v. *Parr*, [1899] 1 Q. B. 805, C. A.; 1 B. W. C. C. (o. s.) 110; see pp. 212, 213, *ante*, Workmen's Compensation Rules, 1907, r. 70 (1).

(*g*) *Crossfield & Sons, Ltd.* v. *Taman*, [1900] 2 Q. B. 629, C. A.; 2 B. W. C. C. (o. s.) 141. But where the physical condition of the workman at the time of the award and time of review is in question, see p. 232, *post*.

(*h*) Workmen's Compensation Rules, 1907, r. 70 (2) (a).

(*i*) *Ibid.*, r. 70 (2) (b), (c). For procedure, see *ibid.*, r. 70 (3), (4).

(*k*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. I. (17). It is only the employer who can institute arbitration proceedings to have the weekly payments redeemed. The workman cannot do so.

(*l*) *Ibid.* The Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37), laid down no principle for application in a claim for redemption, and the matter was left at large at the discretion of the arbitrator; see *Pattinson & Sons* v. *Stevenson* (1900), 109 L. T. Jo. 106; 2 B. W. C. C. (o. s.) 156.

(*m*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58).

(*n*) The words "where the incapacity is permanent" mean where the incapacity for work resulting from the injury is a permanent and total incapacity for work and not that the injury itself is permanent and will occasion incapacity, total or partial (*Calico Printers' Association* v. *Higham* (1911), 28 T. L. R. 53, C. A., dissenting from the Scottish case of *National Telephone Co., Ltd.* v. *Smith* (1909), 46 Sc. L. R. 988).

(*o*) See these annuity tables, Ruegg, Employers' Liability and Workmen's Compensation, 8th ed., Appendix S.

(*p*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. I. (17).

(*q*) See p. 209, *ante*.

(*r*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. I. (17); subject to the approval of the registrar under *ibid.*, Sched. II., (9) (d), see p. 226, *ante*, and note (*o*), *ibid.* It is often difficult to decide within a few months of an accident whether the incapacity resulting therefrom will or will not be permanent. Possibly it may be within the power of an arbitrator in such a case to postpone

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538. A lump sum awarded after arbitration proceedings may be ordered by a committee, arbitrator, or judge to be invested or otherwise applied for the benefit of the person entitled thereto (*a*).

Investment of lump sum.

In the case of a person under legal disability a lump sum arrived at by agreement either in lieu of, or in redemption of, a weekly payment of compensation must be paid into court and dealt with by the court in its discretion for the benefit of such person (*b*).

Payment into court.

Discretion of arbitrator.

539. The employer cannot, when applying for arbitration, by inserting in his particulars a sum for which he is willing to redeem, limit the discretion of the arbitrator in fixing the sum (*c*).

Appeal.

540. An appeal (*d*) lies from the refusal of a judge to register an agreement arrived at between the parties for redemption by payment of a lump sum (*e*).

SUB-SECT. 24.—*Review of Weekly Payments.*

On application of employer or workman.

541. Any weekly payment can be reviewed at the request either of the employer or workman (*f*), and, on such review, may be ended, diminished, or, subject to the maximum provided, increased (*g*).

Arbitration.

542. In default of agreement the amount is settled by arbitration under the Act (*h*).

Agreement.

543. The parties may review the weekly payments by agreement, and such an agreement may be implied from their conduct (*i*); for instance, where an injured workman after a time returns to

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the arbitration proceedings. For an example showing how the redemption price should be calculated, see *Victor Mills, Ltd.* v. *Shackleton*, [1911] W. N. 197, C. A.

(*a*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. I. (17); Workmen's Compensation Rules, r. 59. Such a sum, whether arrived at by agreement or after arbitration proceedings, must be deducted from the compensation payable to the dependants, if death results from the injury (Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. I. (1) (a) (i.)).

(*b*) Workmen's Compensation Rules, 1909, r. 50A.

(*c*) *Castle Spinning Co.* v. *Atkinson*, [1905] 1 K. B. 336, C. A.; 7 B. W. C. C. (o. s.) 124. When redemption is applied for it must be in unqualified terms, leaving the matter to be determined by the arbitrator.

(*d*) As to appeals, see, further, pp. 238 *et seq.*, *post*.

(*e*) *O'Neill* v. *Anglo-American Oil Co., Ltd.* (1909), 2 B. W. C. C. 434, C. A., where the court was of opinion that the refusal of the judge to allow registration of the agreement had been arrived at by a process of misdirecting himself.

(*f*) The same arbitration tribunals have jurisdiction, but if the original award was made by the county court judge he should hear the application to review, and apparently he should do so also when the award was made by an arbitrator appointed by him (see Workmen's Compensation Rules, 1897, r. 31, omitted from the present rules). As to the arbitration tribunals, see pp. 210 *et seq.*, *ante*.

(*g*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. I. (16). Proceedings to review are fresh arbitration proceedings (*ibid.*), and the general rules apply (see Workmen's Compensation Rules, 1907, Form 5).

(*h*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. I. (16).

(*i*) Any such express or implied agreement does not deprive the dependants of their right to compensation, should death ensue; see p. 190, *ante*, and compare pp. 198, 215, *ante*; see also *Williams* v. *Vauxhall Colliery Co., Ltd.*, [1907] 2 K. B. 433, C. A.; 9 B. W. C. C. (o. s.) 120; *Jobson* v. *Cory (W.) & Sons*,

work and earns his full wages, but is subsequently discharged for reasons not connected with the accident, an arbitrator may imply an agreement to end the compensation (*k*). But the mere return to work as before the accident does not show an abandonment by the workman of his right to receive compensation, if the effects of the injury recur; the facts must clearly show an intention on the part of the parties to end the compensation before the arbitrator can find that it is ended by implied agreement (*l*).

Effect of incapacity recurring.

544. Where, on an application to review, the compensation is ended, and the workman does not appeal from the decision, no fresh proceedings for review can be taken though the incapacity may recur (*m*).

Where the incapacity is likely to recur it is usual to make a nominal award or a mere declaration of liability to keep the proceedings alive, and not to end the compensation entirely (*n*).

Duty of arbitrator if incapacity has disappeared.

But the arbitrator may put an end to the compensation entirely if he thinks that the incapacity for work caused by the injury has entirely disappeared (*o*), even where the injury itself is of a permanent nature (*p*). The question is one of fact for the judge, and if there is evidence warranting such a finding the Court of Appeal cannot interfere (*q*).

Consideration of physical capacity for work.

545. An award cannot be reviewed and altered if the circumstances are the same as were existing at the time the award was made (*r*), but the physical condition of the workman and his capacity or incapacity for work at different periods can never be *res judicata* (*s*); and an application to review on the ground that the physical condition of the workman has changed since the last arbitration must be entertained by the arbitrator (*t*). There can be no estoppel on this question (*a*).

Ltd. (1911), 4 B. W. C. C. 284, C. A. Compensation already paid must be deducted (Workmen's Compensation Act, 1906 (6 Edw. 7, c 58), Sched. I. (1) (a) (i.)).

(*k*) *Bradbury* v. *Bedworth Coal and Iron Co.* (1900), 2 B. W. C. C. (o. s.) 138. The workman in this case was discharged because of shortness of work. It was an extreme case, and it is doubtful whether it would, except where the facts were identical, be now followed. See *White (W.) & Sons* v. *Harris* (1910), 4 B. W. C. C. 39 (application to review on ground of workman's misconduct).

(*l*) *Williams* v. *Vauxhall Colliery Co., Ltd.*, [1907] 2 K. B. 433, C. A.; 9 B. W. C. C. (o. s.) 120.

(*m*) *Nicholson* v. *Piper*, [1907] A. C. 215; 9 B W. C. C. (o. s.) 128.

(*n*) See p. 207, *ante*.

(*o*) *London and North-Western Railway* v. *Taylor* (1910), 4 B. W. C. C. 11, C. A.; *Cranfield* v. *Ansell* (1910), 4 B. W. C. C. 57, C. A.; *Reyners, Ltd.* v. *Makin* (1911), 4 B. W. C. C. 267, C. A.

(*p*) *Emmerson* v. *Donkin & Co.* (1910), 4 B. W. C. C. 74, C. A.

(*q*) *Ibid.*

(*r*) *Crossfield & Sons, Ltd.* v. *Tanan*, [1900] 2 Q. B 629, C. A.; 2 B. W. C. C. (o. s.) 141. To allow this would be to allow an arbitrator to alter his award; and see pp. 212, 213, 229, *ante*.

(*s*) *Sharman* v. *Holliday and Greenwood, Ltd.*, [1904] 1 K. B. 235, C. A.; 6 B. W. C. C. (o. s.) 147; *Cawdor and Garnant Collieries, Ltd.* v. *Jones* (1909), 3 B. W. C. C. 59, C. A.

(*t*) *Mead* v. *Lockhart, Ltd.* (1909), 2 B. W. C. C. 398, C. A.; *Thranmere Bay Development Co., Ltd.* v. *Brennan* (1909), 2 B. W. C. C. 403, C. A.

(*a*) *Ibid.*

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546. A finding as to the capacity of an injured man to obtain work is also not *res judicata*, but may be altered on an application to review (*b*); and if, on the review, it is found that the workman is in fact earning (*c*) the same wages as before the accident the compensation must be stopped (*d*).

Capacity to obtain work.

Consideration of opportunity of obtaining work.

547. The arbitrator must, on a review, take into consideration not only the physical capacity of the workman for work, but his opportunity of obtaining it, if he has been handicapped in this respect by the accident (*e*).

Some kind of labour, even physical labour, can generally be done by an injured or crippled man. The difficulty for such a person is to obtain it, and this difficulty the arbitrator must consider (*f*). But a mere inability to obtain work owing to the congested state of the labour market cannot properly be taken into account (*g*).

Burden of proof as to work being obtainable on application for reduction of compensation.

548. Where the employer takes proceedings for review and reduction of compensation on the ground that, although some incapacity for work still exists, the workman is able to do some light work, the burden is on the employer to prove that such light work is obtainable (*h*). But where the effects of the accident are to deprive the workman of capacity to work in one sphere of labour, leaving him full capacity to work in some other sphere or spheres of labour, so that he becomes a workman of a different class, in this case the burden is not on the employer to prove that the workman can obtain work in that class of labour for which he has the capacity (*i*). If, however, the accident leaves him handicapped in all classes of work, "an odd lot in the labour market" (*k*), the burden of proof always rests upon the employer (*l*).

(*b*) *Radcliffe* v. *Pacific Steam Navigation Co.*, [1910] 1 K. B. 685, C. A.; 3 B. W. C. C. 185.

(*c*) *I.e.*, really earning, not receiving *ex gratiâ* (*Chandler* v. *Smith*, [1899] 2 Q. B. 506, C. A.; 1 B. W. C. C. (o. s.) 19; see *Cory Brothers & Co., Ltd.* v. *Hughes*, [1911] 2 K. B. 738, C. A.; 4 B. W. C. C. 291). As to the meaning of "earning," see pp. 201, 207, *ante*.

(*d*) *Irons* v. *Davis and Timmins, Ltd.*, [1899] 2 Q. B. 330, C. A.; 1 B. W. C. C. (o. s.) 26; see p. 207, *ante*.

(*e*) *Clark* v. *Gas Light and Coke Co.* (1905), 21 T. L. R. 184, C. A.; 7 B. W. C. C. (o. s.) 119; *Thomas* v. *Fairbairn, Lawson & Co., Ltd.* (1911), 4 B. W. C. C. 195, C. A.; see *Carlin* v. *Stephen (Alexander) & Sons, Ltd.* (1911), 48 Sc. L. R. 862.

(*f*) *Ibid.*

(*g*) *Dobby* v. *Wilson, Pease & Co.* (1909), 2 B. W. C. C. 370, C. A., *per* COZENS-HARDY, M.R., at p. 371: "I think this court has more than once laid down that the employer does not guarantee the state of the labour market."

(*h*) *Proctor & Sons* v. *Robinson*, [1911] 1 K. B. 1004, C. A.; 3 B. W. C. C. 41.

(*i*) *Cardiff Corporation* v. *Hall*, [1911] 1 K. B. 1009, C. A.; 4 B. W. C. C. 159; *Guest, Keen, and Nettlefolds, Ltd.* v. *Winsper* (1911), 4 B. W. C. C. 289, C. A.; see *Carlin* v. *Stephens (Alexander) & Sons, supra*. Where, on a review, it was proved that the workman was able to do light work, though no evidence was given that he had been offered or could get it, but the workman admitted that he had not tried to obtain any, a reduction of the compensation was upheld (*Anglo-Australian Steam Navigation Co., Ltd.* v. *Richards* (1911), 4 B. W. C. C. 247, C. A.).

(*k*) *Cardiff Corporation* v. *Hall, supra, per* FLETCHER MOULTON, L.J.

(*l*) *Cardiff Corporation* v. *Hall, supra*. The question upon whom rests the burden of proof in arbitration proceedings is an important one. In the first

Where an employer applies for compensation due under an award or agreement to be ended, it lies upon him to show that the workman is then under no incapacity resulting from the accident, and the employer does not show this by merely proving that the workman has been earning as good wages at other work as he did at his own work before the accident (*m*).

On application that compensation be ended.

549. If whilst incapacity for work occasioned by the accident exists a second incapacity arises, it is submitted that the compensation cannot be interfered with on this ground (*n*).

Second incapacity.

550. On an application for review (as indeed on an original application) the arbitrator must consider the nervous and mental, as well as the physical, condition of the workman, and if the nervous and mental condition induced by the accident causes incapacity for work, the workman is entitled to receive, or continue to receive, compensation (*o*). The incapacity due to nervous or mental disease must be a condition produced by the accident itself, and not by the workman morbidly brooding over the accident or its effects (*p*).

Consideration of nervous and mental condition.

551. The court upon a review has to consider the suitability of the work which it is suggested the workman is capable of doing (*q*). It need not be work of the same kind as he was engaged in at the time of the accident (*r*), nor need it necessarily be manual labour (*s*).

Consideration of suitability of work.

place, where a workman or his dependants take proceedings to recover compensation, the burden of proof rests on them to bring themselves within the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 35); see p. 169, *ante*. Where, however, an award or memorandum of agreement exists on the records of a county court, it is thought that the burden of proof rests on the party who asks that such award may be ended, diminished, or increased. This has been so decided in Scotland; see *M'Callum* v. *Quinn*, [1909] S. C. 227.

(*m*) *Cory Brothers & Co., Ltd.* v. *Hughes*, [1911] 2 K. B. 738, C. A.; 4 B. W. C. C. 291.

(*n*) It was held in a case in the county court that a workman whilst in prison was not entitled to receive the compensation to which he otherwise would have been entitled (see *Clayton and Shuttleworth, Ltd.* v. *Dobbs* (1908), 2 B. W. C. C. 488), but it is submitted that this decision is wrong.

(*o*) *Eaves* v. *Blaenclydach Colliery Co., Ltd.*, [1909] 2 K. B. 73, C. A.; 2 B. W. C. C. 329.

(*p*) *Holt* v. *Yates and Thom* (1910), 3 B. W. C. C. 75, C. A. Where an arbitrator found that the refusal of a workman to continue at work was due partly to nervousness induced by the accident and partly to reasons unconnected with the accident, but that an average reasonable man could have overcome the nervousness, the Court of Appeal held that, as the arbitrator had not given compensation, he meant to find that ability to work existed, and upheld the award. In this case COZENS-HARDY, M.R., repeated what was said in *Eaves* v. *Blaenclydach Colliery Co., Ltd.*, *supra*, that the nervous and mental, as well as the physical, condition of an injured workman must be taken into consideration in estimating the extent of his recovery and consequent earning capacity. See, further, p. 235, *post*.

(*q*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. I. (3).

(*r*) *Cammell, Laird & Co., Ltd.* v. *Platt* (1908), 2 B. W. C. C. 368, C. A.

(*s*) Where the finding was that the work offered to and refused by the workman was "not quite suitable," the Court of Appeal regarded the finding as one that the work was not suitable, and refused to interfere with the award (*Eyre* v. *Houghton Main Colliery Co., Ltd.*, [1910] 1 K. B. 695, C. A.; 3 B. W. C. C. 250). In that case BUCKLEY, L.J., at p. 701, said that the question is a mixed

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552. The compensation cannot in case of partial incapacity exceed the difference between the amount of the average weekly earnings before the accident and the average weekly amount which the workman is earning or able to earn in some suitable employment or business after the accident (*t*).

Limit of compensation in partial incapacity.

The sum the workman is able to earn after the accident may include his earnings in an entirely independent business (*a*).

No general rules.

553. A judge or arbitrator must not lay down general rules by which to guide himself in an arbitration. Every case must be considered on its own merits and with reference to its particular facts (*b*).

Period affected by review.

554. An award can be reviewed, for the purpose of dealing with the compensation, as from a time before the hearing of the application to review, or even before the date of the commencement of the proceedings for review (*c*).

If the proceedings for review ask simply for termination, decrease, or increase, this can only be ordered as from the date of the hearing of the application to review (*d*), but where in the application to review the applicant asks in express terms for termination or review as from a definite antecedent date, the judge can review and deal with the compensation as from that date (*e*).

Effect of variation of scale of wages.

555. An arbitrator cannot on review vary the compensation on the ground that the scale of wages in the district has varied, and

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one of law and fact. The meaning of "suitable" is a question of law; the question whether any specified employment comes within this meaning is a question of fact.

(*t*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. I. (3).

(*a*) *Norman and Burt* v. *Walder*, [1904] 2 K. B. 27, C. A.; 6 B. W. C. C. (o. s.) 124. The words "in some suitable employment or business" appear for the first time in the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58).

(*b*) *Webster* v. *Sharp & Co., Ltd.*, [1905] A. C. 284; 7 B. W. C. C. (o. s.) 118; *Blake* v. *Rhodes & Sons* (1911), 46 L. J. 536. In the absence of any misdirection in law, the discretion of a judge in awarding compensation in cases of partial incapacity cannot be interfered with (*Humphreys* v. *City of London Electric Lighting Co.* (1911), 4 B. W. C. C. 275, C. A.).

(*c*) *Morton & Co., Ltd.* v. *Woodward*, [1902] 2 K. B. 276, C. A.; 4 B. W. C. C. (o. s.) 43. The arbitrator should declare in a proper case, and where is asked for, that the incapacity for work ceased on a stated day, and that the compensation is to come to an end from that day (*ibid.*).

(*d*) *Upper Forest and Western Steel and Tinplate Co., Ltd.* v. *Thomas*, [1909] 2 K. B. 631, C. A.; 2 B. W. C. C. 414.

(*e*) *Charing Cross, Euston, and Hampstead Railway* v. *Boots*, [1909] 2 K. B. 640, C. A.; 2 B. W. C. C. 385. Overpayments made between the date of the application for review and the order for reduction cannot be regarded as payments in respect of the reduced amount ordered to be paid (*Hosegood & Sons* v. *Wilson*, [1911] 1 K. B. 30, C. A.; 4 B. W. C. C. 30. Where the employer thinks the incapacity has ceased, and an award or memorandum is registered in the county court (see pp. 225 *et seq.*, *ante*), he should apply to the judge to stay execution until an application for review can be heard. Where a workman has apparently completely recovered from the injury, but there is any reasonable chance of a recurrence, the judge may order a memorandum of agreement to be registered, and at once stay execution thereon, until such time as an application to review can be heard (*Charing Cross, Euston, and Hampstead Railway* v. *Boots*, *supra*); and see Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. II. (9) (b).

that consequently the workman would not have been earning so much at the date of the review (*f*).

An arbitrator cannot, on a review, make an award that the compensation shall continue for a fixed future period and then cease (*g*).

Workman's duty as to aiding recovery.

556. The workman must take reasonable means to aid his own recovery, and must not aggravate his injury by negligence or misconduct (*h*). If the incapacity, or its continuance, is due to the fact that he has not behaved reasonably, then it is no longer a consequence of the accident, but is due to his own unreasonableness (*i*).

Where the incapacity is due to the workman not following the instructions of his medical advisers, but the neglect is not wilful but due to nervousness, partly natural and partly resulting from the accident, compensation may properly be awarded (*j*).

Effect of refusal to undergo operation.

557. There is nothing in the Act (*k*) which imposes on a workman an obligation to submit to a surgical operation (*l*), but a workman who refuses to undergo an operation involving no risk, and which would most likely effect a cure, is no longer suffering from the effects of the accident, but from his own unreasonableness in refusing to be cured (*m*). Where, however, the workman's refusal is founded on the advice of his own medical man, and the arbitrator finds that in so refusing he acted reasonably, the compensation cannot be refused or interfered with (*n*). Even where his own medical man recommends an operation, attended with some but no great danger in capable hands, the arbitrator may find the workman justified in refusing to undergo it (*o*).

Burden proof.

Where the evidence of the advisability of an operation is contradictory the question is one of fact for the arbitrator (*p*). Where

(*f*) *Bevan* v. *Energlyn Colliery Co.* (1911), 28 T. L. R. 27, C. A., distinguishing *James* v. *Ocean Coal Co.*, [1904] 2 K. B. 213, C. A.; 6 B. W. C. C. (o. s.) 128.

(*g*) *Baker* v. *Jewell* (1910), 3 B. W. C. C. 503, C. A., following the Scottish decision in *Allan* v. *Spowart* (*Thomas*) *& Co Ltd.* (1906), 8 F. (Ct. of Sess.) 811; see also p. 207, *ante*.

(*h*) *Warncken* v. *Moreland* (*R.*) *& Son, Ltd.*, [1909] 1 K. B. 184, C. A.; 2 B. W. C. C. 359.

(*i*) *Ibid.* Where the finding was that the continued incapacity of the workman was due to his not taking proper exercise, and want of general condition arising from long-continued and unnecessary idleness, it was held that the arbitrator could refuse to award compensation (*Upper Forest and Worcester Steel and Tinplate Co., Ltd.* v. *Grey* (1910), 3 B. W. C. C. 424, C. A.). For cases where there was no evidence of unreasonable conduct, see *Burgess & Co., Ltd.* v. *Jewell* (1911), 4 B. W. C. C. 145, C. A.; *Moss & Co.* v. *Akers* (1911) 4 B. W. C. C. 294, C. A.

(*j*) *Smith* v. *Coed Talon Colliery Co., Ltd.* (1900), 2 B. W. C. C. (o. s.) 121, C. A.

(*k*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58).

(*l*) *Rothwell* v. *Davies* (1903), 19 T. L. R. 423, C. A.; 5 B. W. C. C. (o. s.) 141. In this case the surgeons said the operation would be attended by some risk; some of them thought it a serious operation.

(*m*) *Warncken* v. *Moreland* (*R.*) *& Sons, Ltd*, *supra*; followed in *Paddington Borough Council* v. *Stack* (1909), 2 B. W. C. C. 402, C. A.

(*n*) *Tutton* v. *S.S. Majestic* (*Owners*), [1909] 2 K. B. 54, C. A.; 2 B. W. C. C. 346.

(*o*) *Hawkes* v. *Coles* (*Richard*) *& Sons* (1910), 3 B. W. C. C. 163, C. A.

(*p*) *Ruabon Coal Co.* v. *Thomas* (1909), 3 B. W. C. C. 32, C. A.

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the workman refuses to submit to an operation the burden rests on the employer to show, not only that the workman ought to submit to it, but also that it would probably result in a removal of the workman's inability to work (*q*). If he fails to prove this, then, though in the opinion of the arbitrator the refusal was unreasonable, payment of compensation cannot be stopped (*q*).

Proof must agree with particulars.

The employer must prove a refusal to submit to the treatment set out in his particulars. If the facts show refusal to submit to medical or surgical treatment other than that alleged in the particulars the award or agreement cannot be interfered with (*r*); nor should amendment be allowed if the proof differs materially from the refusal alleged in the particulars (*r*).

Workman's duty as to obtaining work.

558. The workman must make reasonable endeavours to obtain such work as he has a capacity to perform. Where he has, through misconduct, lost the opportunity of working and earning the same wages as before the accident in the service of his former employer, an award refusing compensation may be made, though some slight incapacity still continues (*a*), but a single act of misconduct is not generally sufficient to disentitle him (*b*).

Provisions affecting minors.

559. Where a workman is, at the time of the accident, under twenty-one years of age, and the review of weekly payments takes place more than twelve months after the accident, the weekly payment may be increased to a sum not exceeding 50 per cent. of what the workman would probably at such time have been earning but for the injury, but not in any case exceeding £1 (*c*). This can only be done where the accident happened after the 1st July, 1907 (*d*).

The provision (*e*) that the compensation must not exceed the difference between the earnings before the accident and the amount which the workman is earning or able to earn after the accident, does not apply to a review of an infant's compensation in the circumstances above mentioned (*f*).

(*q*) *Marshall* v. *Orient Steam Navigation Co., Ltd.*, [1910] 1 K. B. 79, C. A.; 3 B. W. C. C. 15.

(*r*) *Hay's Wharf, Ltd. (Proprietors)* v. *Brown* (1910), 3 B. W. C. C. 84, C. A.

(*a*) *Hill* v. *Ocean Coal Co., Ltd.* (1909), 3 B. W. C. C. 29, C. A.; *McNamara & Co., Ltd.* v. *Burtt* (1911), 4 B. W. C. C. 151, C. A. The proper procedure in such a case is to award a nominal sum, in order that the workman may, after he has purged his misconduct, apply for a review and increase of the weekly payment (*ibid.*); see *Clark* v. *Gas Light and Coke Co.* (1905), 21 T. L. R. 184, C. A.; 7 B. W. C. C. (o. s.) 119; *David* v. *Windsor Steam Coal Co., Ltd.* (1911), 4 B. W. C. C. 177, C. A.

(*b*) Where a workman, having been taken back into the employer's service at the same wages, could not work quite so well as before the accident, and, being complained of, left and made no attempt to find other work, an award of compensation was upheld (*Ward* v. *Miles* (1911), 4 B. W. C. C. 182, C. A.; *White (W.) & Sons* v. *Harris* (1910), 4 B. W. C. C. 39, C. A.

(*c*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. I. (16); Workmen's Compensation Rules, 1907, Form 5.

(*d*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 16 (1).

(*e*) *Ibid.*, Sched. I. (3); see p. 234, *ante*.

(*f*) *Edwards* v. *Alyn Steel Tinplate Co., Ltd.* (1910), 3 B. W. C. C. 141, C. A. The Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. I (16), must

The probable earnings of the particular infant may be taken into account; the arbitrator is not restricted in his consideration to the probable earnings of an infant of the same class or rank in the industrial world to which the particular infant at the time of the accident belonged (*g*).

Arbitrator must come to a decision.

560. However difficult it may be to come to a decision on conflicting evidence, the arbitrator must decide the issue or issues in the arbitration. Thus, the finding of a county court judge that he was unable to say whether the workman was or was not able to do the work offered to him was held inconclusive and the case remitted to him for decision (*h*).

Medical referee summoned to assist.

561. On an application to a judge to review a weekly payment of compensation he may summon a medical referee to sit with him to help him in the arbitration (*i*).

Reference to medical referee.

A judge can, if the medical evidence is conflicting, refer the matter before him to a medical referee (*k*).

Setting aside award made on application to review.

562. The judge may set aside an award made upon an application to review a weekly payment, on proof to his satisfaction that it was obtained by fraud or other improper means (*l*), and whether the award was made by himself or by an arbitrator appointed by him (*m*).

in this case be read as an addition to *ibid*, Sched. I. (3), and not in subordination to it (*Edwards* v. *Alyn Steel Tinplate Co., Ltd.* (1910), 3 B. W. C. C. 141, C. A.

(*g*) *Vickers, Sons & Maxim, Ltd.* v. *Evans*, [1910] A. C. 444; 3 B. W. C. C. 403. In this case an infant skilled labourer, during a slack time, was performing unskilled work at a low rate of pay; on his application for review he claimed compensation based on the weekly sum he would at the time of the review have probably been earning at his skilled work.

(*h*) *Cowan* v. *Simpson* (1909), 3 B. W. C. C. 4, C. A.

(*i*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. II. (5). For procedure, see Workmen's Compensation Rules, 1907, r. 52. Any party to an arbitration may ask the judge to summon a medical referee, but the judge may refuse to do so (Forms 45—47); see p. 221, *ante*. Either a committee (see p. 210, *ante*), arbitrator (see p. 211, *ante*), or judge may in any arbitration, either original or for review of weekly payments, submit a matter material to any question arising in the arbitration for report (Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. II. (15); Workmen's Compensation Rules, rr. 53, 82). Where a certificate of a medical referee (see p. 214, *ante*) as to the condition of a workman is obtained on a reference to him by both parties, *i.e.*, under the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. I. (15) (compare p. 221, *ante*), it is conclusive, and no evidence offered in contradiction can be accepted (*Sapcote & Sons* v. *Hancock* (1911), 4 B. W. C. C. 184, C. A.).

(*k*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. II. (15); *Henriksen* v. *S.S. Svanhilda (Owners)* (1911), 4 B. W. C. C. 233 C. A.; see *Jackson* v. *Scotstoun Estate Co.*, [1911] S. C. 564; and this may be done although the workman is dead (*Carolan* v. *Harrington & Son*, [1911] 2 K. B. 733, C. A.; 4 B. W. C. C. 253).

(*l*) Workmen's Compensation Rules, 1907, r. 70 (2) (a). Such an application can only be made after six months with the leave of the judge, and such leave is not to be granted except where the failure to apply within the period was due to mistake, absence from the United Kingdom, or other reasonable cause (*ibid.*, r. 70 (4)); see p. 229, *ante*.

(*m*) Workmen's Compensation Rules, 1907, r. 70 (2) (a).

Workmen's Compensation Act, 1906.

General rule.

563. The decision of a judge of the county court on a question of law (*n*) submitted to him by a committee or arbitrator (*o*), or in any case where he himself settles the matter under the Act (*p*), or where he gives any decision or makes any order under the Act (*p*), is final, unless within the time, and subject to the conditions prescribed (*q*), either party appeals to the Court of Appeal (*s*).

Appeals to judge.

564. An appeal on a question of law from the committee or arbitrator to the judge is in the discretion of such committee or arbitrator (*t*). It is a submission to the judge of a point of law (*a*), but his decision on such a submission is subject to appeal (*b*).

Where there is no appeal.

There is no appeal from the decision of a committee or arbitrator to the Court of Appeal (*c*), and, on a case stated on a question of law by a committee or arbitrator for the opinion of a county court judge, the judge cannot interfere with or alter the findings of fact (*d*).

Appeals to Court of Appeal.

565. All appeals on questions of law from the decision of the judge as arbitrator under the Act (*e*), in either making or refusing an award, or in giving any decision or making any order go to the Court of Appeal direct (*f*).

On questions of law only.

The appeal from the decision of the judge to the Court of Appeal in any award, decision, or order is on a question of law only (*g*). The question of law must be raised before the judge, for it is his decision on the point of law that is appealable (*h*).

(*n*) The question whether there is any evidence is a question of law (*Smith* v. *General Motor Cab Co., Ltd.*, [1911] A. C. 188; 4 B. W. C. C. 219)

(*o*) See pp. 211, 213, *ante*.

(*p*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58).

(*q*) By the R. S. C., Ord. 58, r. 20, Workmen's Compensation Rules, rr. 71, 72.

(*s*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. II. (4). This is the only provision in the Act giving any right of appeal. As to the court of appeal, see titles COUNTY COURTS, Vol VIII, p. 609; COURTS, Vol. IX., pp. 62 *et seq.*

(*t*) The words are "If they or he think fit" (Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched II. (4))

(*a*) For procedure, which is in the form of a special case, see Workmen's Compensation Rules, r. 32, Form 25.

(*b*) Workmen's Compensation Act 1906 (6 Edw. 7, c. 58), Sched. II (4).

(*c*) *Gibson* v. *Wormald and Walker, Ltd.*, [1904] 2 K. B. 40, C. A.; 6 B. W. C. C. (o. s.) 155.

(*d*) *Ferguson* v. *Green*, [1901] 1 K. B. 25, C. A.; 3 B. W. C. C. (o. s.) 113.

(*e*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58).

(*f*) *Moss* v. *Great Eastern Railway*, [1909] 2 K. B. 274, C. A.; 2 B. W. C. C. 168; Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched II. (4). But where an application was made to a county court judge to review an award made by a committee under *ibid.*, Sched. II. (1) (see p. 210, *ante*), and the judge refused to hear the application on the ground that he had no jurisdiction, it was held that, as the judge had refused jurisdiction, the appeal lay to the Divisional Court (*Howarth* v. *Samuelson (Sir B.) & Co., Ltd.* (1911), 104 L. T. 907, C. A.; 4 B. W. C. C. 287); see also note (*e*), p. 223, *ante*.

(*g*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. II. (4).

(*h*) *Payne* v. *Clifton* (1910), 3 B. W. C. C. 439, C. A.; *Smith* v. *Baker & Sons*, [1891] A. C. 325; *Smith* v. *General Motor Cab Co., Ltd.*, [1911] A. C. 188; 4 B. W. C. C. 249, emphasises this point.

566. A question of mixed fact and law is generally appealable (*i*). Mixed fact and law.

567. Appeals to the Court of Appeal are by notice of motion setting out the grounds of the appeal (*k*). Appeal by notice of motion.

568. The notice is an eight days' notice served on every party affected (*l*). It must be served and the appeal entered within twenty-one days from the date of the judgment, award, order, or finding complained of, and such time runs from the time at which the judgment, award, order, or finding is signed, entered, or otherwise perfected, or from the time of any finding or refusal (*m*). Service and entry of appeal.

569. An appeal is no stay of execution unless the judge so orders, or unless a deposit is made, or security given to the satisfaction of the county court. The deposit or security must not exceed the amount of the money affected by the appeal (*n*). An appeal is no stay.

570. Security for costs of appeal may be required if it is shown to the Court of Appeal, by affidavit, that the appellant will probably be unable to pay the costs of the appeal (*o*), and this even where the costs in the county court have already been paid by a workmen's union (*p*). Security for costs.

571. The Court of Appeal will in special circumstances dispense with security (*q*), but the fact that the county court judge has stayed execution to enable an appeal to be prosecuted is not of itself sufficient ground for doing so (*r*). Dispensing with security

Before an application to the court for security is made application

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(*i*) As to what is a mixed question of fact and law, see *Hoddinott* v. *Newton, Chambers & Co., Ltd.*, [1901] A. C. 49; 3 B. W. C. C. (o. s.) 74; *Fenton* v. *Thorley & Co., Ltd.*, [1903] A. C. 443.

(*k*) R. S. C., Ord. 58, r. 20; see title PRACTICE AND PROCEDURE.

(*l*) R. S. C., Ord. 59, r. 10.

(*m*) R. S. C., Ord. 58, r. 20; Ord. 59, r. 12. The party appealing must procure copies of the judge's notes for the use of the Court of Appeal. If notes are not forthcoming the Court of Appeal has power to hear the appeal on any other evidence or statement it may think sufficient (R. S. C., Ord. 58, r. 20 (b)). The judge, at the hearing of the arbitration or special case, must take a note of any question of law raised, and of the facts and of his decision thereon, and of his decision of the case; see p. 222, *ante*. When the judge has omitted to take a note of the evidence, an affidavit by the solicitor of what took place at the hearing may be admitted (*Turner* v. *Bell (G.) & Sons, Ltd.* (1910), 1 B. W. C. C. 63). The Court of Appeal has power to extend the time for appealing (see *Nicholson* v. *Piper* (1907), 24 T. L. R. 16, C. A.), or to amend the grounds of appeal (see *Barton* v. *Scott and Hodgson* (1910), 4 B. W. C. C. 15, C. A.), or to make any other order, on such terms as it may think fit to ensure the determination on the merits of the real questions in controversy between the parties (R. S. C., Ord. 58, r. 20; Ord. 59, r. 16).

(*n*) *Ibid.*, r. 14.

(*o*) *Hall* v. *Snowdon, Hubbard & Co.*, [1899] 1 Q. B. 593, C. A.; 1 B. W. C. C. (o. s.) 114. The amount of security usually ordered is £15.

(*p*) *McLaughlin* v. *Clayton* (1899), *Times*, 28th February; *Haddock* v. *Humphrey* (1899), *Times*, 1st August. An appeal from an arbitrator is not analogous to an application for a new trial of an action where security was not formerly required (*Re Harwood and Abrahams*, [1901] 2 K. B. 304, C. A., 3 B. W. C. C. (o. s.) 205).

(*q*) *Hubball* v. *Everitt & Sons, Ltd.* (1900), 16 T. L. R. 168, C. A.; 5 B. W. C. C. (o. s.) 115, n.; *Pritchett* v. *Poole* (1897), 76 L. T. 472.

(*r*) *Shea* v. *Drolenvaux* (1903), 88 L. T. 679, C. A.; 5 B. W. C. C. (o. s.) 144.

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must be made to the other side to ascertain whether they are willing to give the same voluntarily (*s*).

In a proper case the appellant may appeal, or the respondent resist the appeal *in formâ pauperis* (*a*).

In formâ pauperis.

572. The Court of Appeal may remit the award, decision, or order to the judge, or order him to state a special case on the points raised (*b*).

Remitting to judge.

Order of Court of Appeal.

573. The order of the Court of Appeal is sent by any party to the county court, and is filed. It has then the same effect as a decision of the judge (*c*) and the court must carry it out (*d*).

Appeal to House of Lords.

574. An appeal lies without leave from the decision of the Court of Appeal to the House of Lords (*e*).

Every appeal is brought by way of petition praying that the matter of the order or judgment appealed against may be reviewed (*f*).

In every appeal to the House of Lords security for costs must be given, unless the appellant obtains leave to sue *in formâ pauperis* (*g*).

The judgment of the House of Lords may for the purposes of its enforcement be entered in and made an order of the Court of Appeal (*h*).

SUB-SECT. 26.—*Costs.*

Costs of arbitration.

575. The costs of the arbitration are in the discretion of the arbitration tribunal, whether a committee, arbitrator, or judge (*i*). An arbitrator cannot award a lump sum for costs (*k*).

No court fees are payable prior to the award (*l*).

(*s*) *Stanland* v. *North-Eastern Steel Co., Ltd.* (1906), 23 T. L. R. 1, C. A.; 9 B. W. C. C. (o. s.) 133. Where no time is limited for giving the security it must be given within fourteen days from the date of the order requiring it; see the remarks of VAUGHAN WILLIAMS, L.J., reported (1902), 18 T. L. R. 537.

(*a*) *Handford* v. *Clarke* (*George*), *Ltd.*, [1907] 1 K. B. 181, C. A.; 9 B. W. C. C. (o. s.) 136. For procedure, see R. S. C., Ord. 16, rr. 22—31.

(*b*) *Glasgow and South-Western Rail. Co.* v. *Laidlaw* (1900), 2 F. (Ct. of Sess.) 708 (Scottish decision).

(*c*) Workmen's Compensation Rules, 1907, r. 72 (1).

(*d*) *Ibid.*, r. 72 (5).

(*e*) Appellate Jurisdiction Act, 1876 (39 & 40 Vict. c. 59), s. 3. Before the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), it was decided that no appeal would lie from the decision of the Court of Session in Scotland in a workmen's compensation case to the House of Lords (*Osborne* v. *Barclay, Curle & Co.*, [1901] A. C. 269; 4 B. W. C. C. (o. s.) 149). An appeal is now given by the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. II. (17) (b). As to such appeals in cases where the accident happened before the Act of 1906 came into operation, see *Mackay* v. *Rosie* (1911), 56 Sol. Jo. 87, H. L.

(*f*) Appellate Jurisdiction Act, 1876 (39 & 40 Vict. c. 59), s. 4; see title PRACTICE AND PROCEDURE.

(*g*) See Appeal (Formâ Pauperis) Act, 1893 (56 & 57 Vict. c. 22).

(*h*) *Hodgson* v. *West Stanley Colliery Co.* (*Owners*) (1910), 3 B. W. C. C. 392, C. A.

(*i*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. II. (7). Subject, in the case of a judge or arbitrator appointed by him, to rules of court (*ibid.*; see p. 216, *ante*).

(*k*) *Gardner* v. *Cox* (1910), 3 B. W. C. C. 245, C. A.; apparently overruling *Welland* v. *Great Western Rail. Co.* (1900), 16 T. L. R. 297, C. A.; 2 B. W. C. C. (o. s.) 145, where such a course was upheld.

(*l*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. II. (13). Where the workman and employer request the registrar to refer the "workman's

576. Special costs incurred by a workman in obtaining a certificate from a medical referee which is used in the arbitration, or in submitting himself for examination to a medical referee, may be allowed (*m*).

Special costs.

577. An arbitrator must not lay down a general rule as to the costs of proceedings (*n*), or make a successful respondent pay the costs of the applicant (*o*), but where the offer of the employer in his answer is ambiguous, he may be made to pay costs thereby occasioned (*p*). In dealing with costs any offer made by the employer may be taken into account (*q*). An employer may receive costs of the arbitration, though his contract with an insurer may include an indemnity against costs (*r*).

No general rule.

578. All costs must be taxed in accordance with the rules, and such taxation may be reviewed by the judge (*s*). Costs awarded by a committee or arbitrator appointed by the parties must be taxed by the registrar of the court in which the memorandum is registered (*t*).

Taxation.

579. The court may (*a*) deduct from compensation all or part of the costs thrown away by the plaintiff bringing an action instead of proceeding under the Act (*b*). An appeal lies from the decision of the judge, on the question of deduction of costs, to the Court of Appeal (*c*). The judge may refuse any costs of assessing compensation if he is of opinion that they were all occasioned by the bringing of the abortive action (*d*). The judge's discretion is almost absolute, and he may order the successful defendant in the action to pay all the costs of the proceedings (*e*).

Costs of abortive action.

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condition" to a medical referee under Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. I. (15), a fee not exceeding £1 may be charged (*ibid.*).

(*m*) Workmen's Compensation Rules, 1907, r. 61 (4), (5). There is also power to award under scale A of the County Court Fees a number of items which were only formerly allowable under scale B (*ibid.*, r. 61 (1)).

(*n*) *Rigby & Co.* v. *Cox* (No. 2), [1904] 2 K. B. 208; 6 B. W. C. C. (o. s.) 161.

(*o*) *Jones* v. *Great Central Rail. Co.* (1901), 4 B. W. C. C. (o. s.) 23, C. A. *Andrew* v. *Grove*, [1902] 1 K. B. 625.

(*p*) *Nicholson* v. *Thomas* (1910), 3 B. W. C. C. 452, C. A.

(*q*) Workmen's Compensation Rules, 1907, r. 61 (3). For scales of costs in the county courts, see Yearly County Court Practice, 1911, 856.

(*r*) *Cornish* v. *Lynch* (1910), 3 B. W. C. C. 343, C. A.

(*s*) Workmen's Compensation Act, 1906, Sched. 11 (7). In all cases for the purpose of allowance and taxation of costs the judge or arbitrator, or in default the registrar, must, where the subject-matter is not a capital sum, decide what amount shall be deemed to be the subject-matter of the arbitration (Workmen's Compensation Rules, 1907, r. 61 (2)).

(*t*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. II. (7). For review of taxation, see Workmen's Compensation Rules, 1907, r. 63.

(*a*) See p. 196, *ante*.

(*b*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 1 (4). It is often difficult to say what costs have been thrown away by the bringing of the action. The two procedures are very different.

(*c*) *Williams* v. *Army and Navy Auxiliary Co-operative Stores* (1907), 23 T. L. R. 408; 9 B. W. C. C. (o. s.) 134.

(*d*) *Skeggs* v. *Keen* (1899), 1 B. W. C. C. (o. s.) 35, C. A.

(*e*) *Cattermole* v. *Atlantic Transport Co.* (1902), 1 K. B. 204, C. A.; 4 B. W. C. C. (o. s.) 28; such a course would generally be wrong (*ibid.*, *per* STIRLING, L.J.).

SECT. 3. Workmen's Compensation Act, 1906.

580. No solicitor or agent can recover from a workman any costs, or claim a lien on, or deduct any costs from the compensation awarded or agreed to be paid, except such sum as the committee, arbitrator, or judge may allow (*f*). Such costs must be taxed on the scale prescribed (*g*).

Recovery by solicitor or agent.

An application by a solicitor or agent for costs against a workman (*h*) must be made to the arbitration tribunal which deals with the matter (*i*).

Application. Recovery.

Where costs are awarded to a solicitor or agent against his client, or a lien is given to him on the sum awarded, or agreed as compensation, or he is allowed to deduct costs from such sum, he can obtain the same from the party liable to pay the compensation, but only to the extent of, and in the manner in which such person is liable to pay the workman (*k*).

If the party liable to pay compensation refuses, or makes default in payment of such costs, execution may by leave be issued against him by the solicitor or agent, and payment is *pro tanto* payment of the compensation awarded (*l*).

No set-off of costs of abortive appeal.

581. A county court judge cannot set off the costs of an unsuccessful appeal by the workman against the costs to which he is entitled in a subsequent arbitration (*m*).

SUB-SECT. 27.—*Miscellaneous Provisions.*

Annual returns of injuries.

582. Annual returns of injuries in respect of which compensation has been paid may be required by the Secretary of State from every employer in any industry to which he directs this rule shall apply (*n*).

Special register.

583. A special register is kept in every county court, in which every proceeding under the Act (*o*) before the judge, or arbitrator appointed by him, is to be recorded (*p*).

(*f*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. II. (14).

(*g*) *Ibid.* The committee, arbitrator, or judge directs the scale on which the costs are to be taxed. If there is no direction, then they are taxed according to the scale which would have been applicable if the proceedings had been an action in the county court (Workmen's Compensation Rules, 1907, r. 61 (1)). Special fees may be allowed under the County Court Rules, Ord. 53, rr. 7, 8 (Workmen's Compensation Rules, 1907, r. 61 (1)). The solicitor to whom costs are awarded may take the same out of court (*ibid.*, r. 64).

(*h*) *I.e.*, under the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. II. (14).

(*i*) Workmen's Compensation Rules, 1907, r. 65. If the arbitration is held before an arbitrator appointed by the judge, and the application is not made to him at the time, it must afterwards be made to the judge (*ibid.*, r. 65 (3)). For procedure, see *ibid.*, r. 65, Form 64.

(*k*) *Ibid.*, r. 66 (d). For procedure, see *ibid.*, r. 66.

(*l*) *Ibid.*, r. 66 (e), (f).

(*m*) *Sutton v. Great Northern Rail. Co.* (No. 2) (1910), 3 B. W. C. C. 160, C. A.

(*n*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 12 (1); see Order of Secretary of State dated 15th January, 1908; Ruegg, Employers' Liability and Workmen's Compensation, 8th ed., 906.

(*o*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 55).

(*p*) Workmen's Compensation Rules, r. 81.

584. Money paid into one county court may be transferred to any other, whether situate in the same part of the United Kingdom or not (*q*). Money in court.

585. Compensation may be invested by the registrar in the Post Office Savings Bank, or in the purchase of an annuity from the National Debt Commissioners through the Post Office, or placed on deposit in the Post Office Savings Bank, and this notwithstanding that it exceeds the amount allowed by statute (*r*). It is to be paid out only on the order of the Treasury, or, subject to regulations, by order of the judge or registrar (*s*). This provision does not prevent the persons entitled to the compensation investing other money in the Post Office Savings Bank (*t*). Investment of compensation.

586. The duty of the judge, or arbitrator appointed by him, is part of the duties of the county court (*u*). Procedure.

The filing and service of documents and notices is prescribed by the Rules (*a*).

Procedure, when not provided for by the Rules made under the Act (*b*), is governed by the general procedure and Rules of the county court, so far as such procedure is applicable to proceedings by way of arbitration (*c*).

The forms attached to the Rules may be used or any other forms which are appropriate (*d*). The registrar or his clerk must give assistance to any illiterate person in filling up the forms (*e*).

587. A convention (*f*) with France exists by which British subjects and their dependants, meeting with accidents in the course of their employment in that country, are to enjoy the benefits given to French citizens by the legislation in force there, in regard to the liability of employers in respect of such accidents. Reciprocally, French citizens who meet with accidents in England have the benefit of the legislation in force in England (*g*). Anglo-French convention.

His Majesty may, by Order in Council, modify the Act (*b*) in such manner as may be necessary to give effect to the convention (*h*).

(*q*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. I. (6); Workmen's Compensation Rules, 1907, r. 76.

(*r*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. I. (10), (11). *Ibid.*, Sched. I. (12).

(*t*) *Ibid.*, Sched. I. (13).

(*u*) *Ibid.*, Sched. II. (12).

(*a*) Workmen's Compensation Rules, 1907, r. 77.
Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58).
Workmen's Compensation Rules, 1907, r. 80.

(*d*) *Ibid.*, r. 84.

(*e*) *Ibid.*, r. 85 (2) (Rules of 31st March, 1911).

(*f*) Concluded 3rd July, 1909; see Order in Council, 22nd November, 1909 (Statutory Rules and Orders, 1909 (No. 1372—444), Master and Servant); see Ruegg, Employers' Liability and Workmen's Compensation, 8th ed., 912

(*g*) For procedure, see Workmen's Compensation Rules, rr. 86—93, Forms 55A, 56B, 57B, 50, 51, 57C, 57D, 58A, 59B, 63 (Rules of 31st March, 1911), and see p. 160, *ante*.

(*h*) Workmen's Compensation (Anglo-French Convention) Act, 1909 (9 Edw. 7, c. 16). Such an Order has been made; see note (*f*), *supra*.

Part X.—Liabilities of the Master to Third Persons.

SECT. 1. General Principles.

SECT. 1.—*General Principles*

SUB-SECT. 1.—*In Contract.*

Express authority necessary.

588. Where a servant, acting under the express instructions of his master, enters into a contract with a third person, the master is liable to the third person upon the contract, provided that the servant, in making the contract, has strictly observed the tenor of his instructions (*i*). If, therefore, the servant, without the knowledge of his master, departs from his instructions (*k*) and makes a contract different from that which he was in fact authorised to make, the master is not liable merely because of the existence of the original authority (*l*). Thus, a servant who is authorised to buy goods on behalf of his master must, in the absence of circumstances pointing to a contrary conclusion (*m*), buy them for cash (*n*); he cannot, therefore, by buying them on credit, unless authorised to do so, render the master liable to pay for them (*o*). Even the fact that the master takes the benefit of his servant's contract does not necessarily impose any liability upon the master under it, since he may be unaware that the contract, the benefit of which he takes, differs in its terms from the contract which he authorised (*p*). If, therefore, he has arranged that the servant is to pay for

(*i*) *Metcalfe* v. *Lumsden* (1844), 1 Car. & Kir. 309; *Helyear* v. *Hawke* (1803), 5 Esp. 72; compare *Hambro* v. *Burnand*, [1904] 2 K. B. 10, C. A.; *Gretton* v. *Mees* (1878), 7 Ch. D. 839; and see also, generally, title AGENCY, Vol. I., pp. 201 *et seq.*

(*k*) *Collen* v. *Gardner* (1856), 21 Beav. 540.

(*l*) *Acey* v. *Fernie* (1840), 7 M. & W. 151. As to the responsibility of a master who employs an illiterate servant to enter into a contract which necessarily involves the signing of a written document, see *Foreman* v. *Great Western Rail. Co.* (1878), 38 L. T. 851.

(*m*) *Maunder* v. *Conyers* (1817), 2 Stark. 281; *Summers* v. *Solomon* (1857), 7 E. & B. 879; see, further, p. 246, *post* No authority to pledge the master's credit is to be implied from the mere necessity of the case; see title AGENCY, Vol. I., p. 165; *Hautayne* v. *Bourne* (1841), 7 M. & W. 595 (where money was borrowed for the purpose of preventing a distress; as to the rights of a lender in such a case, see *Bannatyne* v. *MacIver*, [1906] 1 K. B. 103, C. A.).

(*n*) *Wright* v. *Glyn*, [1902] 1 K. B. 745, C. A.; *Busby* v. *Scarlett* (1803), 5 Esp. 76; *Stubbing* v *Heintz* (1791), Peake, 66 [47].

(*o*) *Maunder* v. *Conyers, supra; Stubbing* v. *Heintz, supra; Pearce* v. *Rogers* (1800), 3 Esp. 214. The same principle applies when the servant is authorised to sell goods on his master's behalf (*Kaye* v. *Brett* (1850), 5 Exch. 269; *Curlewis* v. *Birkbeck* (1863), 3 F. & F. 894; *Howard* v. *Chapman* (1831), 4 C. & P. 508); or to receive payment (*Thorold* v. *Smith* (1706), 11 Mod. Rep. 87; compare *Barrett* v. *Deere* (1828), Mood. & M. 200; *Williams* v. *Goodwin* (1826), 2 C. & P. 257) A servant who is authorised to receive payment by cheque may take a cheque payable to himself, provided that it is honoured (*Walker* v. *Barker* (1900), 16 T. L. R. 393; compare *Hogarth* v *Wherley* (1875), L. R. 10 C. P. 630). As to the effect of tender of payment to a servant, see *Moffat* v. *Parsons* (1814), 5 Taunt. 307.

(*p*) But if he takes the benefit of his servant's contract with knowledge of the facts, his conduct amounts to a ratification of the contract as made (*Bristow* v. *Whitmore* (1861), 9 H. L. Cas 391), and see p. 245, *post*.

the goods himself (*q*), or if he has given the servant the money to pay for them (*r*), the failure of the servant to pay for the goods in accordance with his instructions does not of itself render the master liable, even though the goods are in fact used for the master's purposes (*s*). Where, however, the contract is capable of severance, the master remains liable to the extent to which the contract, as actually made, is in accordance with his instructions, though his liability extends no further (*a*).

When authority implied.

589. The master is not, as a general rule, liable upon the contracts entered into by his servant without express authority, since the relation of master and servant does not in itself confer on the servant an implied authority to bind his master (*b*). An authority to bind the master may, however, be implied from the circumstances of the particular case, and the master will be then liable notwithstanding that the servant disobeyed his instructions (*c*).

Estoppel.

590. Where the master is aware that the servant is making a particular contract on his behalf and does not interfere, he is precluded from afterwards denying liability on the ground that the servant had no authority to make the contract in question, since he has by his conduct held out his servant to the person with whom the contract is made as having authority to make it (*d*).

Ratification.

591. Where the unauthorised contract is afterwards ratified by the master with full knowledge of its terms, he is liable upon it (*e*). He cannot, after ratification, rely either upon the defence that the servant had no authority to contract on his behalf (*f*), or upon the defence that the servant departed from his instructions

(*q*) *Wright* v. *Glyn*, [1902] 1 K. B. 745, C. A., commenting on *Precious* v. *Abel* (1795), 1 Esp. 350, and *Rimell* v. *Sampayo* (1821), 1 C. & P. 254.

(*r*) *Rusby* v. *Scarlett* (1803), 5 Esp. 76; *Miller* v. *Hamilton* (1832), 5 C. & P. 433. But it is otherwise where the master authorises the servant to buy on credit and the servant misappropriates the money which the master afterwards gives him to pay with (*Rusby* v. *Scarlett*, *supra*).

(*s*) *Stubbing* v. *Heintz* (1791), Peake, 66 [47]; *Maunder* v. *Conyers* (1817), 2 Stark. 281; *Pearce* v. *Rogers* (1800), 3 Esp. 214.

(*a*) *Hunter* v. *Berkeley* (*Countess Dowager*) (1836), 7 C. & P. 413 (where the defendant was also held entitled to set off a previous payment made under a contract which had been varied without her knowledge); compare *Bute* (*Marchioness*) v. *Mason*, *Ex parte Heard* (1819), 7 Moo. P. C. C. 1.

(*b*) *Hiscox* v. *Greenwood* (1802), 4 Esp. 174, *Maunder* v. *Conyers*, *supra*; *Waters* v. *Brogden* (1827), 1 Y. & J. 457. The master is not in any event liable if the third person looked exclusively to the servant (*Williamson* v. *Barton* (1862), 7 H. & N. 899).

(*c*) As the liability of the master depends on the application of the general principles of agency, reference should be made to title AGENCY, Vol. I., pp. 164 *et seq.*

(*d*) *Williamson* v. *Barton*, *supra* (where the court was equally divided on the facts); and see title AGENCY, Vol. I., pp. 158, 159; and, generally, title ESTOPPEL, Vol. XIII., pp. 388 *et seq.*

(*e*) *Bristow* v. *Whitmore* (1861), 9 H. L. Cas. 391. In accordance with the same principle the master may ratify an unauthorised contract and enforce it (*Foster* v. *Bates* (1843), 12 M. & W. 226). As to ratification generally, see title AGENCY, Vol. I., pp. 173 *et seq.*

(*f*) Compare *Bird* v. *Brown* (1850), 4 Exch. 786.

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and made a contract differing from that which he was authorised to make (*g*). It is essential, however, that the master should at the time of ratification be fully aware of the facts (*h*). Thus, if a servant, authorised to buy goods on the master's behalf, buys them, in excess of his authority, on credit, the retention of the goods by the master, in ignorance of the fact that his credit was pledged, cannot be treated as a ratification (*i*).

Conduct of master.

592. Where the master, from time to time, allows his servant to make contracts of a particular class on his behalf without express authority, or ratifies them when made, without notifying the person with whom they were made of the fact that they were made without authority, the conduct of the master may amount to a representation to such person (*k*) that the servant has authority to make contracts of that class on his master's behalf (*l*).

Apparent scope of authority:

593. Where the servant, whilst acting in the ordinary course of his employment on his master's behalf, makes a contract which falls within the apparent scope of his authority, the master cannot escape liability on the ground that he did not authorise the making of the contract (*m*), nor even on the ground that he forbade his servant to make it (*n*). All persons dealing with the servant are entitled to assume, unless they have notice to the contrary (*o*), that he possesses the authority which it is usual for a servant in his position to possess (*p*), and his master, by placing him in that position, impliedly holds him out as having such authority (*q*). Where, therefore, it is sought upon this ground to fix the master with liability upon his servant's contract it is necessary to take into consideration the following matters, namely :—

(1.) nature of contract;

(1) The nature of the contract. The contract must be a contract

(*g*) *Bristow* v. *Whitmore* (1861), 9 H. L. Cas. 391.

(*h*) Compare *Savery* v. *King* (1856), 5 H. L. Cas. 627; *Spackman* v. *Evans* (1868), L. R. 3 H. L. 171; *Marsh* v. *Joseph*, [1897] 1 Ch. 213, C. A.; *La Banque Jacques-Cartier* v. *La Banque d'Epargne de la Cité et du District de Montreal* (1887), 13 App. Cas. 111, P. C.

(*i*) *Wright* v. *Glyn*, [1902] 1 K. B. 745, C. A.; *Rushy* v. *Scarlett* (1803), 5 Esp. 76; *Stubbing* v. *Heintz* (1791), Peake, 66 [47]; *Maunder* v. *Conyers* (1817), 2 Stark. 281; *Pearce* v. *Rogers* (1800), 3 Esp. 214.

(*k*) *Farquharson Brothers* v. *King & Co.*, [1902] A. C. 325 and see titles AGENCY, Vol. I., pp. 158 *et seq.*, 204 *et seq.*; ESTOPPEL, Vol. XIII., pp. 382, 383.

(*l*) *Hazard* v. *Treadwell* (1722) 1 Stra. 506; *Todd* v. *Robinson* (1825), Ry. & M. 217; *Spooner* v. *Browning* (1898), 78 L. T. 98, C. A. (where it was held on the facts that there had been no holding out by the master).

(*m*) *Richardson* v. *Cartwright* (1814), 1 Car. & Kir. 328; *Nickson* v. *Brohan* (1713), 10 Mod. Rep. 109; *Smith* v. *Hull Glass Co.* (1852), 11 C. B. 897.

(*n*) *Edmunds* v. *Bushell* (1865), L. R. 1 Q. B. 97; compare *Montaignac* v. *Shitta* (1890), 15 App. Cas. 357, P. C., where the authority was only to be exercised in certain circumstances; and see title AGENCY, Vol. I., pp. 164, 201.

(*o*) *Jordan* v. *Norton* (1838), 4 M. & W. 155; compare *International Sponge Importers, Ltd.* v. *Watt (Andrew) & Sons*, [1911] A. C. 279.

(*p*) *Watteau* v. *Fenwick*, [1893] 1 Q. B. 346, C. A.; *Richardson* v. *Cartwright*, *supra*; *Smith* v. *Hull Glass Co.*, *supra*; *Howard* v. *Sheward* (1866), L. R. 2 C. P. 148; compare *Barrett* v. *Deere* (1828), Mood. & M. 200.

(*q*) *Miller* v. *Hamilton* (1832), 5 C. & P. 433; *Brooks* v. *Hassall* (1883), 49 L. T. 569, with which contrast *Brady* v. *Todd* (1861), 9 C. B. (N. S.) 592; *Real and Personal Advance Co.* v. *Phalempin* (1893), 9 T. L. R. 569, C. A.

the making of which is incidental to the duties which the servant is employed to perform (*r*).

(2) The circumstances of the servant's employment. The implied authority of a servant must, as a matter of course, vary according to the nature of the servant's employment, and need not necessarily include an authority to contract at all. Servants are of different grades, and the authority to be implied in the case of one servant may be more extensive than in the case of another holding a more subordinate position (*s*). The servant may be employed to perform a particular duty only, in which case he has no general authority to bind his master by contract (*t*). If the making of a particular class of contracts is incidental to the duty which he is employed to perform, any contract of that class will bind his master, on the ground that an authority to make it is to be implied from the nature of his employment (*a*). Where, however, the contract belongs to a different class, the master is not liable, since his servant is no longer acting in the course of his employment, and has therefore no implied authority to make it (*b*). If, on the other hand, the servant is given a general authority to conduct his master's business, his authority is wider in its scope, and the master will be liable upon all contracts made by the servant in the ordinary course of business (*c*).

(n) circumstances of servant's employment;

(3) The business of the master. The business of the master must also be taken into consideration, since all servants employed to perform the same duty do not necessarily possess the same implied authority. Thus, a servant who is employed to sell a horse on behalf of his master has no implied authority to give a warranty, if his master is a private person (*d*), though if his master is a

(m) business of master;

(*r*) *Richardson* v. *Carturight* (1844), 1 Car. & Kir. 328; *Graves* v. *Masters* (1883), Cab. & El. 73, *Smith* v *Hull Glass Co* (1852), 11 C. B 897; *Real and Personal Advance Co.* v. *Phalempin* (1893), 9 T. L. R. 569, C. A.; compare *Sanderson* v. *Bell* (1831), 2 Cr & M. 304.

(*s*) Contrast *Walker* v. *Great Western Rail. Co.* (1867), L. R. 2 Exch. 228, with *Cox* v. *Midland Counties Rail. Co* (1849), 3 Exch. 268; and compare *Lanyan* v. *Great Western Rail. Co* (1873), 30 L. T. 173, Ex Ch.

(*t*) *Cox* v. *Midland Counties Rail. Co.*, *supra*

(*a*) *Richardson* v. *Carturight*, *supra*. The fact that the master has previously ratified similar contracts made by servants holding similar positions to that of the servant in question is evidence of the servant's authority (*Cox* v. *Midland Counties Rail. Co.*, *supra*); compare *Thorold* v. *Smith* (1706), 11 Mod. Rep. 87.

(*b*) *Hawtayne* v. *Bourne* (1841), 7 M. & W. 595; *Linford* v. *Provincial Horse and Cattle Insurance Co.* (1864), 34 Beav. 291; *Reynolds* v. *Jex* (1865), 7 B. & S. 86; *A.-G.* v. *Jackson* (1846), 5 Hare, 355; *Re Southport and West Lancashire Banking Co.* (1885), 1 T. L. R. 204, C. A; *Re Cunningham & Co., Ltd., Simpson's Claim* (1887), 36 Ch. D. 532; compare *A.-G.* v. *Briggs*, *A.-G.* v. *Birmingham and Oxford Junction Rail. Co.* (1855), 1 Jur. (N. S.) 1084.

(*c*) *Fenn* v. *Harrison* (1790), 3 Term Rep. 757, 760. *East India Co.* v. *Hensley* (1794), 1 Esp. 112; *Walker* v. *Great Western Rail. Co.*, *supra*; *Smith* v. *Hull Glass Co*, *supra*; *Myers* v. *Willis* (1856), 18 C. B 886; *Summers* v. *Solomon* (1857), 7 E. & B. 879; *Totterdell* v. *Fareham Brick Co* (1866), L. R 1 C. P. 674; *Sandeman* v. *Scurr* (1866), L. R. 2 Q. B. 86; *Geake* v. *Jackson* (1867), 36 L. J. (C. P.) 108; *Beer* v. *London and Paris Hotel Co* (1875), L. R. 20 Eq. 412, *Watteau* v. *Fenwick*, [1893] 1 Q B. 346, with which contrast *Daun* v. *Simmins* (1879), 41 L. T. 783, C. A (where the servant's authority was limited by usage).

(*d*) *Brady* v. *Todd* (1861), 9 C. B. (N S.) 592; compare *Helyear* v. *Hawke*

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horse-dealer a warranty given by his servant will bind the master, even though given contrary to his express instructions (*e*). Where, however, the master carries on a particular business, it is to be presumed that his servants possess the authority usually possessed by other servants in a similar position in the same kind of business (*f*).

(iv.) express prohibition.

(4) The express instructions of the master. The master is bound by all contracts falling within the apparent scope of the servant's authority, notwithstanding that he has by express instructions limited his authority or prohibited its exercise altogether (*g*). A person who is acquainted with the facts cannot, however, hold the master liable upon any contract made in excess of the servant's real authority (*h*).

Notice of determination of authority.

594. Where the servant has been authorised to enter into contracts on his master's behalf, the master may be liable upon contracts made by his servant even after his employment has ended or the authority has been otherwise withdrawn. The liability of the master continues until the persons with whom the servant had authority to deal have received notice (*i*) that his authority has been withdrawn (*k*). It is immaterial whether the original authority was express (*l*), or whether it was to be implied from the servant's employment (*m*) or from the conduct of the master (*n*).

SUB-SECT. 2.—*In Tort.*

Express authority.

595. Where the master expressly authorises his servant to do a particular act, which is in itself a tort (*o*), or which necessarily results in a tort (*p*), the master is liable to an action of tort at the suit of the person injured. His liability is equally clear where he ratifies a tort committed by his servant without his authority (*q*).

(1803), 5 Esp. 72 (where the authority of the servant extended to giving a warranty); see *Miller* v. *Lauton* (1864), 15 C. B. (N. S.) 834.

(*e*) *Howard* v. *Sheward* (1866), L. R. 2 C. P. 148.

(*f*) See *Cox* v. *Midland Counties Rail. Co.* (1849), 3 Exch. 268; compare *Reynolds* v. *Jex* (1865), 7 B. & S. 86.

(*g*) *Smith* v. *M'Guire* (1858), 3 H. & N. 554, 561; *Page* v. *Great Northern Rail. Co* (1868), 2 I. R. C. L. 228.

(*h*) *Jordan* v. *Norton* (1838), 4 M. & W. 155.

(*i*) It is not sufficient to give notice to a servant of a person with whom the servant has dealt on behalf of his master (*Gratland* v. *Freeman* (1800), 3 Esp. 85). But it may be inferred from circumstances such as the lapse of time, or the failure to send in accounts to the master, that such person is aware of the revocation of authority (*Stavely* v. *Uzielli* (1860), 2 F. & F. 30); and see title AGENCY, Vol. I., pp. 235, 236.

(*k*) *Aste* v. *Montague* (1858), 1 F. & F. 264; compare —— v. *Harrison* (1699), 12 Mod. Rep 346.

(*l*) Compare *Curlewis* v. *Birkbeck* (1863), 3 F. & F. 894.

(*m*) *Aste* v. *Montague*, *supra*.

(*n*) *Stavely* v. *Uzielli*, *supra*; *Summers* v. *Solomon* (1857), 7 E. & B. 879.

(*o*) *British Mutual Banking Co* v. *Charnwood Forest Rail. Co.* (1887), 18 Q. B. D. 714, C. A., *per* Lord ESHER, M.R., at p. 717. For the principles of tort, see title TORT

(*p*) *Gregory* v. *Piper* (1829), 9 B. & C. 591; compare *Pitts* v. *Kingsbridge Highway Board* (1871), 25 L. T. 195

(*q*) *Wilson* v. *Tumman* (1846), 6 Man. & G. 236; *Lewis* v. *Read* (1845), 13 M. & W. 834; *Hilbery* v. *Hatton* (1864), 2 H. & C. 822; *Carter* v.

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596. Where the act which the servant is expressly authorised to do is lawful, the master is nevertheless responsible for the manner in which the servant executes his authority (*r*). If, therefore, the servant does the act in such a manner as to occasion injury to a third person, the master cannot escape liability on the ground that he did not actually authorise the particular manner in which the act was done (*s*), or even on the ground that the servant was acting on his own behalf and not on that of his master (*t*).

Manner of executing authority.

597. In order to render the master liable for the torts committed by his servant it is not, however, necessary to prove that the servant was acting under express authority from his master (*a*). The liability of the master extends to all torts committed by the servant for the benefit of his master, within the apparent scope of his authority, and in the course of his employment (*b*). The relation of master and servant amounts to a representation by the master that the servant has authority to perform the duties which he is employed to perform, and to do such acts as are incidental to their performance (*c*). Where, therefore, a tort committed by the servant falls within the scope of the authority to be implied from his employment, the master cannot escape liability on the ground that he gave his servant no authority to commit torts (*d*), or even on the ground that he had expressly prohibited the servant from committing the tort in question (*e*). Nor is it any defence for the master to show that the tort would not have been committed if the

Apparent scope of authority.

St. Mary Abbots, Kensington, Vestry (1900), 64 J. P. 548, C. A.; and see p. 255, *post*. As to the requisites of ratification, see title AGENCY, Vol. I., p. 173.

(*r*) *Freeman* v. *Rosher* (1849), 13 Q. B. 780; *Hatch* v. *Hale* (1850), 15 Q. B. 10; *Tucker* v. *Aylesbridge Highway Board* (1888), 53 J. P. 87; compare *Harry* v. *Rickman and Sutcliffe* (1831), 1 Mood. & R. 126; *Smith* v. *Goodwin* (1833), 4 B. & Ad. 413. Apart from the relation of master and servant, a person directing another to do a particular act is not necessarily responsible as to the manner in which it is done (*Lucas* v. *Mason* (1875), L. R. 10 Exch. 251).

(*s*) See p. 250, *post*.

(*t*) *British Mutual Banking Co.* v. *Charnwood Forest Rail. Co.* (1887), 18 Q. B. D. 714, C. A.; *Re Mutual Aid Permanent Benefit Building Society, Ex parte James* (1883), 49 L. T. 530; compare *Hambro* v. *Burnand*, [1904] 2 K. B. 10, C. A.

(*a*) But there must be evidence that the parties stood in the relation of master and servant (*Powell* v. *M'Glynn and Bradlaw*, [1902] 2 I. R. 154, C. A. (where it was held that the existence of the relation was not to be inferred from mere offer to pay expenses after the accident).

(*b*) *Limpus* v. *London General Omnibus Co.* (1862), 1 H. & C. 526, Ex. Ch., *per* WILLES, J., at p. 539; *Barwick* v. *English Joint Stock Bank* (1867), L. R. 2 Exch. 259, Ex. Ch., *per* WILLES, J., at p. 265, approved in *Mackay* v. *Commercial Bank of New Brunswick* (1874), L. R. 5 P. C. 394, and in *Lloyd* v. *Grace, Smith & Co.*, [1911] 2 K. B. 489, C. A.; see also *Smith* v. *Martin and Kingston-upon-Hull Corporation*, [1911] 2 K. B. 775, C. A., and pp. 252 *et seq.*, *post*. In accordance with the same principle, where *scienter* is necessary to make the master liable, the knowledge of the servant may be imputed to the master (*Baldwin* v. *Casella* (1875), L. R. 7 Exch. 325); see title ANIMALS, Vol. I., p. 373.

(*c*) See *Smith* v. *General Motor Cab Co., Ltd.*, [1911] A. C. 188, and p. 254, *post*.

(*d*) *Barwick* v. *English Joint Stock Bank, supra*; see *Glasgow Corporation* v. *Lorimer*, [1911] A. C. 209; and p. 254, *post*.

(*e*) *Limpus* v. *London General Omnibus Co., supra*; see *Gordon* v. *Rolt* (1849), 4 Exch. 365, *per* ROLFE, B., at p. 367, and p. 252, *post*.

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servant had not exceeded his instructions (*f*). The master has put the servant into a position to do a particular class of acts on his behalf (*g*), and he must therefore accept responsibility for his doing of any such act by his servant, provided that it is done in furtherance of the master's business and for the master's interest (*h*). Where, however, the servant merely avails himself of the opportunity afforded by his employment to commit the tort solely for his own purposes, the master is not liable (*i*).

Crime.

598. In accordance with the same principles, the master is not exempt from liability in tort (*k*) because his servant's act amounts to a crime, provided that it is an act for which he would otherwise be liable (*l*). Where, however, the commission of the crime has the effect of severing the connection between the master and his servant, or otherwise falls outside the scope of the servant's employment, the master is not liable (*m*).

Two classes of tortious acts:

599. For the purpose of determining the master's responsibility for the torts of his servant (*n*), it is necessary to distinguish two classes of tortious acts, namely:

(1) Acts which are tortious because of the manner in which they are performed;

(2) Acts which are tortious in themselves.

(1) Lawful act tortiously performed.

600. It is the duty of the master, as regards third persons (*o*), to employ servants reasonably competent to discharge the duties of their employment (*p*). Where, therefore, a servant in the course of his employment does an act which he is clearly authorised to do, the master is responsible for the manner in which the act is done (*q*); and if, through want of due care, skill, or diligence on the part of the servant, whether in the use of the master's property (*r*) or

(*f*) *Hatch* v. *Hale* (1850), 15 Q. B. 10.

(*g*) *Barwick* v. *English Joint Stock Bank* (1867), L. R. 2 Exch. 259, *per* WILLES, J., at p. 266; compare *Seymour* v. *Greenwood* (1861), 7 H. & N. 355, Ex. Ch.

(*h*) See p. 256, *post*.

(*i*) *British Mutual Banking Co.* v. *Charnwood Forest Rail. Co.* (1887), 18 Q. B. D. 714, C. A.; see *Boyle* v. *Ferguson* (*J. B.*), *Ltd.*, [1911] 2 I. R. 489, and p. 256, *post*.

(*k*) As to the master's own criminal responsibility, see p. 257, *post*

(*l*) *Dyer* v. *Munday*, [1895] 1 Q. B. 742, C. A.; see *Osborn* v. *Gillett* (1873), L. R. 8 Exch. 88.

(*m*) *Cheshire* v. *Bailey*, [1905] 1 K. B. 237, C. A., distinguishing *Abraham* v. *Bullock* (1902), 86 L. T. 796; compare *Shaw* v. *Great Western Rail. Co.*, [1894] 1 Q. B. 373.

(*n*) As to the liability of particular classes of masters, see titles *passim*. As to tort in general, see title TORT.

(*o*) Including licensees on the master's premises (*Gallagher* v. *Humphrey* (1862), 6 L. T. 684); see, *contra*, *Southcote* v. *Stanley* (1856), 1 H. & N. 247, *per* POLLOCK, C.B., at p. 249. As to the master's duty as regards his other servants, see pp. 128 *et seq.*, *ante*.

(*p*) *Wanstall* v. *Pooley* (1841), 6 Cl. & Fin. 910, n.; *Bartonshill Coal Co.* v. *Reid* (1858), 3 Macq. 266, H. L.; *The "Halley"* (1868), 5 Moo. P. C. C. (N. S.) 262, *Swainson* v. *North Eastern Rail. Co.* (1878), 3 Ex. D. 341, C. A.

(*q*) See note (*r*), p. 249, *ante*, and the cases cited *infra*.

(*r*) *White* v. *Boulton* (1791), Peake, 113 [81]; *M'Manus* v. *Crickett* (1800), 1 East, 106; *Sharrod* v. *London and North Western Rail. Co.* (1849), 7 Dow. & L. 213; *Chandler* v. *Broughton* (1832), 1 Cr. & M. 29; *Green* v. *London General Omnibus Co.* (1859), 7 C. B. (N. S.) 290; *Abraham* v. *Bullock*, *supra*.

management of his business (*s*), or otherwise (*t*), a third person sustains injury, either in property or in person, the master is liable as though he had caused the injury himself.

Breach of duty.

To render the master liable it is necessary to prove that the servant has been guilty of a breach of duty towards the person injured (*a*). In some cases the facts speak for themselves and raise a *primâ facie* presumption against the master of a breach of duty on the part of his servant (*b*). More frequently the mere fact that the third person has been injured by the act of his servant is not sufficient without taking into consideration the surrounding circumstances, since the act may not be wrongful in itself, and its tortious character may depend upon the circumstances in which it was done (*c*). In this case it is necessary for the person injured to prove affirmatively that the servant failed to show due care (*d*), skill (*e*), or diligence (*f*). Thus, where a duty towards the third party to take care is shown, the master is responsible if his servant is shown to have been guilty of an error of judgment and mischief is occasioned thereby (*g*), or if he saw the danger and failed to give warning (*h*).

On the other hand, the master is not responsible where the injury

(*s*) *Giles* v. *Taff Vale Rail. Co.* (1853), 2 E. & B. 822, Ex. Ch.; "*Apollo*" (*Owners*) v. *Port Talbot Co., The* "*Apollo*," [1891] A. C. 499.

(*t*) *Lunt* v. *London and North Western Rail. Co.* (1866), L. R. 1 Q. B. 277; *Whiteley* v. *Pepper* (1876), 2 Q. B. D. 276; *Self* v. *London, Brighton, and South Coast Rail. Co.* (1880), 42 L. T. 173, C. A.; *Foreman* v. *Canterbury Corporation* (1871) L. R. 6 Q. B. 214; *Cooke* v. *Midland Great Western Railway of Ireland*, [1909] A. C. 229, considered in *Schofield* v. *Bolton Corporation* (1910), 26 T. L. R. 230, C. A.

(*a*) *Clarke* v. *Midland Rail. Co.* (1880), 43 L. T. 381; *Parker* v. *London General Omnibus Co* (1909), 26 T. L. R. 18, C. A.; *Simon* v. *London General Omnibus Co* (1907), 23 T. L. R. 463; *Hase* v. *London General Omnibus Co.* (1907), 23 T. L. R. 616; *Grand Trunk Railway of Canada* v. *Barnett*, [1911] A. C. 361, P. C.

(*b*) *Scott* v. *London Dock Co.* (1865), 3 H. & C. 596, Ex. Ch.; *Ward* v. *General Omnibus Co.* (1873), 42 L. J. (C. P.) 265, Ex. Ch.; *Walton (Isaac) & Co., Ltd.* v. *Vanguard Motor Bus Co., Ltd.*, *Gibbons* v. *Vanguard Motor Bus Co., Ltd.* (1908), 72 J. P. 505; *Chapronière* v. *Mason* (1905), 21 T. L. R. 633, C. A.; *Barnes Urban District Council* v. *London General Omnibus Co.* (1908), 100 L. T. 115.

(*c*) *North* v. *Smith* (1861), 10 C. B. (N. S.) 572.

(*d*) *Harris* v. *Costar* (1825), 1 C. & P. 636; *Ruddiman & Co.* v. *Smith* (1889), 60 L. T. 708.

(*e*) *Page* v. *Defries* (1866), 7 B. & S. 137.

(*f*) *Dudley* v. *Smith* (1808), 1 Camp. 167.

(*g*) *Jackson* v. *Tollett* (1817), 2 Stark. 37, *per* Lord ELLENBOROUGH, L.C., at p. 38, "Every person who contracts for the conveyance of others is bound to use the utmost care and skill, and, if through any erroneous judgment on his part, any mischief is occasioned, he must answer for the consequences . . . in order to subject the master to damages, it must appear that there has been something to blame on the part of his servant, and he is blameable if he has not exercised the best and soundest judgment on the subject; if he could have exercised a better judgment than he did, the owner is liable"; "*Apollo*" (*Owners*) v. *Port Talbot Co., The* "*Apollo*," *supra*; and see title CARRIERS, Vol. IV., p. 45; compare the liability as to carriage of goods, *ibid.*, p. 8.

(*h*) *Dudley* v. *Smith*, *supra*; but not if he was unaware of the danger and had no reason to anticipate it (*Simon* v. *London General Omnibus Co.*, *supra*, *Hase* v. *London General Omnibus Co.*, *supra*); and see title CARRIERS, Vol. IV., p. 45.

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is occasioned by inevitable accident (*i*), or where, though his servant has been guilty of a breach of duty, the proximate cause of the injury is not the servant's act but the contributory negligence of the person injured (*k*). Where, however, the injury, though actually occasioned by the wrongful act of a stranger, is ultimately attributable to the servant's breach of duty, by which the stranger was afforded an opportunity of doing the act in question, the master is responsible (*l*), though it is otherwise where the stranger's act is wholly unconnected with the servant's breach of duty (*m*).

Scope of authority

601. The master's liability depends upon the servant's failure adequately to discharge the duties which he is employed to perform (*n*). It is not sufficient to show that the relation of master and servant existed between the actual tortfeasor and the person sought to be made liable (*o*), or even that the act in the doing of which the third person was injured was done on the master's behalf (*p*). The act must be shown to fall within the scope of the servant's authority as being an act which he was employed to perform (*q*), or at least, which was incidental to his employment (*r*); and unless this is established, the action against the master will fail (*s*). The master cannot, however, escape responsibility where the act is otherwise one for which he is responsible, on the ground that he had forbidden the servant to do the act in the manner which produced the injury (*a*).

(*i*) *Aston* v. *Heaven* (1797), 2 Esp. 533; *Christie* v. *Griggs* (1809), 2 Camp. 79; *Crofts* v. *Waterhouse* (1825), 3 Bing. 319; *Holmes* v. *Mather* (1875), L. R. 10 Exch. 261.

(*k*) *Reynolds* v. *Tilling* (1903), 20 T. L. R. 57, C. A.; *Richmond* v. *Smith* (1828), 8 B. & C. 9; compare *Lingard* v. *Kirkpatrick* (1866), 15 L. T. 245; see title NEGLIGENCE. The master is liable if the servant could by taking reasonable care have avoided the accident (*Springett* v. *Ball* (1865), 4 F. & F. 172).

(*l*) *Illidge* v. *Goodwin* (1831), 5 C. & P. 190 (master liable for damage done by his horse and cart, due to a stranger striking the horse while left unattended by servant); *Engelhart* v. *Farrant & Co.*, [1897] 1 Q. B. 240, C. A. (servant leaving horse and cart contrary to instructions giving opportunity to a lad, employed, not to drive, but to deliver parcels, to drive on and thus collide with plaintiff's carriage).

(*m*) *McDowall* v. *Great Western Railway*, [1903] 2 K. B. 331, C. A.; *Murphy* v. *Great Northern Rail. Co.*, [1897] 2 I. R. 301, C. A.

(*n*) *Lamb* v. *Palk* (1840), 9 C. & P. 629; compare *The Calliope* (1889), 14 P. D. 138, C. A.; reversed, [1891] A. C. 11.

(*o*) See pp. 253, 256, *post*.

(*p*) *Barnett* v. *South London Tramways Co.* (1887), 18 Q. B. D. 815, C. A.; see p. 255, *post*.

(*q*) *Tebbutt* v. *Bristol and Exeter Rail. Co.* (1870), L. R. 6 Q. B. 73; *Barnett* v. *South London Tramways Co.*, *supra*; *Newlands* v. *National Employers' Accident Association* (1885), 54 L. J. (Q. B.) 428, C. A.; *Newwith* v. *Over Darwen Industrial Co-operative Society* (1894), 63 L. J. (Q. B.) 290. It is sufficient if the act, though not strictly falling within his ordinary duties, is habitually done by him without question (*Milner* v. *Great Northern Rail. Co.* (1884), 50 L. T. 367).

(*r*) *Ruddiman & Co.* v. *Smith* (1889), 60 L. T. 708; *Burns* v. *Poulsom* (1873), L. R. 8 C. P. 563; *Welch* v. *London and North-Western Rail. Co.* (1885), 34 W. R. 166.

(*s*) *London General Omnibus Co* v. *Booth* (1893), 63 L. J. (Q. B.) 244; *Beard* v. *London General Omnibus Co.*, [1900] 2 Q. B. 530, C. A.; compare *Lygo* v. *Newbold* (1854), 9 Exch. 302; *Murphy* v. *Caralli* (1864), 3 H. & C. 462.

(*a*) *Limpus* v. *London General Omnibus Co.* (1862), 1 H. & C. 526, Ex. Ch.; *Whatman* v. *Pearson* (1868), L. R. 3 C. P. 422; but see *Stevens* v. *Woodward*

Delegation.

602. The master may, in some cases, be responsible for the manner in which an act is done, even though it is done by a stranger (*b*) or by a servant acting outside the course of his employment (*c*), provided that the act was done with the permission of the servant whose duty it was to do it. In such case the master is not liable unless the servant himself is guilty of a breach of duty in allowing it to be done (*d*), and his breach of duty is in fact the effective cause of the injury (*e*).

Course of employment.

603. It is further necessary to show that the servant, in doing the act which occasioned the injury, was acting in the course of his employment (*f*). For this purpose it is not sufficient merely to show that the act is one which falls within the scope of his authority (*g*); the particular act must be shown to have been done by him in the capacity of servant and whilst engaged on his master's business (*h*). If at the time when the injury took place he was engaged, not on his master's business, but on his own, the relation of master and servant does not exist, and the master is not therefore liable to third persons for the manner in which it is performed, since he is in the position of a stranger (*i*). In this case it is immaterial whether the servant is using his master's property with his master's permission (*k*), so long as he is clearly acting on his own behalf (*l*), or whether he is using it surreptitiously, and is therefore, as regards his master, a trespasser (*m*). Where, however, the

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(1881), 6 Q. B. D. 318 (where the fact that the act was forbidden showed that it was outside the scope of the servant's authority); compare *Green* v. *Macnamara* (1859), 1 L. T. 9; *Harris* v. *Perry & Co.*, [1903] 2 K. B. 219, C. A. (where the act, though forbidden, was tacitly allowed); and see p. 219, *ante*.

(*b*) *Booth* v. *Mister* (1835), 7 C. & P. 66; but see *Mann* v. *Ward* (1892), 8 T. L. R. 699, C. A.; compare *Baker* v. *Snell*, [1908] 2 K. B. 825, C. A. (where, however, the liability depended on different principles).

(*c*) *Engelhart* v. *Farrant & Co.*, [1897] 1 Q. B. 240, C. A.

(*d*) A servant has no implied authority to engage a stranger to do work on behalf of his master, so as to render the master liable for the stranger's acts or defaults, except, perhaps, in a case of necessity (*Gwilliam* v. *Twist*, [1895] 2 Q. B. 84, C. A.); compare *Harris* v. *Fiat Motors, Ltd.* (1907), 23 T. L. R. 504, C. A.

(*e*) *Engelhart* v. *Farrant & Co.*, *supra*.

(*f*) *Whiteley* v. *Pepper* (1876), 2 Q. B. D. 276; *Page* v. *Defries* (1866), 7 B. & S. 137; *The Rhosina* (1885), 10 P. D. 131, C. A.; see *Cheshire* v. *Bailey*, [1905] 1 K. B. 237, *per* COLLINS, M.R., at p. 240, and titles AGENCY, Vol. I., p. 212, and BAILMENT, Vol. I., pp. 551, 553.

(*g*) *Ward* v. *General Omnibus Co.* (1873), 42 L. J. (C. P.) 265, Ex. Ch.

(*h*) *Mitchell* v. *Crasweller* (1853), 13 C. B. 237; *Wilson* v. *Owens* (1885), 16 L. R. Ir. 225, C. A.; compare *Goodman* v. *Kennell* (1827), 3 C. & P. 167.

(*i*) *Williams* v. *Jones* (1865), 3 H. & C. 602, Ex. Ch. (where a fire was occasioned by a carpenter lighting his pipe); *Sanderson* v. *Collins*, [1904] 1 K. B. 628, C. A.; *Dowling* v. *Robinson* (1909), 43 I. L. T. 210, C. A.; see *Boyle* v. *Ferguson* (*J. B.*), *Ltd.*, [1911] 2 I. R. 489.

(*k*) *Cormack* v. *Digby* (1876), 9 I. R. C. L. 557 (where the servant had borrowed his master's cart for his own purposes, and it was held that the master was not liable, although the servant had offered to bring back certain goods on his master's behalf and the master had agreed).

(*l*) *Sanderson* v. *Collins*, *supra*.

(*m*) *Joel* v. *Morison* (1834), 6 C. & P. 501; *Rayner* v. *Mitchell* (1877), 2 C. P. D. 357 (where it was held to be immaterial that the servant, after taking his master's cart for his own purposes, had called on his return journey for certain goodsbelonging to his master); *Sanderson* v. *Collins*, *supra*, distinguishing *Coupé Co.* v. *Maddick*, [1891] 2 Q. B. 413.

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servant, whilst using his master's property in the course of his employment, embarks upon business of his own, and the injury is occasioned afterwards, the liability of the master continues (*n*), unless the servant, in deviating from the business which he was employed to perform, can no longer be considered to be acting in the course of his employment, and must be regarded as engaged in a separate transaction (*o*).

(ii.) Acts tortious *per se*.

604. A master is responsible, not only for the manner in which his servants discharge the duties of their employment, but also for the acts done by them in the discharge of their duties, and the principles upon which the liability depends are, in the main, the same in both cases. In ascertaining the liability of a master, therefore, for an act which is in itself tortious, it is necessary in the first place to consider the nature of the servant's employment, and the extent of the authority to be implied therefrom (*p*). It is also necessary where the master is a corporation to take into consideration the powers conferred upon it by its constitution (*q*).

Absence of authority.

605. The master cannot escape liability by merely showing that the servant had no authority to commit (*r*), or even that he was expressly forbidden to commit (*s*), the tort in question.

Scope of employment.

606. If the act is one which, if lawful, would have fallen within the scope of the servant's employment (*t*), as being reasonably necessary for the due discharge of his duties (*a*), or the preservation

(*n*) *Patten* v. *Rea* (1857), 2 C. B. (N. S.) 606 (where the servant, who was driving a gig, was going a journey partly on his master's business and partly on private business of his own); *Sleath* v. *Wilson* (1839), 9 C. & P. 607; *Venables* v. *Smith* (1877), 2 Q. B. D. 279. The proprietor of a hackney carriage is, as regards persons using his carriage, to be regarded as master of the driver, even though the relation between them is in fact that of bailor and bailee, and he is therefore responsible for the manner in which the carriage is driven (*Powles* v. *Hider* (1856), 6 E. & B. 207; *Fowler* v. *Lock* (1872), L. R. 7 C. P. 272; *Venables* v. *Smith*, *supra*; distinguished in *King* v. *Spurr* (1881), 8 Q. B. D. 104, and approved in *King* v. *London Improved Cab Co.* (1889), 23 Q. B. D. 181, C. A.; *Keen* v. *Henry*, [1894] 1 Q. B. 292; *Gates* v. *Bill* (*R.*) *& Son*, [1902] 2 K. B. 38, C. A.; *Smith* v. *General Motor Cab Co.*, [1911] A. C. 188, *per* Lord ATKINSON, at p. 192 (taxi-cab)).

(*o*) *Storey* v. *Ashton* (1869), L. R. 4 Q. B. 476.

(*p*) *Bank of New South Wales* v. *Owston* (1879), 4 App. Cas. 270, P. C. It must be shown that the relation of master and servant exists (*Hoslin* v. *Agricultural Hall Co.* (1876), 1 C. P. D. 482, C. A.).

(*q*) *Poulton* v. *London and South Western Rail. Co.* (1867), L. R. 2 Q. B. 534; compare *Lane* v. *Royal Society for the Prevention of Cruelty to Animals* (1902), 18 T. L. R. 634 (where the act was authorised by the defendants' rules, though not expressly by their Act of Parliament); see *Glasgow Corporation* v. *Lorimer*, [1911] A. C. 209.

Barwick v. *English Joint Stock Bank* (1867), L. R. 2 Exch. 259, Ex. Ch.

(*s*) *Betts* v. *Neilson*, *Betts* v. *De Vitre* (1868), 3 Ch. App. 429, 441; *Limpus* v. *London General Omnibus Co.* (1862), 1 H. & C. 526, Ex. Ch. But the master may, by the orders which he gives, limit the scope of the servant's authority (*Walker* v. *South Eastern Rail. Co.*, *Smith* v. *Same* (1870), L. R. 5 C. P. 640; *Charleston* v. *London Tramways Co.* (1888), 4 T. L. R. 629, C. A.).

(*t*) *Giles* v. *Taff Vale Rail. Co.* (1853), 2 E. & B. 822, Ex. Ch.; *Haseler* v *Lemoyne* (1858), 5 C. B. (N. S.) 530; *Dyer* v. *Munday*, [1895] 1 Q. B. 742, C. A., with which contrast *Richards* v. *West Middlesex Waterworks Co.* (1885), 15 Q. B. D. 660.

(*a*) *Ashton* v. *Spiers and Pond* (1893), 9 T. L. R. 606, C. A.

of the master's interests (*b*), or otherwise incidental to the purposes of his employment (*c*), the master must accept responsibility, inasmuch as he has authorised the servant to do that particular class of act and is therefore precluded from denying the servant's authority to do the act complained of (*d*). If, on the other hand, the act is one which, even if lawful, would not have fallen within the scope of the servant's employment (*e*), or in the case of a corporation would have been *ultra vires* of the corporation, the master is not bound (*f*), unless the act is capable of being ratified (*g*) and is in fact ratified by him (*h*). The fact that the act which the servant has done would only be covered by his authority on the supposition that certain facts existed, and that they did not exist, does not excuse the master, provided that the servant acted on the belief that they did exist (*i*). On the other hand, the master is not liable merely because the servant, in doing the act, honestly believed that he was acting in his master's interests and intended the act to be for the master's benefit (*k*).

607. The master is not liable merely because the act falls within

Benefit of master.

(*b*) *Stevens* v. *Hinshelwood* (1891), 55 J. P. 341, C. A. In this case the authority of the servant to do the act may depend upon the exigency of the particular occasion (*Bank of New South Wales* v. *Owston* (1879), 4 App. Cas. 270, P. C.), and may cease to exist when the master's interests are no longer in danger (*Allen* v. *London and South Western Rail. Co.* (1870), L. R. 6 Q. B. 65; *Abrahams* v. *Deakin*, [1891] 1 Q. B. 516, C. A.; *Hanson* v. *Waller*, [1901] 1 K. B. 390); and see title AGENCY, Vol. I., p. 166.

(*c*) *Bayley* v. *Manchester, Sheffield, and Lincolnshire Rail. Co.* (1873), L. R. 8 C. P. 148, Ex. Ch.; *Lowe* v. *Great Northern Rail. Co.* (1893), 62 L. J. (Q. B.) 524.

(*d*) *Moore* v. *Metropolitan Rail. Co.* (1872), L. R. 8 Q. B. 36; *Lane* v. *Royal Society for the Prevention of Cruelty to Animals* (1902), 18 T. L. R. 634; *Farry* v. *Great Northern Rail Co.*, [1898] 2 I. R. 352.

(*e*) *Glasgow Corporation* v. *Lorimer*, [1911] A. C. 209; *Coleman* v. *Riches* (1865), 16 C. B. 104; *Edwards* v. *London and North Western Rail. Co.* (1870), L. R. 5 C. P. 445; *Walker* v. *South Eastern Rail. Co., Smith* v. *Same* (1870), L. R. 5 C. P. 640; *Great Western Rail. Co.* v. *Bunch* (1888), 13 App. Cas. 31; *Welch* v *London and North-Western Rail. Co.* (1885), 34 W. R. 166; *Knight* v. *North Metropolitan Tramways Co.* (1898), 78 L. T. 227; see also *Lumsden* v. *London and South-Western Rail. Co.* (1867), 16 L. T. 609; *Lyons* v. *Martin* (1838), 8 Ad. & El. 512; *Richards* v. *West Middlesex Waterworks Co.* (1885), 15 Q. B. D. 660.

(*f*) *Poulton* v. *London and South Western Rail. Co.* (1867), L. R. 2 Q. B. 534; and see titles AGENCY, Vol. I., p. 213; CORPORATIONS, Vol. VIII., p. 388.

(*g*) As to the requisites of ratification, see title AGENCY, Vol. I., pp. 173 *et seq.* As to ratification of unauthorised contracts, see p. 245. *ante.*

(*h*) *Lewis* v. *Read* (1845), 13 M. & W. 834; *Eastern Counties Rail. Co.* v. *Broom* (1851), 6 Exch. 314, Ex. Ch.; *Roe* v. *Birkenhead, Lancashire and Cheshire Junction Rail. Co.* (1851), 7 Exch. 36; *Knight* v. *North Metropolitan Tramways Co., supra; Carter* v. *St. Mary Abbots, Kensington, Vestry* (1900), 64 J. P. 548, C. A. The mere receipt of the benefit of the servant's act without knowledge of its nature does not amount to a ratification (*Freeman* v. *Rosher* (1849), 13 Q. B. 780; *Haseler* v. *Lemoyne* (1858), 5 C. B. (N. S.) 530).

(*i*) *Seymour* v. *Greenwood* (1861), 7 H. & N. 355, Ex. Ch.; *Bayley* v. *Manchester, Sheffield, and Lincolnshire Rail. Co., supra; Lowe* v. *Great Northern Rail. Co., supra; Bank of New South Wales* v. *Owston, supra; Furlong* v. *South London Tramways Co.* (1884), Cab. & El. 316; *Smith* v. *North Metropolitan Tramways Co.* (1891), 55 J. P. 630, C. A.; *Ashton* v. *Spiers and Pond* (1893), 9 T. L. R. 606, C. A.; *Lambert* v. *Great Eastern Railway*, [1909] 2 K. B. 776, C. A.

(*k*) *Bolingbroke* v. *Swindon Local Board* (1874), L. R. 9 C. P. 575; *Byrne* v. *Londonderry Tramway Co.*, [1902] 2 I. R. 457, C. A.

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the apparent scope of the servant's employment. In addition, it is necessary to show that the act was done by the servant in the course of his employment, and was intended to benefit the master (*l*) or to further his interests (*m*). Where the servant, in doing the act, was acting on his own behalf and for his own purposes, the master is not liable (*n*), even though the opportunity of doing the act arises out of, and is afforded by, the servant's employment (*o*). In such case the act of the servant is no longer covered by the implied authority which extends only to acts done on the master's behalf (*p*); the relation of master and servant as regards the particular act does not exist, and the servant is in the same position as a stranger (*q*).

Nature of tort immaterial.

608. Where the liability of the master is otherwise clear, the nature of the act committed by his servant is immaterial and the master is liable, whether the tort is an assault (*r*), a false imprisonment or arrest (*s*), a conversion (*t*), a trespass (*a*), an infringement of

(*l*) *Thompson* v. *Bell* (1854) 10 Exch. 10; *Thorne* v. *Heard and Marsh*, [1895] A. C. 495; *Lloyd* v. *Grace, Smith & Co.*, [1911] 2 K. B. 489, C. A., *per* FARWELL, L.J., at p. 507; compare *Re Japanese Curtains and Patent Fabric Co., Ex parte Shoolbred* (1880), 28 W. R. 339.

(*m*) *Ward* v. *General Omnibus Co.* (1873), 42 L. J. (C. P.) 265, Ex. Ch.

(*n*) *Croft* v. *Alison* (1831), 4 B. & Ald. 590, *Ward* v. *General Omnibus Co., supra; British Mutual Banking Co.* v. *Charnwood Forest Rail. Co.* (1887), 18 Q. B. D. 714, C. A.; *Smith* v. *Martin and Kingston-upon-Hull Corporation*, [1911] 2 K. B. 775, C. A.; compare *Ellis* v. *Turner* (1800), 8 Term Rep. 531.

(*o*) *Ruben* v. *Great Fingall Consolidated*, [1906] A. C. 439; *Whitechurch (George) Ltd.* v. *Cavanagh*, [1902] A. C. 117; *Lloyd* v. *Grace, Smith & Co., supra;* compare *Coleman* v. *Riches* (1855), 16 C. B. 104; and see *Boyle* v. *Ferguson (J. B.), Ltd.*, [1911] 2 I. R. 489 (where the servant's own pleasure was, on his admission in evidence, shown to be combined with his employer's benefit).

(*p*) *Richards* v. *West Middlesex Waterworks Co.* (1885), 15 Q. B. D. 660; *British Mutual Banking Co.* v. *Charnwood Forest Rail. Co., supra; Whitechurch (George), Ltd.* v. *Cavanagh, supra.*

(*q*) *Croft* v. *Alison, supra; Cheshire* v. *Bailey*, [1905] 1 K. B. 237, C. A.

(*r*) *Seymour* v. *Greenwood* (1861), 7 H. & N. 355, Ex. Ch.; *Eastern Counties Rail. Co.* v. *Broom* (1851), 6 Exch. 314, Ex. Ch. (corporation); *Bayley* v. *Manchester, Sheffield, and Lincolnshire Rail. Co.* (1873), L. R. 8 C. P. 148 (corporation); *Smith* v. *North Metropolitan Tramways Co.* (1891), 55 J. P. 630, C. A.; *Lowe* v. *Great Northern Rail. Co.* (1893), 62 L. J. (Q. B.) 524 (corporation); *Dyer* v. *Munday*, [1895] 1 Q. B. 742, C. A.; and see titles AGENCY, Vol. I., p. 212; CARRIERS, Vol. IV., p. 63; COMPANIES, Vol. V., pp. 309, 310; CORPORATIONS, Vol. VIII., pp. 386 *et seq.*). The liability of the master is not affected by the previous conviction of the servant in respect of the same assault (*Dyer* v. *Munday, supra;* but see *Wright* v. *London Omnibus Co* (1877), 2 Q. B. D. 271; and see title TRESPASS.

(*s*) *Goff* v. *Great Northern Rail. Co.* (1861), 3 E. & E. 672 (corporation); *Walker* v. *South Eastern Rail. Co., Smith* v. *Same* (1870), L. R. 5 C. P. 640 (corporation); *Moore* v. *Metropolitan Rail. Co.* (1872), L. R. 8 Q. B. 36 (corporation); *Furlong* v. *South London Tramways Co.* (1884), Cab. & El. 316 (corporation); *King* v. *Metropolitan District Rail. Co.* (1908), 72 J. P. 295 (corporation); and see title TRESPASS.

(*t*) *Jones* v. *Hart* (1698), 2 Salk. 441; *Duncan* v. *Surrey Canal (Proprietors)* (1821), 3 Stark. 50; *Yarborough* v. *Bank of England* (1812), 16 East, 6 (corporation); *Giles* v. *Taff Vale Rail. Co.* (1853), 2 E. & B. 822, Ex. Ch. (corporation); *Barnett* v. *Crystal Palace Co.* (1861), 4 L. T. 403 (corporation); and see title TROVER AND DETINUE. As to when an admission by a servant that the goods are in the possession of his master is admissible against the master, see *Garth* v. *Howard* (1832), 8 Bing. 451, *per* TINDAL, C.J., at p. 453.

(*a*) *Gregory* v. *Piper* (1829), 9 B. & C. 591; *Lyons* v *Martin* (1838), 8 Ad. & El. 512; and see title TRESPASS.

a patent (*b*), or a nuisance (*c*). A master, including a corporation (*d*), is even liable where the tort involves malice or guilty knowledge, as, for instance, in the case of malicious prosecution (*e*), libel or slander (*f*), or fraud (*g*).

SUB-SECT. 3.—*Criminal Liability.*

Express orders.

609. A master who expressly orders (*h*) or permits (*i*) his servant to do an act which is a crime, or who knowingly participates in the benefit of his servant's crime (*j*), or otherwise identifies himself with it (*k*), is criminally responsible although he did not do the act himself (*l*).

Nuisance.

610. If the act of his servant amounts to a nuisance the master (*m*) is liable to be indicted where the business upon which the servant

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(*b*) *Betts* v. *Neilson*, *Betts* v. *De Vitre* (1868), 3 Ch. App. 429, 441 (corporation); *Sykes* v. *Howarth* (1879), 12 Ch. D. 826; *Tonge* v. *Ward* (1869), 21 L. T. 480; and see title PATENTS AND INVENTIONS, compare *Hanley* v. *Fuld* (1835), 2 Cr. & M. 432 (infringement of right of ferry); and see title FERRIES, Vol. XIV., p. 561.

(*c*) *Rapier* v. *London Tramways Co.*, [1893] 2 Ch. 588, C. A. (corporation); and see title NUISANCE.

(*d*) See the cases cited *infra*; and title CORPORATIONS, Vol. VIII., p. 387. See also title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 235 *et seq.*

(*e*) *Bank of New South Wales* v. *Owston* (1879), 4 App. Cas. 270, P. C. (corporation), *Edwards* v. *Midland Rail. Co.* (1880), 6 Q. B. D. 287 (corporation); *Cornford* v. *Carlton Bank*, [1899] 1 Q. B. 392 (corporation); and see title MALICIOUS PROSECUTION AND PROCEDURE, Vol. XIX., p. 673.

(*f*) *Whitfield* v. *South Eastern Rail. Co.* (1858), E. B. & E. 115 (corporation); *Citizens' Life Assurance Co.* v. *Brown*, [1904] A. C. 423, P. C. (corporation, where the defence of privilege was rebutted on proof of actual malice in the servant); compare *Ellis* v. *National Free Labour Association* (1905), 7 F. (Ct. of Sess.) 629, *Nevill* v. *Fine Arts and General Insurance Co.*, [1895] 2 Q. B. 156, C. A., *Glasgow Corporation* v. *Lorimer*, [1911] A. C. 209, and see title LIBEL AND SLANDER, Vol. XVIII., pp. 617, 662 *et seq.*

(*g*) *Barwick* v. *English Joint Stock Bank* (1867), L. R. 2 Exch. 259, Ex. Ch. (corporation); *Mackay* v. *Commercial Bank of New Brunswick* (1874), L. R. 5 P. C. 394 (corporation), *Houldsworth* v. *City of Glasgow Bank* (1880), 5 App. Cas. 317 (corporation); and see title MISREPRESENTATION AND FRAUD, p. 710, *post.*

(*h*) *R.* v. *Bleasdale* (1848), 2 Car. & Kir. 765, *R.* v. *James* (1837), 8 C. & P. 131; *R.* v. *Michael* (1840), 9 C. & P. 356; *R.* v. *Mazeau* (1840), 9 C. & P. 676; *R.* v. *Manley* (1844), 1 Cox, C. C. 104; *R.* v. *Bull and Schmidt* (1845), 1 Cox, C. C. 281; *R.* v. *Bannen* (1844), 1 Car. & Kir. 295, *R.* v. *Clifford* (1845), 2 Car. & Kir. 202; *R.* v. *Giles* (1827), 1 Mood. C. C. 166; *R.* v. *Williams* (1842), Car. & M. 259; *R.* v. *Butcher* (1858), Bell, C. C. 6; *R.* v. *Dowey* (1868), 37 L. J. (M. C.) 52, C. C. R. As to the liability of the servant, see p. 278, *post.* As to the special rules applicable to criminal libel, see title LIBEL AND SLANDER, Vol. XVIII., p. 744.

(*i*) *R.* v. *Dixon* (1814), 3 M. & S. 11.

(*j*) Compare *R.* v. *Woodward* (1862), Le. & Ca. 122; and contrast *R.* v. *Dring* (1857), 6 W. R. 41.

(*k*) *R.* v. *Smith* (1855), 24 L. J. (M. C.) 135, C. C. R.; compare *R.* v. *Douglas* (1836), 7 C. & P. 644; *R.* v. *Shelton* (1850), 3 Car. & Kir. 119.

(*l*) See, further, titles AGENCY, Vol. I., p. 218; CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 234, 235. As to the criminal liability of companies and corporations, see titles COMPANIES, Vol. V., pp. 294, 311, 312; CORPORATIONS, Vol. VIII., pp. 390, 391.

(*m*) Including a corporation (*R.* v. *Great North of England Rail. Co* (1846), 9 Q. B. 315; *R.* v. *Birmingham and Gloucester Rail. Co.* (1842), 3 Q. B. 223).

SECT. 1. General Principles.

is employed necessarily involves the commission of the nuisance (*n*), or where the servant is allowed by the master to conduct the business in such a way as to create it (*o*). He is also liable where the nuisance is committed in the ordinary course of the servant's employment on his behalf (*p*), and he cannot escape on the ground that he was ignorant of the nuisance, and that its commission was inconsistent with his orders (*q*). Except in these cases, a master is not, as a general rule, criminally responsible for any act committed by his servant, since it is not to be inferred that he gave the servant authority to commit crimes because he has employed him in the conduct of the business (*r*), and it is immaterial whether the act is one for which he is liable civilly in an action for damages (*s*).

Statutory liability.

611. Where the act of the servant is criminal because it contravenes the provisions of a statute, the liability of the master depends upon the language of the particular statute. For this purpose it is necessary to distinguish the following cases, namely:—

(1) The statute may make the master liable for his servant's act in any event (*t*). In this case it is only necessary to show that the act was done by the servant in the course of his employment (*a*). The liability of the master arises solely from his relation to the servant (*b*), and the absence of personal guilt is immaterial (*c*). He

(*n*) *R.* v. *United Kingdom Electric Telegraph Co.* (1862), 3 F. & F. 73; *R.* v. *Train* (1862), 2 B. & S. 640.

(*o*) *Barnes* v. *Akroyd* (1872), L. R. 7 Q. B. 474.

(*p*) *R.* v. *Medley* (1834), 6 C. & P. 292.

(*q*) *R.* v. *Stephens* (1866), L. R. 1 Q. B. 702, approved in *R.* v. *Holbrook* (1878), 4 Q. B. D. 42, *per* LUSH, J., at p. 51; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 235.

(*r*) *R.* v. *Holbrook* (1877), 3 Q. B. D. 60, *per* COCKBURN, C.J., at p. 63; *R.* v. *Holbrook* (1878), 4 Q. B. D. 42, *per* LUSH, J., at p. 47; *R.* v. *Pearson* (No. 2) (1908), 72 J. P. 451, C. C. A.; *R.* v. *Key* (1909), 52 Sol. Jo. 784; compare *R.* v. *Huggins* (1730), 2 Ld. Raym. 1574.

(*s*) *R.* v. *Allen* (1835), 7 C. & P. 153; *R.* v. *Bennett* (1858), Bell, C. C. 1.

(*t*) *Mullins* v. *Collins* (1874), L. R. 9 Q. B. 292 (see title INTOXICATING LIQUORS, Vol. XVIII., p 134), discussed in *Somerset* v. *Hart* (1884), 12 Q. B. D. 360; *Collman* v. *Mills*, [1897] 1 Q. B. 396 (bye-law); *St. Helen's District Tramways Co.* v. *Wood* (1891), 60 L. J. (M. C.) 141 (bye-law); *Niven* v. *Greaves* (1890), 54 J. P. 548 (Public Health Act, 1875 (38 & 39 Vict c. 55), s. 91); *Howells* v. *Wynne* (1863), 15 C. B. (N. S.) 3 (statutory regulation); compare *Davies* v. *Harvey* (1874), L. R. 9 Q. B. 433.

(*a*) *A.-G.* v. *Siddon* (1830), 1 Cr. & J. 220 (Excise Drawback Act, 1817 (57 Geo. 3, c. 87), s. 13); *Niven* v. *Greaves*, *supra*; *Police Commissioners* v. *Cartman*, [1896] 1 Q. B. 655 (see title INTOXICATING LIQUORS, Vol. XVIII., p. 119); *Boyle* v. *Smith*, [1906] 1 K. B. 432 (see title INTOXICATING LIQUORS, Vol. XVIII., p. 110); *Anglo-American Oil Co., Ltd.* v. *Manning*, [1908] 1 K. B. 536 (Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), s. 25); *McKenna* v. *Harding* (1905), 69 J. P. 354; *Russon* v. *Dutton* (No. 2) (1911), 27 T. L. R. 198 (see title INTOXICATING LIQUORS, Vol. XVIII., p. 123); *Wake* v. *Dyer* (1911), 104 L. T. 448.

(*b*) *Somerset* v. *Hart*, *supra*; *Boyle* v. *Smith*, *supra*; see *Bond* v. *Evans* (1888), 21 Q. B. D. 249 (see title INTOXICATING LIQUORS, Vol. XVIII., p. 139); *Pasquier* v. *Neale*, [1902] 2 K. B. 287.

(*c*) *Mullins* v. *Collins*, *supra*. The knowledge of the servant may be equally immaterial (*Pain* v. *Boughtwood* (1890), 24 Q. B. D. 353; *Morris* v. *Corbett* (1892), 56 J. P. 649; see title FOOD AND DRUGS, Vol. XV., pp. 23, 65).

cannot, therefore, escape criminal responsibility on the ground that he himself had acted in good faith (*d*) and had forbidden the servant to do the act (*e*), or that he was unaware of what the servant had done (*f*).

(2) The statute may make the master liable for his servant's act, unless he can prove that he himself is not in default (*g*). In this case the master is *primâ facie* liable, as soon as the act is shown to fall within the scope of the servant's employment (*h*); and he cannot escape liability merely on the ground that the servant disobeyed his instructions (*i*). To exempt himself from liability he must show that he has taken all reasonable steps to prevent the servant from doing the act in question (*k*).

(3) The statute may make the master liable for his servant's act only if the prosecution proves affirmatively that he knew, either actually or constructively (*l*), of the servant's act, or that he connived at its commission (*m*). He is not therefore liable if the act is done without his knowledge and against his express orders (*n*).

(*d*) *Morris* v. *Corbett* (1892), 56 J. P. 649 (Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s 6); or that his servant had acted under a mistake (*A.-G.* v. *Stanyforth* (1722), Bunb. 97, Ex. Ch.).

(*e*) *Collman* v. *Mills*, [1897] 1 Q. B. 396; *Brown* v. *Foot* (1892), 61 L. J. (M.C.) 110 (see title FOOD AND DRUGS, Vol. XV., p. 18); *Dunning* v. *Owen*, [1907] 2 K. B. 237 (see title INTOXICATING LIQUORS, Vol. XVIII., p. 110); *Police Commissioners* v. *Cartman*, [1896] 1 Q. B. 665.

(*f*) *Mullins* v. *Collins* (1874), L. R. 9 Q. B. 292; *Michell* v. *Brown* (1858), 1 E. & E. 267 (Harbours Act, 1814 (54 Geo. 3, c. 159), s. 11); compare *Mitchell* v. *Torrups* (1766), Park. 227; but see *Sherras* v. *De Rutzen*, [1895] 1 Q. B. 918 (see title INTOXICATING LIQUORS, Vol. XVIII., p. 134).

(*g*) *Dickenson* v. *Fletcher* (1873), L. R. 9 C. P. 1 (stat. (1860) 23 & 24 Vict c. 151, s. 22, now repealed); *Christie, Manson and Woods* v. *Cooper*, [1900] 2 Q. B. 522 (Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28), s. 2 (2)).

(*h*) *Thompson* v. *McKenzie*, [1908] 1 K. B. 905 (see title INTOXICATING LIQUORS, Vol. XVIII., p. 118).

(*i*) *Coppen* v. *Moore* (No. 2), [1898] 2 Q. B. 306 (Merchandise Marks Act, 1887 (50 & 51 Vict. c 28), s. 2 (2)).

(*k*) *Ibid.*; *Dickenson* v. *Fletcher*, *supra*.

(*l*) *Redgate* v. *Haynes* (1876), 1 Q. B. D. 89; *Bond* v. *Evans* (1888), 21 Q. B. D. 249 (see title INTOXICATING LIQUORS, Vol. XVIII., p. 139); *Emary* v. *Nolloth*, [1903] 2 K. B. 264 (see title INTOXICATING LIQUORS, Vol. XVIII., p. 122); *McKenna* v. *Harding* (1905), 69 J. P. 354; *Allchorn* v *Hopkins* (1905), 69 J. P. 355; compare *Core* v. *James* (1871), L. R. 7 Q. B. 135 (see title FOOD AND DRUGS, Vol. XV., p. 47); *Small* v. *Warr* (1882), 47 J. P. 20 (see title ANIMALS, Vol. I., p. 411).

(*m*) *Bosley* v. *Davies* (1875), 1 Q. B. D. 84 (see title INTOXICATING LIQUORS, Vol. XVIII., p. 139); *Redgate* v. *Haynes*, *supra*; *Roberts* v. *Woodward* (1890), 25 Q. B. D. 412 (Weights and Measures Act, 1889 (52 & 53 Vict. c. 21), s. 29); compare *R.* v. *Handley* (1864), 9 L. T. 827; *Nichols* v. *Hall* (1873), L. R. 8 C. P. 322; *Massey* v. *Morriss*, [1894] 2 Q. B. 412; *R.* v. *Parts of Holland, Lincolnshire, Justices* (1882), 46 J. P. 312.

(*n*) *Kearley* v. *Tonge* (1891), 60 L. J. (M. C.) 159 (see title FOOD AND DRUGS, Vol. XV., p. 18); *Copley* v. *Burton* (1870), L. R. 5 C. P. 489; *Boyle* v. *Smith*, [1906] 1 K. B. 432 (see title INTOXICATING LIQUORS, Vol. XVIII., p. 110); *Newman* v. *Jones* (1886), 17 Q. B. D. 132, distinguished in *Bond* v. *Evans*, *supra*. Where knowledge on the part of the servant is an essential part of the offence, the master is not liable if the servant acted in ignorance (*Crabtree* v. *Fern Spinning Co.* (1901), 85 L. T. 519 (Factory and Workshop Act, 1895 (58 & 59 Vict. c. 37), s. 9 (2), (3)); *Groom* v. *Grimes* (1903), 89 L. T. 129 (see title INTOXICATING LIQUORS, Vol. XVIII., p. 122)).

SECT. 1. General Principles.

In some cases the language of the statute may render it necessary to prove that the act was committed by his express instructions (*o*).

(4) The statute may make the master liable, not for his servant's act, but only for his own (*p*).

SECT. 2.—*Effect of Disabilities.*

General principles.

612. Though a master who is under a disability is not necessarily precluded from entering into a valid contract of service with a servant (*q*), his liability for the acts of the servant depends upon the nature and extent of the disability to which he is subject.

Infants.

613. The servant of an infant may have an implied authority to pledge his master's credit for necessaries (*r*), or on his behalf to enter into a contract, such as a contract for the purchase of land (*s*) belonging to the class of contracts which are binding on the infant, unless expressly repudiated on his coming of age (*t*).

The servant of an infant may have also an implied authority to protect his master's property, and may therefore be entitled to expel a trespasser (*a*). An infant is further liable for the torts of his servant if committed with his express authority or privity (*b*).

Lunatics.

614. Where the master is a lunatic, he cannot, as a general rule, be made liable for the acts of persons purporting to act on his behalf (*c*). There may, however, be an implied authority to pledge his credit for the expenses necessary for the protection of his person or estate (*d*), though the implication of authority is rebutted by evidence that the person who is alleged to have pledged the lunatic's credit had sufficient money in hand belonging to the lunatic's estate (*e*). Where the master becomes a lunatic after the contract of service has been entered into, the effect of his lunacy is to revoke any authority which the servant may possess (*f*). The master remains liable, however, upon all contracts made by the servant

(*o*) *Wilson* v. *Stewart* (1863), 3 B. & S 913 (Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), s. 44).

(*p*) *Chisholm* v. *Doulton* (1889), 22 Q. B. D. 736 (stat. (1853) 16 & 17 Vict. c. 128 (now repealed)), with which contrast *Niven* v. *Greaves* (1890), 54 J. P. 548; *Harding* v. *Barker & Sons* (1888), 37 W. R. 78 (Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 237).

(*q*) See p. 72, *ante*.

(*r*) See *Chapple* v. *Cooper* (1844), 13 M. & W. 252, *per* ALDERSON, B., at p. 258; *Hands* v. *Slaney* (1800), 8 Term Rep. 578; title INFANTS AND CHILDREN, Vol. XVII., p. 67.

(*s*) *Whittingham* v. *Murdy* (1889), 60 L. T. 956.

(*t*) As to such contracts, see title INFANTS AND CHILDREN, Vol. XVII., p. 64.

(*a*) *Ewer* v. *Jones* (1846), 9 Q. B. 623; see title AGENCY, Vol. I., p. 150.

(*b*) See *Burnard* v. *Haggis* (1863), 14 C. B. (N. S.) 45.

(*c*) *Richardson* v. *Du Bois* (1869), L. R. 5 Q. B. 51; see title LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., p. 396.

(*d*) *Williams* v. *Wentworth* (1842), 5 Beav. 325; compare *Re Wood's Estate, Davidson* v. *Wood* (1863), 1 De G. J. & Sm. 465, C. A.; *Read* v. *Legard* (1851), 6 Exch 636; and see title LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., pp. 398, 399.

(*e*) *Richardson* v. *Du Bois*, *supra*.

(*f*) *Drew* v. *Nunn* (1879), 4 Q. B. D. 661, C. A.; *Richardson* v. *Du Bois*, *supra*.

within the scope of his authority, provided that they are made with persons to whom the master, before he became a lunatic, held out the servant as having authority to contract on his behalf, and provided that such persons, at the time of making the contract, were not aware of the master's lunacy and consequent revocation of authority (*g*). SECT. 2. Effect of Disabilities.

615. Where the master of a servant is a corporation aggregate, the identification of the master with the acts of the servant is much closer than where the master is an individual, since the corporation is incapable of doing any act itself, but must necessarily avail itself of the services of others (*h*). Nevertheless, the liability of the corporation is governed by the same general principles as in the case of an individual (*i*), subject to this further limitation, that no servant can, even with express authority, bind a corporation to an act which is *ultra vires* of the corporation (*k*). Thus, where the servant of a corporation created by statute enters into a contract which is not expressly or impliedly authorised by its constitution, the corporation is not bound (*l*), even by a subsequent ratification (*m*). Similarly, where the servant commits a tortious act, the corporation is not liable if the act is one which it could not in any circumstances have authorised a servant to commit (*n*). Where, however, the act is not *ultra vires* of the corporation, and is committed by the servant within the scope of his authority and in the course of his employment on the corporation's behalf, the corporation is liable (*o*), and it cannot escape liability on the ground that, being a corporation, it cannot commit torts (*p*), nor even on the ground that the particular tort committed is one involving malice (*q*). Corporations.

SECT. 3.—*Exemptions from Liability.*

616. There are certain cases in which the general principles governing the liability of a master for the acts of his servants do not apply, or apply only to a limited extent. These cases are the following, namely :— Exemptions:

(1) No action lies at common law against the Crown, and the Crown cannot, therefore, be made responsible for the acts of its servants (*r*). Where the act of a servant is tortious, or negligent, (1) The Crown;

(*q*) *Drew* v. *Nunn* (1879), 4 Q. B. D. 661, C. A., see *Yonge* v. *Toynbee*, [1910] 1 K. B. 215, C. A.

(*h*) As to the position of corporations generally, see title CORPORATIONS, Vol. VIII., pp. 299 *et seq.*

(*i*) See pp. 244 *et seq.*, *ante*.

(*k*) *Montreal Assurance Co.* v. *M'Gillivray* (1859), 13 Moo. P. C. C. 87; see, further, title CORPORATIONS, Vol. VIII., pp. 359 *et seq.*, 379 *et seq.*

(*l*) *Shrewsbury and Birmingham Rail. Co.* (*Directors*) v. *North Western Rail. Co.* (*Directors*) (1857), 6 H. L. Cas. 113, approving *South Yorkshire Railway and River Dun Co.* v. *Great Northern Rail. Co.* (1853), 9 Exch. 55, *per* PARKE, B., at p. 84; *Wenlock* (*Baroness*) v. *River Dee Co.* (1885), 10 App. Cas. 354.

(*m*) *Ashbury Railway Carriage and Iron Co.* v. *Riche* (1875), L. R. 7 H. L. 653; applied in *Wenlock* (*Baroness*) v. *River Dee Co.*, *supra*.

(*n*) *Poulton* v. *London and South Western Rail. Co.* (1867), L. R. 2 Q. B. 534.

(*o*) See title CORPORATIONS, Vol. VIII., pp. 386 *et seq.*

(*p*) *Barwick* v. *English Joint Stock Bank* (1867), L. R. 2 Exch. 259, Ex. Ch.

(*q*) See p. 257, *ante*.

(*r*) See title CONSTITUTIONAL LAW, Vol. VI., pp. 413 *et seq.*

SECT. 3. Exemptions from Liability.

or criminal, the exemption from liability is absolute; in other cases, arising out of contract, or relating to real or personal property otherwise than in tort, the remedy by way of petition of right is available (*s*).

(2) trade unions;

(2) A trade union, whether of masters or servants, is not responsible for any tortious act alleged to have been committed by its servants in furtherance or in contemplation of a trade dispute (*t*).

(3) public authorities;

(3) A public authority, though in general responsible for the acts of its servants, provided that proceedings against it are taken within the requisite time (*a*), is not liable when the tort is committed by the servant in the discharge of a duty, which he is required to perform as a public duty imposed upon himself, and not as a duty imposed upon the local authority to be performed through its servant (*b*).

(4) trustees;

(4) Trustees who have the management and control of property for public purposes are not exempt from liability for the acts or defaults of any person employed for the purpose of carrying out their duties on the ground that they act gratuitously (*c*). To exempt themselves from liability they must prove either (i.) that the act or default complained of does not amount to a breach of any duty imposed upon them as regards the person injured (*d*); or (ii.) that the relation of master and servant does not exist between themselves and the person actually at fault (*e*).

(*s*) Petitions of Right Act, 1860 (23 & 24 Vict. c. 34), s. 2. As to petitions of right generally, see title CROWN PRACTICE, Vol. X., pp. 26 *et seq.* As to actions against a servant of the Crown, see title CONSTITUTIONAL LAW, Vol. VI., pp. 413 *et seq.*

(*t*) Trade Disputes Act, 1906 (6 Edw. 7, c. 47), s. 4 (1); see, further, title TRADE AND TRADE UNIONS. This Act does not confer a general exemption from liability, but an exemption only in respect of such torts as are committed in furtherance or in contemplation of trade disputes (*Rickards* v. *Bartram* (1908), 25 T. L. R. 181). It is not retrospective (*Smithies* v. *National Association of Operative Plasterers*, [1909] 1 K. B. 310, C. A.).

(*a*) That is, within six months of the act complained of (Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 1; see title LIMITATION OF ACTIONS, Vol. XIX., p. 176). This provision applies even where the public authority is carrying on an ordinary commercial undertaking (*Parker* v. *London County Council*, [1904] 2 K. B. 501; *Hewlett* v. *London County Council* (1908), 24 T. L. R. 331, where the defendants by their conduct had induced the plaintiff to delay commencing proceedings); but it does not apply where the action is *in rem* (*The Burns*, [1907] P. 137, C. A.), or where the duty which is violated arises out of contract (*Pearson (S.) & Son, Ltd.* v. *Dublin Corporation*, [1907] A. C. 351; *Sharpington* v. *Fulham Guardians*, [1904] 2 Ch. 449). Nor does it protect an independent contractor employed by the public authority (*Kent County Council* v. *Folkestone Corporation*, [1905] 1 K. B. 620, C. A., followed in *Tilling (T.), Ltd.* v. *Dick Kerr & Co., Ltd.*, [1905] 1 K. B. 562); it has no application to a claim under the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58) (*Fry* v. *Cheltenham Corporation* (1911), 28 T. L. R. 16, C. A.); see, further, titles LIMITATION OF ACTIONS, Vol. XIX., p. 176; PUBLIC AUTHORITIES AND PUBLIC OFFICERS.

(*b*) See titles AGENCY, Vol. I., p. 213; PUBLIC AUTHORITIES AND PUBLIC OFFICERS.

(*c*) *Mersey Docks Trustees* v. *Gibbs* (1866), L. R. 1 H. L. 93, applying *Parnaby* v. *Lancaster Canal Co.* (1839), 11 Ad. & El. 223, Ex. Ch., and reviewing the earlier conflicting cases; *Coe* v. *Wise* (1866), L. R. 1 Q. B. 711, C. A.; see, generally, title PUBLIC AUTHORITIES AND PUBLIC OFFICERS.

(*d*) *Forbes* v. *Lee Conservancy Board* (1879), 4 Ex. D. 116.

(*e*) *Metcalfe* v. *Hetherington* (1860), 5 H. & N. 719, Ex. Ch.

SECT. 3. Exemptions from Liability.

In the case of private trustees, executors, and other persons in a fiduciary position, who are obliged, for the due performance of their duties, to engage servants, their personal liability for the acts of their servants done in the course of their employment and within the scope of their authority is absolute (*f*). They are, however, entitled to be indemnified out of the trust estate, whether their liability is founded upon contract (*g*) or upon tort (*h*), provided that such liability was incurred in the reasonable and proper management of the estate. Any third person who has succeeded in establishing the liability of a trustee for any act done by his servant is subrogated to the trustee's right of indemnity, and may claim direct against the trust estate, whether he has recovered judgment against the trustee in contract (*i*) or in tort (*k*).

(5) Pilots.

(5) When the employment of a pilot is compulsory, the owner of the ship is not responsible for his errors of navigation, provided that it is part of the pilot's duty to take sole charge of the ship to the exclusion of the master employed by the owner (*l*). The owner is, however, liable if his employment of the pilot is not compulsory (*m*), or if, though compulsory, his employment does not necessarily involve the taking of the ship out of the charge of the master (*n*).

Selection restricted.

617. Except in the case of compulsory pilotage, a master is not exempt from liability merely on the ground that he is required by law to employ as his servant a person who is a member of a particular class, or who possesses a particular qualification (*o*). It is immaterial that the master's power of selection is in consequence restricted or even that he is prohibited from himself doing the work for which the servant is employed (*p*). Nor is it

(*f*) Compare *Brazier* v. *Camp* (1894), 63 L. J. (Q. B.) 257, C. A.; and see, generally, titles EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 314 *et seq.*; RECEIVERS; TRUSTS AND TRUSTEES.

(*g*) *Farhall* v. *Farhall* (1871), 7 Ch. App. 123. They may be entitled to be indemnified personally by the *cestui que trust* if the trust estate is insufficient (*Matthews* v. *Ruggles-Brise*, [1911] 1 Ch. 194, applying *Jervis* v. *Wolferstan* (1871), L. R. 18 Eq. 18, *per* JESSEL, M.R., at p. 24, *Fraser* v. *Murdoch* (1881), 6 App. Cas. 855, *per* Lord BLACKBURN, at p. 872, and *Hardoon* v. *Belilios*, [1901] A. C. 118, 123, P. C.); but this principle does not apply to a receiver and manager appointed by the court, who can look to the assets under the control of the court only (*Boehm* v. *Goodall*, [1911] 1 Ch. 155).

(*h*) *Benett* v. *Wyndham* (1862), 4 De G. F. & J. 259, C. A.

(*i*) *Dowse* v. *Gorton*, [1891] A. C. 190; *Re Blundell*, *Blundell* v. *Blundell* (1890), 44 Ch. D. 1, C. A.; compare *Re Richardson*, *Ex parte St. Thomas's Hospital (Governors)*, [1911] 2 K. B. 705, C. A.

(*k*) *Re Raybould*, *Raybould* v. *Turner*, [1900] 1 Ch. 199, following *Benett* v. *Wyndham*, *supra*.

(*l*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 633; *The "Halley"* (1868), L. R. 2 P. C. 193; and see, generally, title SHIPPING AND NAVIGATION. The employer is, however, liable where his own master or crew is guilty of contributory negligence (*The "Velasquez"* (1867), L. R. 1 P. C. 494; *The Guy Mannering* (1882), 7 P. D. 132, C. A., *per* BRETT, L.J., at p. 134), but not where his own master has taken all reasonable steps to minimise the danger (*The Octavia Stella* (1887), 57 L. T. 632).

(*m*) *The Maria* (1839), 1 Wm. Rob. 95.

(*n*) *The Guy Mannering*, *supra*; *The Prins Hendrik*, [1899] P. 177; *The Dallington*, [1903] P. 77.

(*o*) *Martin* v. *Temperley* (1843), 4 Q. B. 298 (lightermen on the Thames).

(*p*) *Ibid.*, *per* COLERIDGE, J., at p. 312.

SECT. 3. Exemptions from Liability.

a defence that the person by whom the tort was actually committed was not directly chosen or appointed by the person sought to be made responsible, if the relation of master and servant is in fact constituted between them (*q*).

SECT. 4.—*Contractors.*

SUB-SECT. 1.—*Effect of Employing Independent Contractors.*

Employer as a rule not liable.

618. The liability of an employer for the tort of a person in his employment does not arise from the mere fact that such person is engaged to do work on the employer's behalf, but depends upon the existence of the relation of master and servant between them (*r*). If the person employed to do a particular work is not in the position of a servant, but is an independent contractor (*s*), the employer is not, as a rule, responsible for any tort committed by him in the course of his employment (*t*), or by the servants whom he may have engaged for the actual performance of the work (*a*), and any person injured thereby must look to the independent contractor for compensation (*b*).

Cases of liability:

619. There are, however, certain cases in which the employer may be liable for the torts committed by an independent contractor or by the servants of the latter. These cases are the following:—

(1) Personal interference;

(1) An employer who personally interferes with the contractor or his servant, and in fact directs the manner in which the work is to be done, places himself in the position of a master, and is therefore responsible for any injury occasioned to a third person in the course of carrying out his direction (*c*).

(2) work dangerous;

(2) An employer who employs an independent contractor to execute a work from which, in the natural course of things, injurious consequences to his neighbour must be expected to arise, unless measures are adopted by which such consequences may be prevented, is bound to see that everything is done which

(*q*) See p. 266, *post*.

(*r*) *Sadler* v. *Henlock* (1855), 4 E. & B. 570; *Randleson* v. *Murray* (1838), 8 Ad. & El. 109; *Holmes* v. *Onion* (1857), 2 C. B. (N. S.) 790; *Oldfield* v. *Furness, Withy & Co.* (1894), 58 J. P. 102, C. A.; see also *Mersey Docks Trustees* v. *Gibbs* (1866), L. R. 1 H. L. 93, *per* BLACKBURN, J., at p. 115.

(*s*) As to the difference between a servant and an independent contractor, see pp. 67, 118, note (*e*), *ante*. As to the effect of the interposition of an independent contractor upon an employer's liability in case of accident, see p. 149, *ante*.

(*t*) *Rapson* v. *Cubitt* (1842), 9 M. & W. 710. The contractor may be, for other purposes, a servant of the employer (*Knight* v. *Fox* (1850), 5 Exch. 721). There is clearly no liability when the tort falls outside the scope of the employment (*Pickard* v. *Smith* (1861), 10 C. B. (N. S.) 470, *per* WILLIAMS, J., at p. 480).

(*a*) *Milligan* v. *Wedge* (1840), 12 Ad. & El. 737; *Reedie* v. *London and North Western Rail. Co.*, *Hobbit* v. *Same* (1849), 4 Exch. 244; *Peachey* v. *Rowland* (1853), 13 C. B. 182; *Overton* v. *Freeman* (1852), 11 C. B. 867; *Cuthbertson* v. *Parsons* (1852), 12 C. B. 304; *Steel* v. *South-Eastern Rail. Co.* (1855), 16 C. B. 550; *Taylor* v. *Greenhalgh* (1874), L. R. 9 Q. B. 487; *Hardaker* v. *Idle District Council*, [1896] 1 Q. B. 335, C. A., *Penny* v. *Wimbledon Urban Council*, [1899] 2 Q. B. 72, C. A.; *Holliday* v. *National Telephone Co.*, [1899] 2 Q. B. 392, C. A.

(*b*) *Pearson* v. *Cox* (1877), 2 C. P. D. 369, C. A.; *White* v. *Peto Brothers* (1888), 58 L. T. 710; *Waldock* v. *Winfield*, [1901] 2 K. B. 596, C. A.

(*c*) *Burgess* v. *Gray* (1845), 1 C. B. 578; *M'Laughlin* v. *Pryor* (1842), 4 Man. & G. 48; *Hardaker* v. *Idle District Council*, *supra*; compare *Marney* v. *Scott* [1899] 1 Q. B. 986 (where the employer was personally in default).

is necessary for the purpose (*d*). He cannot, therefore, relieve himself of his responsibility by proving that he had delegated the performance of this duty to the contractor employed to do the work, or to some independent person (*e*), however competent such contractor or person may be (*f*). But such liability does not extend to casual or collateral acts of negligence on the part of the contractor or his servants (*g*). In accordance with the same principle, where the work which the independent contractor is employed to do is of a character likely to be dangerous to the public, unless done with proper precautions, the employer is responsible to any member of the public who sustains injury in consequence of the manner in which the work is done (*h*).

(3) statutory obligation;

(3) An employer who is under a statutory obligation to execute a particular work and who entrusts the execution of it to an independent contractor is responsible to third persons for any injury sustained by them in consequence of the improper execution of the work by the independent contractor (*i*).

(4) work unlawful.

(4) An employer who employs an independent contractor to execute work which is in itself unlawful is responsible to third persons for any injuries sustained by them in consequence of the improper execution of the work by the independent contractor (*j*).

SUB-SECT. 2.—*Servants of Contractors.*

Independent contractor.

620. An independent contractor is, as being the master of his

(*d*) *Bower* v. *Peate* (1876), 1 Q. B. D. 321; *Hughes* v. *Percival* (1883), 8 App. Cas. 443, *Black* v. *Christchurch Finance Co.*, [1894] A. C. 48, P. C.; *Lemaitre* v. *Davis* (1881), 19 Ch. D. 281; *Odell* v. *Cleveland House, Ltd.* (1910), 102 L. T. 602; *Quarman* v. *Burnett* (1840), 6 M. & W. 499, *per* PARKE, B., at pp. 509, 510, 511, approving the judgment of LITTLEDALE, J., in *Laugher* v. *Pointer* (1826), 5 B. & C. 547. It has been suggested that the liability is absolute (*Bower* v. *Peate*, *supra*, *per* COCKBURN, C.J., at p. 327; compare *Hughes* v. *Percival*, *supra*, *per* Lord WATSON, at p. 451); but more probably it depends upon whether the contractor has failed to take the requisite precautions (*Hughes* v. *Percival*, *supra*, *per* Lord BLACKBURN, at p. 445; *Dalton* v. *Angus* (1881), 6 App. Cas. 740, *per* Lord BLACKBURN, at p. 829; *Penny* v. *Wimbledon Urban Council*, [1899] 2 Q. B. 72, C. A., *per* ROMER, L.J., at p. 78; compare *Pearson* v. *Cox* (1877), 2 C. P. D. 369, C. A.).

(*e*) *Bower* v. *Peate*, *supra*, *per* COCKBURN, C.J., at p. 326.

(*f*) *Hughes* v. *Percival*, *supra*. It is immaterial that the employer has stipulated for proper precautions to be taken (*Bower* v. *Peate*, *supra*; *Hughes* v. *Percival*, *supra*, *Black* v. *Christchurch Finance Co.*, *supra*).

(*g*) Such as the leaving of a pickaxe in the road (*Penny* v. *Wimbledon Urban Council*, *supra*, *per* A. L. SMITH, L.J., at p. 76, and *per* ROMER, L.J., at p. 78). But an act which is part of the work the contractor is employed to do is not an act either casual or collateral with reference to the contract (*ibid.*, *per* A. L. SMITH, L.J., at p. 76).

(*h*) *Pickard* v. *Smith* (1861), 10 C. B. (N. S.) 470; *Blake* v. *Thirst* (1863), 2 H. & C. 20; *Gray* v. *Pullen* (1864), 5 B. & S. 970, Ex. Ch.; *Tarry* v. *Ashton* (1876), 1 Q. B. D. 314; *Penny* v. *Wimbledon Urban Council*, *supra*, *Hill* v. *Tottenham Urban District Council* (1898), 79 L. T. 495; *The Snark*, [1899] P. 74; compare *Peachey* v. *Rowland* (1853), 13 C. B. 182; *Duke* v. *Courage & Co.* (1882), 46 J. P. 453.

(*i*) *Hole* v. *Sittingbourne and Sheerness Rail. Co.* (1861), 6 H. & N. 488; *Gray* v. *Pullen*, *supra*; *Hyams* v. *Webster* (1867), L. R. 2 Q. B. 264; *Hardaker* v. *Idle District Council*, [1896] 1 Q. B. 335, C. A.; *Robinson* v. *Beaconsfield Rural Council*, [1911] 2 Ch. 188, C. A.; and see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 136. But the employers may be exempt from liability under the terms of the statute imposing the duty (*Hovitt* v. *Nottingham Tramways Co.* (1883), 12 Q. B. D. 16; *Barham* v. *Ipswich Dock Commissioners* (1885), 54 L. T. 23).

(*j*) *Ellis* v. *Sheffield Gas Consumers' Co.* (1853), 2 E. & B. 767.

SECT. 4. Contractors.

servants, liable for all torts committed by them in the course of their employment, and his liability is not affected by the existence of his contract with his employer (*k*). The contractor is therefore responsible not only to third persons, but also to his employer (*l*), provided that the servant who commits the tort is acting in the course of his employment and within the scope of his authority (*m*).

When employer liable.

To absolve the contractor from liability and to make the employer liable (*n*) it is necessary to prove that the relation of master and servant has been temporarily constituted between the employer and the contractor's servant, and that it existed at the time when the tort was committed (*o*). For this purpose it is not sufficient to show that the contract between the employer and the contractor necessarily involved the employment of a servant and that all which the contractor had to do was to choose the servant (*p*). Nor is it sufficient to show that the employer actually chose the servant in question himself (*q*), or that the employer paid him (*r*), or that he had the right to dismiss him (*s*). It must be shown that the employer was for the time being in the position of his master; that he not merely gave the servant directions as to what work he had to do (*t*), but controlled him to the entire exclusion of his master (*a*).

(*k*) *Dalyell* v. *Tyrer* (1858), E. B. & E. 899.

(*l*) *Holmes* v. *Onion* (1857), 2 C. B. (N. S.) 790.

(*m*) There is no liability if the relation of master and servant does not exist between himself and the person who does the wrongful act, even though he may have undertaken to furnish a person for the purpose of performing certain work (*Hillyer* v. *St. Bartholomew's Hospital (Governors)*, [1909] 2 K. B. 820, C. A., applying *Hall* v. *Tees*, [1904] 2 K. B. 602, C. A.; compare *Evans* v. *Liverpool Corporation*, [1906] 1 K. B. 160).

(*n*) There cannot be a liability in both for the same tort (*Laugher* v. *Pointer* (1826), 5 B. & C. 547, *per* LITTLEDALE, J., at p. 558; but see *Mileham* v. *St. Marylebone Borough Council and Latter* (1903), 67 J. P. 110, where judgment was entered against both).

(*o*) *Quarman* v. *Burnett* (1840), 6 M. & W. 499, followed in *Jones* v. *Liverpool Corporation* (1885), 14 Q. B. D. 890; *Milligan* v. *Wedge* (1840), 12 Ad. & El. 714; *Brady* v. *Giles* (1835), 1 Mood. & R. 494; *Jones* v. *Scullard*, [1898] 2 Q. B. 565, where the cases are reviewed; compare *Nicholson* v. *Harrison* (1856), 4 W. R. 459; *Laugher* v. *Pointer*, *supra*.

(*p*) *Norris* v. *Wolseley Tool and Motor Cab Co.* (1907), 52 Sol. Jo. 116. Where, however, the servant's duty is to drive a vehicle, or to manage a machine, or do some similar work, the fact that the vehicle, or the machine, or as the case may be, together with the horses, harness, or other requisites, is the property of the employer, and that the contractor supplies nothing but the servant, leads to the inference that the employer is the master (*Jones* v. *Scullard*, *supra*).

(*q*) *Quarman* v. *Burnett*, *supra*; but it would be otherwise if the employer had insisted on the contractor employing a stranger in place of one of his regular servants (*ibid.*, *per* PARKE, B., at p. 508).

(*r*) *Quarman* v. *Burnett*, *supra*.

(*s*) *Reedie* v. *London and North Western Rail. Co.*, *Hobbit* v. *Same* (1849), 4 Exch. 244.

(*t*) *Steel* v. *South-Eastern Rail. Co.* (1855), 16 C. B. 550; *Evans* v. *Liverpool Corporation*, *supra*; *Waldock* v. *Winfield*, [1901] 2 K. B. 596, C. A.; compare *Dewar* v. *Tasker & Sons* (1907), 23 T. L. R. 259, C. A. But the employer will be responsible if his directions bring about the injury (*Hardaker* v. *Idle District Council*, [1896] 1 Q. B. 335, C. A., *per* A. L. SMITH, L.J., at p. 344); compare *Brown* v. *Accrington Cotton Spinning and Manufacturing Co.* (1865), 3 H. & C. 511; *Mileham* v. *St. Marylebone Borough Council and Latter*, *supra*.

(*a*) *Jones* v. *Scullard*, *supra*, followed in *Dewar* v. *Tasker & Sons*, *supra*, and in *Perkins* v. *Stead* (1907), 23 T. L. R. 433; compare *M'Laughlin* v. *Pryor* (1842),

Loan of servant.

621. In accordance with the same principle, a servant who is lent by his master to a third person for the purpose of being employed in a particular way is to be deemed whilst thus employed the servant of the person to whom he is lent, though for other purposes he remains the servant of his master (*b*). Such person will therefore be liable for torts committed by the servant in the course of his particular employment (*c*), provided that the servant is at the time when they are committed subject to his control and not to that of the master (*d*). His liability is, it seems, the same whether the lending is gratuitous or for reward (*e*).

Part XI.—Rights of the Master against Third Persons.

SECT. 1.—*Procuring or Encouraging Breach of Contract by Servant.*

Breach of contract essential.

622. Since it is a violation of legal right to interfere with contractual relations recognised by law, if there is no sufficient justification for the interference (*f*), an action lies at the suit of a master against any person who, without any such justification, induces the servant to commit a breach of the contract of service and leave his master before the time fixed for the lawful determination of his service (*g*). No action, however, lies where no breach of the contract of service is actually committed (*h*). Any person may, therefore, with impunity induce a servant to leave his master when the period for which he was engaged expires (*i*), although the servant may, until such person interfered, have had no intention of leaving (*k*), or to decline to renew an engagement which in the ordinary course would, but for such interference, have been renewed by the servant without question (*l*). In accordance with the same

Man & G. 48; *Ruth* v *Surrey Commercial Dock Co* (1891), 8 T L R 116 C. A.; *Murphy* v. *Casalis* (1864), 3 H & C 362, *Lucent* v *Peto* (1864), 4 F. & F.

(*b*) See cases cited in note (*a*), p 266, *ante*

(*c*) Compare *Baumwoll Manufactur von Carl Scheibler* v. *Furness*, [1893] A C. 8; *Dalyell* v. *Tyner* (1858), E B. & E. 899. As to the defence of "common employment" in such a case, see pp 133, 134, *ante*.

(*d*) *Murray* v. *Currie* (1870), L. R. 6 C. P. 24; *Rourke* v. *White Moss Colliery Co.* (1877), 2 C. P. D 205, C. A; *Donovan* v. *Laing, Wharton, and Down Construction Syndicate*, [1893] 1 Q. B. 629, C A; *Jones* v. *Scullard*, [1898] 2 Q B. 565; compare *M'Fall* v. *Adams & Co*, [1907] S. C. 367; *M'Cartan* v. *Belfast Harbour Commissioners*, [1911] 2 I. R. 143

(*e*) *Donovan* v. *Laing, Wharton, and Down Construction Syndicate, supra.*

(*f*) *Quinn* v. *Leathem*, [1901] A. C. 495, *per* Lord MACNAGHTEN, at p. 510. As to the position of the parties where the servant has been bribed, see titles AGENCY, Vol. I., pp. 210 *et seq.*; CRIMINAL LAW AND PROCEDURE, Vol. IX., p 710.

(*g*) *Grinnell* v. *Wells* (1844), 7 Man. & G. 1033, 1041 As to what is evidence of inducing a servant to leave his master, see *Keane* v. *Boycott* (1795), 2 Hy? Bl. 511. As to the termination of hiring and service, see pp 94 *et seq*, *ante*.

(*h*) *Forbes* v. *Cochrane* (1824), 2 B. & C. 448; *Allen* v. *Flood*, [1898] A. C. 1.

(*i*) *Nichol* v. *Martyn* (1799), 2 Esp. 732; *Hart* v. *Aldridge* (1771), 1 Cowp. 54.

(*k*) *Nichol* v. *Martyn, supra.*

(*l*) *Ibid.*

SECT. 1. **Procuring or Encouraging Breach of Contract by Servant.**

principle it is not actionable for any person to induce the servant to give such notice to his master as may be requisite for the lawful determination of his contract of service (*m*), even though the effect of giving notice may be to determine the contract at a date earlier than either of the parties to it had anticipated (*n*). In these cases there is no violation of the master's legal right to the services of his servant, and the motive by which the person who induces the servant to leave his master is therefore immaterial (*o*).

Nature of contract.

623. The precise nature of the contract which the servant is induced to break may be disregarded, provided that the master is entitled under it to his services (*p*). The contract need not be one by which the servant is to give his services for a definite period; it may be a contract to do piecework (*q*). Nor is the master's right of action restricted to the cases of menial servants or labourers, or even to cases in which any express contract of service exists (*r*). The action lies wherever one person is under contract to give his personal services, whether exclusive or otherwise (*s*), for the benefit of another, and is induced to break his contract by the procurement or encouragement of a third person (*t*). There must, however, at the time when the third person interferes be in existence a valid contract under which his services are due (*a*), although it is not necessary that the service should then be subsisting (*b*). The existence of a contract may be implied in some cases from the mere position of the parties by and to whom the services are rendered (*c*). Where, however, the alleged contract under which the services are claimed is void, no action for inducing a breach of it is maintainable (*d*).

When interference justifiable.

624. What facts constitute a sufficient justification for interfering with the contract between master and servant, and thereby inducing the servant to commit a breach of it, is a question of

(*m*) *Allen* v. *Flood*, [1898] A. C. 1; compare *Jose* v. *Metallic Roofing Co. of Canada, Ltd.*, [1908] A. C. 314, P. C. As to the determination of the contract by notice, see p. 96, *ante*.

(*n*) *Allen* v. *Flood*, *supra*.

(*o*) *Ibid*, overruling on this point *Bowen* v. *Hall* (1881), 6 Q. B. D. 333, C. A., and *Temperton* v. *Russell*, [1893] 1 Q. B. 715; but see *Giblan* v. *National Amalgamated Labourers' Union of Great Britain and Ireland*, [1903] 2 K. B. 600, C. A., which appears to be inconsistent with *Allen* v. *Flood*, *supra*, *Dixon* v. *Dixon*, [1904] 1 Ch. 161 (where the servants in question were employed by a receiver and manager).

(*p*) *Lumley* v. *Gye* (1853), 2 E. & B. 216.

(*q*) *Hart* v. *Aldridge* (1774), 1 Cowp. 54; *Anon.* (1774), Lofft, 493.

(*r*) As to what constitutes a contract of service, see pp. 75 *et seq.*, *ante*.

(*s*) Compare *Rist* v. *Faux* (1863), 4 B. & S. 409; *Ogden* v. *Lancashire* (1866), 15 W. R. 158.

(*t*) *Lumley* v. *Gye*, *supra*.

(*a*) *De Francesco* v. *Barnum* (1890), 45 Ch. D. 430; *Bowen* v. *Hall*, *supra*

(*b*) *Lumley* v. *Gye*, *supra*.

(*c*) *Evans* v. *Walton* (1867), L. R. 2 C. P. 615 (where the relation was that of parent and child).

(*d*) *De Francesco* v. *Barnum*, *supra*; see *contra*, *Keane* v. *Boycott* (1795), 2 Hy. Bl. 511.

difficulty to which it is impossible to give a complete answer (*e*). It is not a sufficient justification that the person who procured or encouraged the breach did not, in so doing, act maliciously, and had no desire to injure the master (*f*). Nor is it sufficient that he honestly believed at the time when he procured or encouraged the breach, that it was for the common interest of himself and the servant that the latter should break his contract of service (*g*), or that the very existence of the contract of service was a breach of a prior contract between himself and the servant, under which the servant was precluded from entering into the contract of service in question, and that his motive was to secure the due performance by the servant of the prior contract with himself (*h*). Even the fact that in these cases the person procuring or encouraging the breach is correct in his belief makes no difference to his liability (*i*). Nor does the fact that he owes the servant a duty to advise him as to his position and dealings as regards his master, excuse him from liability, if the object of the advice is to procure or encourage what is illegal (*k*), though the mere giving of advice, which is in fact honest and *bonâ fide*, is not rendered actionable because it is followed by a breach of the contract of service (*l*). There are, however, cases in which, from the relation between the servant and the person who induces him to break his contract, the duty which such person owes to the servant may be greater than the ordinary duty which he owes to the master of not interfering with the contract of service, and it would therefore seem that in these cases the existence of the relation, when taken into consideration with the facts of the particular case, is a sufficient justification for interference with the contract, and excuses the person interfering from liability (*m*).

Harbouring a servant.

625. An action lies not only against the person who actually induces the servant to break his contract of service, but also against any person who knowingly harbours or employs the servant, without the consent of his master, during the subsistence of the original contract of service (*n*). It is immaterial that such person took no

(*e*) The principal cases in which the question has been discussed arose out of trade disputes, which have been removed from the jurisdiction of the court (Trade Disputes Act, 1906 (6 Edw. 7, c. 47), s. 4 (1)); see title TRADE AND TRADE UNIONS.

(*f*) *South Wales Miners' Federation* v. *Glamorgan Coal Co.*, [1905] A. C. 239; *Read* v. *Friendly Society of Operative Stonemasons of England, Ireland and Wales*, [1902] 2 K. B. 732, C. A.

(*g*) *South Wales Miners' Federation* v. *Glamorgan Coal Co.*, *supra*.

(*h*) *Read* v. *Friendly Society of Operative Stonemasons of England, Ireland and Wales*, *supra*; *Smithies* v. *National Association of Operative Plasterers*, [1909] 1 K. B. 310, C. A.

(*i*) *Read* v. *Friendly Society of Operative Stonemasons of England, Ireland and Wales*, *supra*.

(*k*) *South Wales Miners' Federation* v. *Glamorgan Coal Co.*, *supra*.

(*l*) *Ibid.*, *per* Lord LINDLEY, at p. 254.

(*m*) *Ibid.* For suggested examples of cases in which the interference would be justifiable, see *Glamorgan Coal Co.* v. *South Wales Miners' Federation*, [1903] 2 K. B. 545, C. A., *per* VAUGHAN WILLIAMS, L.J., at p. 569, and S. C., [1905] 1 K. B. 118, *per* BIGHAM, J., at p. 135.

(*n*) *Ashcroft* v. *Bertles* (1796), 6 Term Rep. 652; compare *Forbes* v. *Cochrane*

SECT. 1. Procuring or Encouraging Breach of Contract by Servant.

active part in inducing the servant to break his contract, or even that he did not know at the time when he himself took the servant into his employment that any contract of service with the master in question existed (*o*), since it is a sufficient cause of action that he continued to employ the servant after he had learned of the existence of the original contract and of the master's rights thereunder (*p*). He cannot, however, be made liable on this ground unless the original contract is proved to have been valid (*q*).

Measure of damages.

626. The damages recoverable by a master against the person inducing his servant to commit a breach of the contract of service are not to be measured merely by the actual loss which the master may sustain at the time when the servant leaves his service, but by the injury occasioned to the master by the loss of the servant's services (*r*). It is, however, an essential part of the cause of action that the master should have sustained some loss (*s*). Where, therefore, he has already been indemnified for his loss by the servant, he cannot maintain an action against the third person (*t*).

The master may in the same action join the servant as a co-defendant and claim, as against the servant, an injunction only (*a*).

SECT. 2.—*Seduction.*

Deprivation of service.

627. The right of the master to recover damages where he has been deprived of the services of his servant by the wrongful act of a third person applies to the case where he has been deprived of the services of a female servant by reason of her seduction and consequent confinement (*b*). By the adoption of the convenient fiction that a daughter is the servant of her parent seduction has developed into what may be regarded to all intents and purposes as a separate tort, for which, subject to certain limitations, an action lies.

(1824), 2 B. & C. 448 (where escaped slaves were harboured on board a British man-of-war, and it was held that no action lay against the captain, though slavery was lawful by the *lex loci*, since the servitude of the slaves ceased as soon as they came on board). A master cannot obtain possession of his apprentice, who is in the service of another, unless the apprentice is detained against his will (*R.* v. *Reynolds* (1795), 6 Term Rep. 497; *Ex parte Gill* (1806), 7 East, 376). No action lies against a person who merely renders pecuniary assistance to the servant after he has broken his contract (*Denaby and Cadeby Main Collieries, Ltd.* v. *Yorkshire Miners' Association*, [1906] A. C. 384).

(*o*) *Blake* v. *Lanyon* (1795), 6 Term Rep. 221; *Foster* v. *Stewart* (1814), 3 M. & S. 191.

(*p*) *Sykes* v. *Dixon* (1839), 9 Ad. & El. 693; *Pilkington* v. *Scott* (1846), 15 M. & W. 657.

(*q*) *De Francesco* v. *Barnum* (1890), 45 Ch. D. 430.

(*r*) *Hodsoll* v. *Stallebrass* (1840), 11 Ad. & El. 301; *Gunter* v. *Astor* (1819), 4 Moore (C. P.), 12; *Dixon* v. *Bell* (1816), 5 M. & S. 198. The master may waive the tort and sue on an implied contract for the value of the servant's services (*Lightly* v. *Clouston* (1808), 1 Taunt 112; *Foster* v. *Stewart* (1814), 3 M. & S. 191).

(*s*) *Mary's (Robert) Case* (1612), 9 Co. Rep. 111 b.

(*t*) *Bird* v. *Randall* (1762), 3 Burr 1345.

(*a*) *De Francesco* v. *Barnum*, *supra*.

(*b*) *Fores* v. *Wilson* (1791), Peake, 77 [55]; *McKenzie* v. *Hardinge* (1906), 23 T. L. R. 15. The master's right of action does not pass to his trustee in bankruptcy (*Howard* v. *Crowther* (1841), 8 M. & W. 601).

Persons entitled to sue.

628. A woman who has been seduced cannot herself, as being a consenting party, maintain any action (*c*) against her seducer (*d*). The action must be brought by someone who can be assumed to be her master. This will, as a rule, be her father (*e*), or, if the father is not alive, her mother (*f*), though action may also be brought by her father by adoption (*g*), and, where the facts are not inconsistent with the maintenance of the action, by an uncle (*h*), aunt (*i*) or brother (*k*). No action can, however, be brought by any person who encourages or connives at the seduction (*l*).

When service is to be presumed.

629. Since the right of action is based upon the loss of service it is necessary for the father, or other person *in loco parentis*, to establish the existence of the relation of master and servant between himself and the woman seduced (*m*), and if he fails to do so, the action must fail (*n*). It is not, however, necessary for him to prove that there was an express contract for service. The existence of the relation is to be presumed from the fact that she resides with her father and performs the duties of a servant, and in this case it is immaterial that the daughter is of age (*o*) or married (*p*). Nor is it necessary for her to reside in the same house as her father, so long as she is in the position of his servant (*q*). Where, however, she resides in the same house, it is sufficient to show that she rendered occasional assistance in the work of the household (*r*), or even that, in the circumstances, as, for example, when she is under age (*s*), the father had a right to her service (*t*).

(*c*) As to her right to bring affiliation proceedings, see title BASTARDY, Vol. II., pp. 443 *et seq.*

(*d*) *Wellock* v. *Constantine* (1863), 2 H. & C. 146.

(*e*) See the cases cited throughout this section of the title.

(*f*) *Hedges* v. *Tagg* (1872), L. R. 7 Exch. 283. The mother cannot maintain the action if the father dies after the seduction, but before the birth of the child (*Hamilton* v. *Long*, [1905] 2 I. R. 552, C. A., affirming S. C., [1903] 2 I. R. 407).

(*g*) *Irwin* v. *Dearman* (1809), 11 East, 23.

(*h*) *Manvell* v. *Thompson* (1826), 2 C. & P. 303.

(*i*) *Edmondson* v. *Machell* (1787), 2 Term Rep. 4.

(*k*) *Murray* v. *Fitzgerald*, [1906] 2 I. R. 254, C. A.

(*l*) *Reddie* v. *Scoolt* (1795), Peake, 316 [210]. As to the offence of encouraging seduction, see title INFANTS AND CHILDREN, Vol. XVII., p. 164.

(*m*) *Torrence* v. *Gibbins* (1843), 5 Q. B. 297. *Salter* v. *Walker* (1869), 21 L. T. 360.

(*n*) *Satterthwaite* v. *Dewhurst* (1785), 4 Doug. (K. B.) 315; *Grinnell* v. *Wells* (1844), 7 Man. & G. 1033; *Eager* v. *Grimwood* (1847), 1 Exch. 61. As to what is sufficient evidence of service, see *O'Reilly* v. *Blaney* (1892), 32 L. R. Ir. 316; *Murray* v. *Fitzgerald*, *supra*. But when the seduction takes place in the father's house, and the seducer is also guilty of trespass, the father may sue in trespass for breaking and entering his house, and allege the seduction as matter of aggravation (*Russell* v. *Corn* (1704), 6 Mod. Rep. 127; *Bennett* v. *Allcott* (1787), 2 Term Rep. 166; *Woodward* v. *Walton* (1807), 2 Bos. & P. (N. R.) 476).

(*o*) *Bennett* v. *Allcott*, *supra*.

(*p*) *Harper* v. *Luffkin* (1827), 7 B. & C. 387.

(*q*) *Mann* v. *Barrett* (1806), 6 Esp. 32; *Holloway* v. *Abell* (1836), 7 C. & P. 528.

(*r*) *Manvell* v. *Thompson* (1826), 2 C. & P. 303; *Carr* v. *Clarke* (1818), 2 Chit. 260.

(*s*) *Terry* v. *Hutchinson* (1868), L. R. 3 Q. B. 599.

(*t*) *Maunder* v. *Venn* (1829), Mood. & M. 323.

SECT. 2. Seduction.

Effect of concurrent contract of service.

The presumption is not rebutted by proving the existence of a contract of service on the part of the daughter with another person, provided that there is nothing in such contract inconsistent with the subsistence of the relation of master and servant between her father and herself (*a*). Where, therefore, though absent from her father's home during the usual working hours for the purpose of fulfilling her contract of service, she sleeps there and assists in the household duties, the action lies (*b*), even though the seducer is her master under the contract (*c*). Even a temporary residence elsewhere in accordance with the terms of her contract with her employer does not necessarily break the relation so as to prevent her father from maintaining the action (*d*).

When the relation no longer exists.

Where, however, the daughter is compelled, for the purpose of performing her duties under her contract with her master, to reside away from her father's home, the relation of master and servant no longer exists between her father and herself (*e*), even though she may intend to return home when the contract comes to an end (*f*). No action is therefore maintainable at the suit of the father, although the daughter may have been permitted by her master to assist her father in her spare time (*g*), or to return temporarily to her father's house, where she has assisted, during her stay, in the household duties, and where the seduction has in fact taken place (*h*). It is immaterial in this case that the seducer is the master himself (*i*), unless it can be shown that he entered into the contract of service for the express purpose of seducing his servant (*k*). Where, however, the contract of service has come to an end, and the daughter is seduced on the way to her father's house, the relation of master and servant is again revived and the father is entitled to sue (*l*).

When no action can be maintained.

630. In accordance with the same principles, a father cannot maintain an action for the seduction of his daughter where she does not reside with him, but has her own house, and carries on a business of her own (*m*).

What constitutes loss of service.

631. The actual loss of service upon which the right of action is founded arises from the incapacity of the daughter, during her

(*a*) *Davies* v. *Williams* (1847), 10 Q. B. 725.
(*b*) *Rist* v. *Faux* (1863), 4 B. & S. 409.
(*c*) *Ogden* v. *Lancashire* (1866), 15 W. R. 158; *Rist* v. *Faux*, *supra*; but see *Whitbourne* v. *Williams*, [1901] 2 K. B. 722, C. A.
(*d*) *Griffiths* v. *Teetgen* (1864), 15 C. B. 344; compare *Edmondson* v. *Machell* (1787), 2 Term Rep. 4.
(*e*) *Dean* v. *Peel* (1804), 5 East, 45.
(*f*) *Blaymire* v. *Haley* (1840), 6 M. & W. 55; *Gladney* v. *Murphy* (1890), 25 L. R. Ir. 651.
(*g*) *Thompson* v. *Ross* (1859), 5 H. & N. 16; *Whitbourne* v. *Williams*, *supra*; compare *Carr* v. *Clarke* (1818), 2 Chit. 260 (where the father received part of his daughter's wages).
(*h*) *Hedges* v. *Tagg* (1872), L. R. 7 Exch. 283.
(*i*) *Whitbourne* v. *Williams*, *supra*; *Gladney* v. *Murphy*, *supra*; compare *Harris* v. *Butler* (1837), 2 M. & W. 539 (where the daughter was apprenticed to the defendant's wife).
(*k*) *Speight* v. *Oliviera* (1819), 2 Stark. 493.
(*l*) *Terry* v. *Hutchinson* (1868), L. R. 3 Q. B. 599.
(*m*) *Manley* v. *Field* (1859), 7 C. B. (N. S.) 96.

confinement, to render service to her father. To establish the right of action it is therefore necessary to prove not only the seduction (*n*) but also illness in consequence thereof (*o*). If it is proved that the defendant seduced the plaintiff's daughter, and that she was delivered of a child, but that the defendant was not the father of it, the plaintiff cannot recover, as the loss of service is not attributable to the defendant's act (*p*). He is not, however, precluded from proving that the defendant is the father of the child by the fact that the affiliation proceedings against the defendant have proved unsuccessful, since he was not a party to them and is therefore not bound by their result (*q*).

Dates at which service must exist.

632. The plaintiff must also prove that the relation of master and servant existed both at the date of the seduction and the time when the child was born (*r*). If, therefore, the daughter is seduced at a time when the relation did not exist, the fact that she returned to his house and re-established the relation before the child was born does not entitle him to maintain the action (*s*), and it is immaterial that she returned in pursuance of her intention to return when her contract of service with another master came to an end (*t*), or because she was dismissed by her master in consequence of her seduction (*a*).

In accordance with the same principle the mother of the daughter has no right of action if the father dies after the seduction and before the birth of the child (*b*).

Measure of damages.

633. The damages which a father is entitled to recover are exemplary damages (*c*), and are not restricted to the actual loss which he may have sustained (*d*). He is therefore entitled to compensation for his distress and anxiety of mind (*c*), for the dishonour which he

(*n*) But see *Evans* v. *Walton* (1867), L. R. 2 C. P. 615, where the action was brought for enticing away the plaintiff's daughter (see p. 268, *ante*), and it appears from the statement of facts that the defendant seduced her, though no child was born.

(*o*) *Manvell* v. *Thomson* (1826), 2 C. & P. 303; but see *Boyle* v. *Brandon* (1845), 13 M. & W. 738 (where it was doubted whether an action would lie if the illness was occasioned by the defendant deserting the plaintiff's daughter after her seduction and not by the seduction).

(*p*) *Eager* v. *Grimwood* (1847), 1 Exch. 61.

(*q*) *Anderson* v. *Collinson*, [1901] 2 K. B. 107.

(*r*) *Davies* v. *Williams* (1847), 10 Q. B. 725; *Terry* v. *Hutchinson* (1868), L. R. 3 Q. B. 599. *Quære*, if the daughter leaves the father's service after her seduction and re-enters it before the birth of the child; see *Long* v. *Keightley* (1877), 11 I. R. C. L. 221, where it was held that the father could recover.

(*s*) *Davies* v. *Williams*, *supra*; *Dean* v. *Peel* (1804), 5 East, 45.

(*t*) *Blaymire* v. *Haley* (1840), 6 M. & W. 55; *Gladney* v. *Murphy* (1890), 26 L. R. Ir. 651.

(*a*) *Dean* v. *Peel*, *supra*.

(*b*) See note (*f*), p. 271, *ante*.

(*c*) As to what is meant by exemplary damages, see title DAMAGES, Vol. X., p. 324.

(*d*) *Elliott* v. *Nicklin* (1818), 5 Price, 641. But where the action is brought by a master not *in loco parentis*, he is only entitled to his actual out-of-pocket expenses (*McKenzie* v. *Hardinge* (1906), 23 T. L. R. 15).

(*e*) *Andrews* v. *Askey* (1837), 8 C. & P. 7.

SECT. 2. Seduction.

receives (*f*), for the loss of the society of his daughter (*g*), and for the expense of maintaining a bastard child (*h*). The jury are entitled to take into consideration the situation in life of the parties (*i*), and the conduct of the defendant (*k*), including his conduct at the trial (*l*).

Evidence as to defendant.

634. Evidence may be given of the defendant's position in life, though not of his pecuniary means (*m*). Evidence may also be given that the defendant was paying his addresses to the plaintiff's daughter, with the intention of marrying her (*n*), but not that the seduction was accomplished by means of a promise of marriage (*o*), though a new trial will not be granted because such evidence has been admitted (*p*).

Evidence of character.

635. The daughter is not a necessary witness (*q*). If she gives evidence she is not bound to answer in cross-examination questions as to her intercourse with other men (*r*), though, if she answers, her answers may be contradicted (*s*). The defendant may give evidence as to her general loose character (*t*), in which case her father may call rebutting evidence of good character (*a*). The defendant may also call witnesses to depose to particular acts of sexual intercourse between the plaintiff's daughter and themselves, specifying the time and place of their occurrence (*b*): but such evidence will not prevent the plaintiff from recovering if the jury find that the defendant is the father of the child; it will only go in mitigation of damages (*c*).

Particulars.

The defendant is not entitled to particulars of the time and place

(*f*) *Bedford* v. *McKowl* (1800), 3 Esp. 119; *Terry* v. *Hutchinson* (1868), L. R. 3 Q. B. 599.

(*g*) *Bedford* v. *McKowl*, *supra*.

(*h*) *Terry* v. *Hutchinson*, *supra*.

(*i*) *Andrews* v. *Askey* (1837), 8 C. & P. 7.

(*k*) *Russell* v. *Corn* (1704), 6 Mod. Rep. 127; *Bennett* v. *Allcott* (1787), 2 Term Rep. 166; compare *Appleby* v. *Franklin* (1885), 17 Q. B. D. 93, where the statement of claim alleged that the defendant had administered noxious drugs to the plaintiff's daughter with intent to procure abortion, and it was held that the allegation could not be struck out on the ground that it charged the defendant with felony.

(*l*) Compare *Berry* v. *Da Costa* (1866), L. R. 1 C. P. 331 (breach of promise of marriage).

(*m*) *Salter* v. *Walter* (1869), 21 L. T. 360; *Hodsoll* v. *Taylor* (1873), L. R. 9 Q. B. 79, *per* BLACKBURN, J., at pp. 81, 82.

(*n*) *Elliott* v. *Nicklin* (1818), 5 Price, 641.

(*o*) *Dodd* v. *Norris* (1814), 3 Camp. 519.

(*p*) *Tullidge* v. *Wade* (1769), 3 Wils. 18.

(*q*) *Farmer* v. *Joseph* (1816), Holt (N. P.), 451. As to the scope of her evidence, see *Colyer* v. *Mayne* (1849), 2 Car. & Kir. 1011.

(*r*) *Dodd* v. *Norris*, *supra*.

(*s*) *Andrews* v. *Askey*, *supra*; *Carpenter* v. *Wall* (1840), 11 Ad. & El. 803.

(*t*) *Carpenter* v. *Wall*, *supra*.

(*a*) *Bamfield* v. *Massey* (1808), 1 Camp. 460; *Bate* v. *Hill* (1823), 1 C. & P. 109; *Dodd* v. *Norris*, *supra* (where it was held that cross-examination of his daughter as to her character was not sufficient to make evidence of good character admissible); and see title EVIDENCE, Vol. XIII., pp. 454, 455.

(*b*) *Verry* v. *Watkins* (1836), 7 C. & P. 308.

(*c*) *Ibid.*

of the alleged seduction, at least before delivering his defence (*d*), unless he denies the seduction on oath (*e*). SECT. 2. Seduction.

SECT. 3.—*Personal Injury of Servant.*

636. The principles regulating the right of a master to be compensated for loss of service apply equally where the loss of service is attributable to personal injuries occasioned to the servant by the wrongful act of a third person, in consequence of which the servant is incapacitated, either permanently or temporarily, from the further performance of his contract (*f*). Loss of service.

Where the act occasioning the injury to the servant is a pure tort, no difficulty arises as to the master's right to sue the tortfeasor (*g*). An action therefore lies at the suit of the master, even though the tortious act amounts to a felony (*h*), since it is not his duty to prosecute the felon (*i*), and his right to sue in respect of the tort which has in fact been committed against him is not, in consequence, postponed (*k*). Nor is he precluded from recovering by the fact that the servant has himself recovered damages from the tortfeasor in respect of the same act, since the servant's right of action is based upon his own personal injury, whereas the master's right depends upon the loss of service consequent thereon (*l*). Where, on the other hand, the injury is occasioned by the breach, on the part of the third person, of a contract between the servant and himself, the master is not entitled to recover against the third person merely on the ground that he has lost his servant's services, and that his loss is attributable to the breach of contract (*m*). To be so entitled it is necessary to establish either that the contract was in fact made with the master through the medium of the servant acting as agent in that behalf (*n*), or that, so far as he is concerned, his claim is based upon a pure tort, wholly independent of the servant's contract (*o*).

637. Since the death of the servant puts an end to the contract of service (*p*), the master is precluded from recovering if the effect Death.

(*d*) *Knight* v. *Eagle* (1889), 61 L. T. 780.

(*e*) *Thomson* v. *Berkley* (1882), 47 L. T. 230; *Hanna* v. *Keers*, [1896] 2 I. R. 226. As to interrogatories, see title DISCOVERY, INSPECTION, AND INTERROGATORIES, Vol. XI., p. 105.

(*f*) *Martinez* v. *Gerber* (1841), 3 Man. & G. 88.

(*g*) *Ditcham* v. *Bond* (1814), 2 M. & S. 436; *Hall* v. *Hollander* (1825), 4 B. & C. 660; *Hodsoll* v. *Stallebrass* (1840), 11 Ad. & El. 301; compare *Grinnell* v. *Wells* (1844), 7 Man. & G. 1033, 1042.

(*h*) *Osborn* v. *Gillett* (1873), L. R. 8 Exch. 88.

(*i*) *Appleby* v. *Franklin* (1885), 17 Q. B. D. 93.

(*k*) As to the postponement of the right of action when the tortious act amounts to a felony, see title ACTION, Vol. I., pp. 27 *et seq.*

(*l*) *Martinez* v. *Gerber*, *supra*.

(*m*) *Alton* v. *Midland Rail. Co.* (1873), 19 C. B. (N. S.) 213, discussed in *Taylor* v. *Manchester, Sheffield, and Lincolnshire Rail. Co.*, [1895] 1 Q. B. 134, C. A.

(*n*) *Alton* v. *Midland Rail. Co.*, *supra*, as explained in *Meux* v. *Great Eastern Rail. Co.*, [1895] 2 Q. B. 387, C. A.

(*o*) *Berringer* v. *Great Eastern Rail. Co.* (1879), 4 C. P. D. 163 (where the servant had contracted with one railway company, but his injuries were due to the negligence of another railway company); *Meux* v. *Great Eastern Rail. Co.*, *supra*; compare *Hayn* v. *Culliford* (1879), 4 C. P. D. 182, C. A.

(*p*) See p. 94, *ante*.

SECT. 3. Personal Injury of Servant.

of the tort is to kill the servant instantaneously (*q*), though it is otherwise where the servant dies after an interval of time (*r*).

Contract of service essential.

638. The right of the master being based upon loss of service, it is necessary for him to prove the existence of a valid contract of service, though he need not show that the servant was hired at wages or at a salary (*s*). Under this head a father is entitled to recover damages, including the amount of fees incurred for medical attendance (*t*), for loss of service where a child is injured, it being sufficient to show that the child lived in the father's house, and was part of his family, without showing further that he did any material business for his father (*u*). The child must, however, be old enough to be capable of rendering services; if, therefore, he is so young that it is impossible for him to do so the father cannot recover (*a*).

Defence of servant.

639. The master may, in an action of assault brought against him, excuse himself from liability by proving that he committed the assault in question in the defence of his servant against the unlawful act of the plaintiff (*b*). Similarly, it is the right of the master, where proceedings are taken against his servant in respect of a tort for which his master is equally responsible to the injured party, to undertake, at his own cost, the defence of his servant without being guilty of maintenance (*c*).

Part XII.—Liabilities of the Servant to Third Persons.

SECT. 1.—*In Tort.*

Liability independent of contract of service.

640. A servant who commits a tort is, as a general rule, liable in damages to the person injured thereby (*d*), and his liability is

(*q*) *Osborn* v. *Gillett* (1873), L. R. 8 Exch. 88; *Clark* v. *London General Omnibus Co., Ltd.*, [1906] 2 K. B. 648, C. A.; compare *Higgins* v. *Butcher* (1606), Yelv. 90 (where the rule was said to be based on the merger of the tort in the felony); *Baker* v. *Bolton* (1808), 1 Camp. 493.

(*r*) Compare *Osborn* v. *Gillett*, *supra*.

(*s*) *Martinez* v. *Gerber* (1841), 3 Man. & G. 88.

(*t*) *Dixon* v. *Bell* (1816), 5 M. & S. 198. But not damages for the injury to his parental feelings (*Flemanyton* v. *Smithers* (1826), 2 C. & P. 292, where, however, the expenses of visiting the child at the hospital were allowed). As to such damages in the case of seduction, see p. 273, *ante*.

(*u*) *Jones* v. *Brown* (1794), 1 Esp. 217; see title INFANTS AND CHILDREN, Vol. XVII., p. 107.

(*a*) *Hall* v. *Hollander* (1825), 4 B. & C. 660.

(*b*) *Tickell* v. *Read* (1773), Lofft, 215; but see *Leward* v. *Basely* (1695), 1 Ld. Raym. 62.

(*c*) *Bray* v. *Royal British Nurses' Association*, [1897] 2 Ch. 272, C. A.; *Alabaster* v. *Harness*, [1895] 1 Q. B. 339, C. A.; *Elborough* v. *Ayres* (1870), L. R. 10 Eq. 367; *Wallis* v. *Portland* (*Duke*) (1797), 3 Ves. 494; 1 Bl. Com. 429. As to maintenance, see title ACTION, Vol. I., pp. 51 *et seq.*

(*d*) As to the cases in which the master is liable, see pp. 248 *et seq.*, *ante*. As to a servant's liability to attachment if he assists his master in disobeying an order of the court, see *Seaward* v. *Paterson*, [1897] 1 Ch. 515, C. A.; see title CONTEMPT

not affected by the existence of a contract of service (*e*), or, where he commits the tort in the course of his employment and within the scope of his authority, by the existence of the corresponding liability of his master for the same tort (*f*), since he is the actual tortfeasor (*g*).

Circumstances not affording defence.

A servant cannot, therefore, excuse himself from liability for his own act on the ground that he did it solely in his capacity as servant for another, and that, but for the existence of the contract of service, he would not have done it at all (*h*). Thus, it is no defence to the servant that, in doing the act complained of, he was obeying the express orders of his master (*i*), or that his master subsequently adopted or ratified it, unless the act is thereby deprived of its tortious character (*k*). Similarly, it is no defence that he himself gained no personal benefit by his tort (*l*), but that he acted solely on his master's behalf and in his master's interest (*m*). Nor can he escape responsibility on the ground that he did not know and had no reason to know or to suspect that the act in question was tortious (*n*), unless such act is incapable of being regarded as a tort in the absence of actual or imputed knowledge that it is wrongful (*o*). Even the fact that the master who commanded the act to be done was innocent of any intention to do any wrong, and *bonâ fide* believed that he was entitled to command the servant to do it, does not excuse his servant if the act, when done, is in fact a tort (*a*). Thus, a servant who acquires possession (*b*) of the property of another, and deals with it in such a manner as to constitute a conversion of it (*c*), is personally guilty of conversion (*d*).

OF COURT, ATTACHMENT, AND COMMITTAL, Vol. VII., p. 292. As to tort in general, see title TORT.

(*e*) *Lane* v. *Cotton* (1701), 12 Mod. Rep. 472, 488; *Sands* v. *Child* (1693), 3 Lev. 351. This is clearly the case where the act is one for which the master cannot be held responsible (*M'Manus* v. *Crickett* (1800), 1 East, 106; *Butler* v. *Basing* (1827), 2 C. & P. 613).

(*f*) See pp. 248 *et seq.*, *ante*, *Glasgow Corporation* v. *Lorimer*, [1911] A. C. 209. He may, however, in such a case be entitled to be indemnified by his master, if he is not *in pari delicto* (*Dixon* v. *Fawcus* (1861), 3 E. & B. 537; *Toplis* v. *Grane* (1839), 5 Bing. (N. C.) 636; *Adamson* v. *Jarvis* (1827), 4 Bing. 66).

(*g*) A judgment against the principal is a bar to an action against his servant (*Brinsmead* v. *Harrison* (1872), L. R. 7 C. P. 547, Ex. Ch.).

(*h*) *Mill* v. *Hawker* (1875), L. R. 10 Exch. 92.

(*i*) *Cullen* v. *Thompson's Trustees and Kerr* (1862), 4 Macq. 424, H. L.; *Sands* v. *Child* (1693), 3 Lev. 351.

(*k*) *Hull* v. *Pickersgill* (1819), 1 Brod. & Bing. 282; *Whitehead* v. *Taylor* (1839), 10 Ad. & El. 210; compare *Sykes* v. *Sykes* (1870), L. R. 5 C. P. 113; see title AGENCY, Vol. I., pp. 224, 225.

(*l*) *Bennett* v. *Bayes* (1860), 5 H. & N. 391; *Lowe* v. *Dorling & Son*, [1906] 2 K. B. 772, C. A.

(*m*) *Perkins* v. *Smith* (1752), Say. 40; *Stephens* v. *Elwall* (1815), 4 M. & S. 259; *Wilson* v. *Peto* (1821), 6 Moore (C. P.), 47; *Cranch* v. *White* (1835), 1 Bing. (N. C.) 414.

(*n*) *Stephens* v. *Elwall*, *supra*; compare *Consolidated Co.* v. *Curtis & Son*, [1892] 1 Q. B. 495; *Baschet* v. *London Illustrated Standard Co.*, [1900] 1 Ch. 73.

(*o*) Compare *Day* v. *Bream* (1837), 2 Mood. & R. 54; *Emmens* v. *Pottle* (1885), 16 Q. B. D. 354, C. A.; see title AGENCY, Vol. I., p. 225.

(*a*) *R.* v. *James* (1837), 8 C. & P. 131, *per* Lord ABINGER, C.B., at p. 132.

(*b*) As to the necessity of possession to constitute a conversion, see *Cochrane* v. *Rymill* (1879), 40 L. T. 744, C. A.; *Barker* v. *Furlong*, [1891] 2 Ch. 172.

(*c*) As to what constitutes conversion, see title TROVER AND DETINUE.

(*d*) *Cary* v. *Webster* (1721), 1 Stra. 480; *Greenway* v. *Fisher* (1824), 1 C. & P.

SECT. 1. In Tort.

Effect of nonfeasance.

641. Where the act committed by the servant is merely an act of nonfeasance, which, without proof of a contract to do that which has been left undone, would not give rise to a cause of action (*e*), and the only contract in existence relating to the nonfeasance is between the master and the person injured by the servant's nonfeasance, the servant, not being a party to the contract, is not liable for the consequences of his nonfeasance to the person injured (*f*), but only to his own master, to whom it was his duty to perform the obligations imposed by the contract of service (*g*). In this case the injured person must look to the master for any compensation to which he may be entitled by reason of the nonfeasance (*h*).

Defence of master.

642. A servant may justify the commission of an act which is *primâ facie* tortious, where it is committed in defence of his master's person (*i*) or property (*k*), provided that the act is one which would have been justifiable, if committed by the master himself. Thus, a servant is entitled to evict a trespasser from his master's land, and for that purpose to make use of the necessary amount of force (*l*).

SECT. 2.—*Criminal Liability.*

Liability in general.

643. The existence of the relation of master and servant does not, as a general rule, affect the criminal responsibility of a servant in respect of his own acts (*m*). If, therefore, he commits an act which is in fact a crime, he is guilty of the crime in question, and his guilt is not affected by the fact that he committed the act in obedience to his master's orders (*n*). Where, however, the act is one which is not, on the face of it, criminal (*o*), and which, on the other hand, is one which would be lawful if the master was entitled to give the order which he does give (*p*), the servant, by doing the act which he is ordered to do, does not render himself guilty of a crime if he honestly and *bonâ fide* believes that the act is lawful and that his master has a right to order it to be done (*q*).

190; and see, further, titles AGENCY, Vol. I., pp. 225, 226; TROVER AND DETINUE.

(*e*) *Kelly* v. *Metropolitan Rail. Co.*, [1895] 1 Q. B. 944, C. A., *per* A. L. SMITH, L.J., at p. 947.

(*f*) It is otherwise where the duty to the injured person exists irrespective of contract (*ibid.*).

(*g*) See p. 125, *ante*.

(*h*) *Lane* v. *Cotton* (1701), 12 Mod. Rep. 472, 488.

(*i*) *Leeward* v. *Basilee* (1695), 1 Salk. 407; and see p. 126, *ante*.

(*k*) *Ewer* v. *Jones* (1846), 9 Q. B. 623.

(*l*) *Ibid.*

(*m*) *R.* v. *Knell* (1729), 1 Barn. (K. B.) 305; *R.* v. *Hughes* (1857), 26 L. J. (M. C.) 202, C. C. R.

(*n*) *Wilson* v. *Stewart* (1863), 3 B. & S 913; compare *R.* v. *Manley* (1844), 1 Cox, C. C. 104; unless the act ceases to be criminal if done by his master's orders (*R.* v. *Taylor* (1812), 15 East, 460); but see *Ex parte Sylvester* (1829), 9 B. & C. 61.

(*o*) *R* v. *Bleasdale* (1848), 2 Car & Kir. 765.

(*p*) *R.* v. *James* (1837), 8 C. & P. 131.

(*q*) Compare *R.* v. *Tyler* (1841), 1 Cox, C. C. 84.

Liability under statute.

644. Where the doing of a particular act is made an offence by statute, the liability of a servant (*r*), who does the act in the course of his employment on his master's behalf, depends upon the construction of the statute in question. There may be an absolute prohibition against the doing of the act, in which case the servant is liable, even though he acted innocently (*s*); or the servant may incur no liability, unless he is himself personally in default (*t*). Again, where a statute prohibits the doing of certain acts by unqualified persons, a servant who does any such act may, in some cases, be guilty of an offence, unless he personally possesses the requisite qualification (*a*), whilst, in other cases, the fact that the master under whose orders he does the act is qualified may be sufficient to exempt him from liability either absolutely (*b*) or subject to conditions (*c*).

No question of liability can, however, arise, in any case, unless the act which the servant does falls within the purview of the particular statute alleged to have been violated (*d*).

Part XIII.—Rights of the Servant against Third Persons.

SECT. 1.—*Procuring or Encouraging Breach of Contract by the Master.*

When actionable.

645. A servant is entitled to maintain an action against any person who interferes with the contract of service by inducing the master to break it and discharge the servant before its lawful determination (*e*). The principles regulating the rights of the servant are, with the necessary modifications, the same as those regulating the rights of a master in the corresponding case (*f*). Thus, it is

(*r*) As to the criminal liability of the master in such a case, see p. 258, *ante*. As to the special provisions relating to particular classes of servants, such as miners, seamen, railway servants, and the like, see the appropriate titles.

(*s*) *Hotchin* v. *Hindmarsh*, [1891] 2 Q. B. 181 (see title FOOD AND DRUGS, Vol. XV., p. 18).

(*t*) *Wilson* v. *Stewart* (1863), 3 B. & S. 913; *Williamson* v. *Norris*, [1899] 1 Q. B. 7.

(*a*) *Ex parte Sylvester* (1829), 9 B. & C. 61; *Masters* v. *Lowther* (1852), 11 C. B. 948; *Pharmaceutical Society* v. *Wheeldon* (1890), 24 Q. B. D. 683 (Pharmacy Act 1868 (31 & 32 Vict. c. 121), s. 15); *Killick* v. *Graham*, *Linton* v. *Burchell*, [1896] 2 Q. B. 196; *Hepple* v. *Brumby* (1896), 60 J. P. 792; *Pharmaceutical Society* v. *Nash*, [1911] 1 K. B. 520; compare *Stansfield & Co.* v. *Andrews* (1909), 100 L. T. 529.

(*b*) *R.* v. *Taylor* (1812), 15 East, 460; *Williamson* v. *Norris*, [1899] 1 Q. B. 7 (see title INTOXICATING LIQUORS, Vol. XVIII., p. 110).

(*c*) *Killick* v. *Graham*, *Linton* v. *Burchell*, *supra*; compare *Stuchbery* v. *Spencer* (1886), 55 L. J. (M. C.) 141.

(*d*) *Pharmaceutical Society* v. *White*, [1901] 1 K. B. 601, C. A.

(*e*) *Read* v. *Friendly Society of Operative Stonemasons of England, Ireland and Wales*, [1902] 2 K. B. 732, C. A.

(*f*) See pp. 267 *et seq.*, *ante*, where the subject is fully discussed. As to the effect of the Trade Disputes Act, 1906 (6 Edw. 7, c. 67), see *Conway* v. *Wade*, [1908] 2 K. B. 844, C. A.

SECT. 1. Procuring or Encouraging Breach of Contract by Master.

not a sufficient justification for interference with the contract that the person who procured its breach acted in the *bonâ fide* belief that it was made in breach of a prior contract between himself and the master, such as, for instance, a contract to the effect that no person in the position of the plaintiff was to be taken by the master as an apprentice (*g*); and even the fact that the contract of service is actually a breach of such prior contract may, in certain circumstances at least, be insufficient (*h*). Where, on the other hand, the contract of service is not broken, but lawfully determined by the master, no action will lie (*i*).

SECT. 2.—*In Tort.*

When action lies.

646. In considering the rights of a servant who is injured by the wrongful act of a third person, the existence of the contract of service or the fact that, at the time of the injury, the servant was engaged in the course of his employment on his master's behalf may, as a general rule, be disregarded, since his right is based upon the violation of a duty towards himself (*k*). Where, therefore, the third person owes a duty to the master only, its violation confers no rights upon the servant, though he may sustain injury thereby (*l*). Thus, a servant who is in occupation of premises on his master's behalf cannot maintain an action against a trespasser, since he has himself no estate therein, and it is immaterial that he may have been allowed by his master to use the premises for his own business (*m*).

Extension of breach of duty.

647. In order to establish a breach of duty towards the servant it may be necessary to consider whether the servant was acting in the course of his employment. The facts of the case may show that the third person owed a duty not only to the master, but also to the

(*g*) *Read* v. *Friendly Society of Operative Stonemasons of England, Ireland and Wales*, [1902] 2 K. B. 732, C. A.

(*h*) *Ibid.*, where threats were used to procure the breach.

(*i*) *Bulcock* v. *St. Anne's Master Builders' Federation* (1902), 19 T. L. R. 27. As to whether an action will lie for inducing persons not to employ a particular person as their servant, see *Giblan* v. *National Amalgamated Labourers' Union of Great Britain and Ireland*, [1903] 2 K. B. 600, C. A., where it was held that the action would lie, following *Quinn* v. *Leathem*, [1901] A. C. 495; and see, *contra*, *Huttley* v. *Simmons*, [1898] 1 Q. B. 181, applying *Allen* v. *Flood*, [1898] A. C. 1. It is difficult to reconcile *Giblan* v. *National Amalgamated Labourers' Union of Great Britain and Ireland*, *supra*, with *Allen* v. *Flood*, *supra*; see, further, title TRADE AND TRADE UNIONS.

(*k*) *Membery* v. *Great Western Rail. Co.* (1889), 14 App. Cas. 179; *Johnson* v. *Lindsay & Co.*, [1891] A. C. 371, where the doctrine of common employment was held not to apply to the servant of a contractor injured by the negligence of the servant of a sub-contractor; compare *Thrussell* v. *Handyside* (1888), 20 Q. B. D. 359; see p. 133, *ante*, and, generally, titles NEGLIGENCE; TORT. A servant is not entitled to maintain an action for slander, when the words are not actionable *per se*, merely because they induced his dismissal (*Vicars* v. *Wilcocks* (1806), 8 East, 1; *Speake* v. *Hughes*, [1904] 1 K. B. 138, C. A.); he must show that his dismissal was the direct and natural consequence of the defendant's words (*Vicars* v. *Wilcocks*, *supra*; *Knight* v. *Gibbs* (1834), 1 Ad. & El. 43); and see titles DAMAGES, Vol. X., p. 319, note (*b*); LIBEL AND SLANDER, Vol. XVIII., pp. 730 *et seq.*

(*l*) *Winterbottom* v. *Wright* (1842), 10 M. & W. 109, followed in *Earl* v. *Lubbock*, [1905] 1 K. B. 253, C. A.; *Powell* v. *Thorndike* (1910), 26 T. L. R. 399; compare *Wood & Co.* v. *Mackay* (1906), 8 F. (Ct. of Sess.) 625.

(*m*) *White* v. *Bayley* (1861), 10 C. B. (N. S.) 227.

servants engaged on his behalf (*n*), and they may in consequence acquire larger rights than those of the general public (*o*). Thus, a servant who in the course of his employment goes upon the premises of a third person is not a trespasser or licensee, but is there upon lawful business, and may consequently maintain an action for any injury sustained by reason of the condition of the premises or otherwise through such person's want of care (*p*). Where, on the other hand, the servant is not acting in the course of his employment, the existence of the contract of service does not operate to extend the obligations of the owner of the premises (*q*).

(*n*) *Parry* v. *Smith* (1879), 4 C. P. D. 325; *Elliott* v *Hall* (1885), 15 Q. B D. 315

(*o*) *Indermaur* v. *Dames* (1867), L. R. 2 C. P. 311, Ex. Ch.

(*p*) *Ibid*; *Heaven* v. *Pender* (1883), 11 Q. B. D. 503, C. A., distinguished in *Caledonian Rail. Co* v *Mulholland*, [1898] A. C. 216; see title NEGLIGENCE.

(*q*) *Batchelor* v. *Fortescue* (1883), 11 Q. B. D. 474, C. A.

MASTER OF THE CROWN OFFICE.

See CROWN PRACTICE.

MASTER OF THE MINT.

See CONSTITUTIONAL LAW.

MASTER OF THE SUPREME COURT.

See COURTS; PRACTICE AND PROCEDURE.

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MAYOR'S COURT, LONDON.

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SECT. 1.—*Constitution.*

SUB-SECT. 1.—*The Court.*

Constitution of the court.

648. The Mayor's Court of London is a court of record styled "the court of our Lord the King holden before the Lord Mayor and Aldermen in the chamber of the Guildhall of the City of London" (*a*).

The fees of this court belong to the Corporation of London, by whom all the expenses of the court are defrayed (*b*).

SUB-SECT. 2.—*Sittings.*

Sittings.

649. The sittings are held monthly, and the dates are fixed by the Recorder (*c*).

Two or more courts may be held at the same time (*d*).

SUB-SECT. 3.—*Judges.*

Judges.

650. The Lord Mayor and all the aldermen are in law the judges, but they take no part in the actual business of the court.

The Recorder.

The Recorder alone sits by custom, as the acting or officiating judge (*e*).

(*a*) Mayor's Court of London Procedure Act, 1857 (20 & 21 Vict. c. clvii), s. 54; Appendix to the Report of the Municipal Corporations Commissioners (London and Southwark), Parliamentary Paper, 1837 (60), p. 123; Pulling, Laws, Customs, Usages, and Regulations of the City and Port of London, p. 177; Thorpe, Ancient Laws and Institutions of England, p. 197, n.; Liber Albus (Rolls Series), Vol. I., p. 498; Sharpe, Calendar of Wills, Court of Husting, London, Vol. I., p. ii., note 3; see Glyn and Jackson, Mayor's Court Practice, 3rd ed., 1. (Note: the last-named authority is hereafter referred to as "Glyn and Jackson.")

(*b*) Royal Commission, 1893, City of London, Statement as to the Origin etc. of the Corporation of London, p. 82; and as to the Corporation see title METROPOLIS, pp. 422 *et seq.*, *post*.

(*c*) Appendix to Report of Municipal Corporations Commissioners (London and Southwark), Parliamentary Paper, 1837 (60), p. 124. As to the Recorder, see the text, *infra*.

(*d*) Borough and Local Courts of Record Act, 1872 (35 & 36 Vict. c. 86), s. 4; Order in Council of 26th June, 1873 (Stat. R. & O. Rev., Vol. IV., 971).

(*e*) See Emerson, Courts of Law of the City of London, p. 33; Pulling, Laws,

651. In the absence of the Recorder, the Common Serjeant (*f*) presides as judge.

Common Serjeant.

In case of illness or unavoidable absence of the Recorder or Common Serjeant, they, or either of them, or in case of their inability to appoint, the Court of Common Council (*g*) may appoint, a barrister-at-law, who has practised as such for at least seven years, to act as a deputy judge during such illness or unavoidable absence (*h*).

Deputy judge: (i.) During illness;

The Recorder or Common Serjeant, or either of them, may also appoint a deputy, who has practised as a barrister for at least seven years, to act for either of them for any time or times not exceeding in the whole two months in any one year, and such deputy has all the powers and can perform all the duties of a judge of the court (*i*).

(ii.) for a period not exceeding two months.

652. The Recorder has also, as judge of the Mayor's Court, power to appoint a deputy or Assistant Judge (*j*), subject to confirmation by the Lord Chancellor and approval by the Court of Common Council. This power has been exercised, and since 1873 there has always been an Assistant Judge.

Deputy or assistant judge.

SUB-SECT. 4.—*Officers.*

Officers.

653. There is a Registrar of the Mayor's Court, appointed by the Court of Common Council (*g*), whose principal duties are to record all the proceedings of the court; to tax bills of costs; to assess damages under order of the judge in case of an interlocutory judgment where the damages are a matter of calculation (*k*); to attend the court whilst sitting for the trial of causes; and, in the absence of the judge, to hold the court, and transact all the business of the court, except the trial of issues of law or fact (*l*). On applications or summonses at chambers the Registrar has all the powers and authorities which a master of the Supreme Court has in like proceedings in the High Court, subject to appeal to a judge (*m*).

Registrar.

Customs, and Regulations of the City and Port of London, 2nd ed., p. 116. He is elected for life by the Court of Aldermen, and sworn in before that body, and cannot be removed but for reasonable cause. He is the chief adviser and advocate of the corporation. By the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 42 (14), no Recorder of the City of London can now exercise any judicial functions unless he is appointed by the Crown to exercise them.

(*f*) Mayor's Court of London Procedure Act, 1857 (20 & 21 Vict. c. clvii.), s. 43. The Common Serjeant acts, like the Recorder, as advisor and advocate of the corporation. The appointment of the Common Serjeant is now vested in the Crown (Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 42 (14)).

(*g*) See title METROPOLIS, pp. 426 *et seq.*, *post*.

(*h*) Mayor's Court of London Procedure Act, 1857 (20 & 21 Vict. c. clvii.), s. 43; and see title BARRISTERS, Vol. II., p. 382.

(*i*) Mayor's Court of London Procedure Act, 1857 (20 & 21 Vict. c. clvii.), s. 43.

(*j*) Borough and Local Courts of Record Act, 1872 (35 & 36 Vict. c. 86), s. 7; Order in Council of 26th June, 1873 (Stat. R. & O. Rev., Vol. IV., 971).

(*k*) Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 94.

(*l*) Mayor's Court of London Procedure Act, 1857 (20 & 21 Vict. c. clvii.), s. 41.

(*m*) Mayor's Court of London Rules, 1892, Ord. 10, r. 3; see Glyn and Jackson, pp. 3, 278; and title PRACTICE AND PROCEDURE.

SECT. 1. Constitution.

Serjeant-at-mace.

The court also has a Serjeant-at-mace, who executes the process of the court under executions and in equity proceedings, and a Deputy Serjeant-at-mace (*n*).

SECT. 2.—*Jurisdiction.*

SUB-SECT. 1.—*Customary or General.*

Jurisdiction.

654. The Mayor's Court possesses both a legal and equitable jurisdiction. It has, however, no jurisdiction in replevin.

Equitable jurisdiction.

655. The equitable jurisdiction of the court is similar to that exercised on the equity side of the old Court of Exchequer. The court generally takes cognisance of all causes of an equitable nature between party and party, such as partition of property, administration, trust, and partnership. It can decree specific performance of an agreement, the redemption or foreclosure of a mortgage of property in the City of London and its liberties, and can grant injunctions (*o*).

Limit to jurisdiction.

656. The Mayor's Court is an inferior court of local jurisdiction, and therefore, except by statute, it has jurisdiction only where the whole cause of action (*p*) arises within the local limits of its jurisdiction (*q*). In such cases its jurisdiction is unlimited.

SUB-SECT. 2.—*Exclusive.*

Exclusive jurisdiction.

657. The Mayor's Court has exclusive jurisdiction in awarding restitution of apprentices' premiums and indentures of apprenticeship within the City of London, and in a variety of causes which arise out of City of London customs, such as foreign attachments, disfranchisements, *feme sole* merchants, arrest for better security in certain cases of defamation, and in penal actions under acts of Common Council (*r*). The court is also the court of appeal from decisions of

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(*n*) *Re Holland, Ex parte Warren* (1885), 54 L. J. (Q. B.) 320, C. A. As to the office of secondary, see title SHERIFFS AND BAILIFFS.

(*o*) As to the subjects of equitable jurisdiction generally, see title EQUITY, Vol. XIII., pp. 4 *et seq.*

(*p*) *London Corporation* v. *Cox* (1867), L. R. 2 H. L. 239; *Cooke* v. *Gill* (1873), L. R. 8 C. P. 107, *per* BOVILL, C.J., at p. 112, *per* BRETT, J., at p. 116. "Cause of action" means every fact which is material to be proved to entitle the plaintiff to succeed—*i.e.*, every fact which the defendant would have a right to traverse (*R.* v. *London Corporation* (1892), 61 L. J. (Q. B.) 329; *Bowler* v. *Barberton Development Syndicate*, [1897] 1 Q. B. 164, C. A.). See, further, title COURTS, Vol. IX., pp. 12, 14, 176, 177.

(*q*) The local limits of the jurisdiction of the court extend over the City and liberties, but not over Southwark or the river Thames (Appendix to Report of the Municipal Corporations Commissioners (London and Southwark), Parliamentary Paper, 1837 (60), p. 124). As to such areas generally, see title METROPOLIS, p. 400, *post.*

(*r*) Royal Commission, 1893, City of London, Statement as to the Origin etc. of the Corporation of London, p. 79. The decision of the House of Lords in *London Corporation* v. *London Joint Stock Bank* (1881), 6 App. Cas. 393, practically put an end to foreign attachment. As to foreign attachment, see Brandon, Law of Foreign Attachment. As to penal actions, see Pulling, Laws, Customs and Regulations of the City and Port of London, 2nd ed., 186.

the Chamberlain's Court in disputes between masters and apprentices, and such appeals are heard before the Recorder and a jury (*s*).

SUB-SECT. 3.—*Statutory.*

Claims not exceeding £50.

658. Where the debt or damage claimed does not exceed £50, no plea to the jurisdiction is allowed, provided the defendant or one of the defendants dwells or carries on business within the City of London or the liberties thereof at the time of the action brought, or has dwelt or carried on business there at some time within six months next before the time of the action brought, or if the cause of action, either wholly or in part, arose therein (*t*).

"Part of the cause of action" means a material part of the cause of action, and includes the delivery of an offer or acceptance (*a*), the assignment of a chose in action (*b*), the breach of a contract (*c*), the delivery of goods (*d*), the acceptance (*e*) or the indorsement or presentment of a bill of exchange (*f*), and an account stated (*g*).

A defendant may not object to the jurisdiction of the court by any proceeding whatsoever in the court except by plea (*h*). This, however, does not prevent the defendant from obtaining a writ of prohibition in a case where such a writ would lie (*i*).

Extent of power to grant relief.

659. The Mayor's Court has power to grant such relief, redress or combination of remedies, either absolute or conditional, and to

(*s*) See Royal Commission, 1893, City of London, Statement as to the Origin etc. of the Corporation of London, p. 109; title COURTS, Vol. IX., p. 178.

(*t*) Mayor's Court of London Procedure Act, 1857 (20 & 21 Vict. c. clvii.), s. 12. As to what is the meaning of "dwelling," or "carrying on business," see *Sheils* v. *Rait* (1849), 7 C. B. 116; *Macdougall* v. *Paterson* (1851), 11 C. B. 755; *Kerr* v. *Haynes* (1860), 29 L. J. (Q. B.) 70; *Alexander* v. *Jones* (1866), L. R. 1 Exch. 133; *Massey* v. *Burton* (1857), 2 H. & N. 597; *Lewis* v. *Graham* (1888), 20 Q. B. D. 780, affirmed *sub nom. Graham* v. *Lewis*, 22 Q. B. D. 1, C. A.; *Glennie* v. *Delmar* (1850), 1 L. M. & P. 402; *Sangster* v. *Kay* (1850), 5 Exch. 386; *Buckley* v. *Hann* (1850), 5 Exch. 43; *Re Bowie, Ex parte Breull* (1881), 16 Ch. D. 484, C. A.; *Gorslett* v. *Harris* (1857), 29 L. T. (O. S.) 75, *Keynsham Blue Lias Lime Co.* v. *Baker* (1863), 2 H. & C. 729; *Brown* v. *London and North-Western Rail. Co.* (1863), 4 B. & S. 326; *Le Tailleur* v. *South Eastern Rail. Co.* (1877), 3 C. P. D. 18; *Rogers* v. *London, Chatham, and Dover Rail. Co.* (1877), 26 W. R. 192

(*a*) *Borthwick* v. *Walton* (1855), 15 C. B. 501; *Green* v. *Beach* (1873), L. R. 8 Exch. 208; *Taylor* v. *Jones* (1875), 1 C. P. D. 87; *Taylor* v. *Nicholls* (1876), 1 C. P. D. 242, C. A.; see also *Household Fire Insurance Co.* v. *Grant* (1879), 4 Ex. D. 216, C. A.; *Dunlop* v. *Higgins* (1848), 1 H. L. Cas. 381; *Evans* v. *Nicholson* (2) (1875), 32 L. T. 778; *Bennett* v. *Cosgriff* (1876), 38 L. T. 177.

(*b*) *Read* v. *Brown* (1888), 22 Q. B. D. 128. C. A., *Bennett* v. *White*, [1910] 2 K. B. 643.

(*c*) *Northey Stone Co.* v. *Gidney*, [1894] 1 Q. B. 99, C. A.

(*d*) *Norman* v. *Marchant* (1852), 7 Exch. 723; *Kemp* v. *Clark* (1848), 12 Q. B. 647; *Smith* v. *Hudson* (1865), 6 B. & S. 431; *Norman* v. *Phillips* (1845), 14 M. & W. 277.

(*e*) *Hawes* v. *Paveley* (1876), 1 C. P. D. 418, C. A.

(*f*) *Williamson* v. *Cotterell* (1880), 70 L. T. Jo. 24, C. A.; *Jesolyne* v. *Roberts*, [1908] 2 K. B. 349.

(*g*) *Taylor* v. *Nicholls, supra*; *Evans* v. *Nicholson* (1875), 32 L. T. 664, 778.

(*h*) Mayor's Court of London Procedure Act 1857 (20 & 21 Vict. c. clvii.), s. 15; see *Hawes* v. *Paveley* (1876), 1 C. P. D. 418, *per* JESSEL, M.R.

(*i*) *Jacobs* v. *Brett* (1875), L. R. 20 Eq. 1, *per* JESSEL, M.R.; *Bridge* v. *Branch* (1876), 34 L. T. 905; *London Corporation* v. *Cox* (1867), L. R. 2 H. L. 239. As to prohibition, see Glyn and Jackson, pp. 18, 19; and see p. 301, *post*.

SECT. 2. Jurisdiction.

give the like effect to every ground of defence or counterclaim, equitable or legal, in as full and ample a manner as the High Court (*k*). The court has no power relating to procedure under the Rules of the Supreme Court, except where certain of these rules have been applied to the Mayor's Court by the Rule Committee under the statutes relating thereto (*l*).

Jurisdiction as to counterclaims.

660. The court can entertain counterclaims which are beyond its jurisdiction, so far as they relate to the plaintiff's claim and the defence thereto, but no relief exceeding that which the court has jurisdiction to administer can be given to the defendant on any such counterclaim (*m*).

The court is also empowered to deal finally with counterclaims (1) which are outside its local jurisdiction and within the jurisdiction of any other inferior court in England; (2) which involve more than one cause of action, each such cause of action being within the jurisdiction of the court, as to each of which the defendant might have maintained a separate action, although the aggregate amount of the counterclaim exceeds the jurisdiction of the court; (3) which are for an amount exceeding the jurisdiction of the court, provided the plaintiff does not object in writing, within the prescribed time, to the court giving relief exceeding its jurisdiction (*m*).

SECT. 3.—*Practice and Procedure.*

SUB-SECT. 1.—*General Regulations.*

Practice and procedure on common law side.

661. The practice and procedure on the common law side of the Mayor's Court are regulated by the Common Law Procedure Acts, 1852, 1854, and 1860 (*n*), and by the Mayor's Court of London Procedure Act, 1857 (*o*).

(*k*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 89; see *Richards* v. *Cullerne* (1881), 7 Q. B. D. 623, C. A.; *R.* v *Selfe*, [1908] 2 K. B. 121.

(*l*) Mayor's Court of London Procedure Act, 1857 (20 & 21 Vict. c. clvii.), s. 45; Judicature Act, 1881 (47 & 48 Vict. c. 61), s. 21; Rules Publication Act, 1893 (56 & 57 Vict. c. 66); see *Pryor* v. *City Offices Co.* (1883), 10 Q. B. D. 504, C. A.; *Richards* v. *Cullerne*, *supra*. As to the application of such rules in practice and procedure, see p. 289, *post*.

(*m*) Judicature Act, 1873 (36 & 37 Vict. c. 66), ss. 89, 90; Judicature Act, 1884 (47 & 48 Vict. c. 61), s. 18.

(*n*) 15 & 16 Vict. c. 76; 17 & 18 Vict. c. 125; 23 & 24 Vict. c. 126. By Order in Council of 17th November, 1863, the following provisions (with certain variations) of these Acts were applied to the Mayor's Court. Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), ss. 3, 7, 16, 17, 32—57, 60, 61, 64—71, 74—80, 87—89, 91, 94—96, 117—119, 123—126, 128—201, 203—216, 218—221, 223—226, Sched. A (except Forms 1—5), Sched. B; the whole of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), except ss. 2, 35—40, 42, 43, 76, 77, 95, 99—102, 104—107; the whole of the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126), except ss. 22—27, 40—46. This Order is revoked by Order in Council of 28th June, 1892, so far as regards the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), ss. 3—17, and the provisions of the Arbitration Act, 1889 (52 & 53 Vict. c. 49), except s. 17, substituted. See Glyn and Jackson, pp. 303, 377. The application of these statutes to the Mayor's Court is not affected by their partial repeal; see Statute Law Revision and Civil Procedure Act, 1883 (46 & 47 Vict. c. 49), s. 7.

(*o*) 20 & 21 Vict. c. clvii. As to fees and costs, see Mayor's Court of London, Rules as to Fees and Costs, 1890, amended by the Rules of 1892 and 1903; Glyn and Jackson, pp. 248—262, 267, 274, 278, 280.

SECT. 8. Practice and Procedure.

Application of rules.

662. Certain rules of the Supreme Court have been applied to the Mayor's Court (*p*), namely, those relating to proceedings by or against partnerships and firms (*q*); third party procedure (*r*); payment into and out of court and tender (*s*); proceedings in lieu of demurrer (*t*); discovery and inspection (*u*); admissions (*x*); further and better particulars (*y*); arbitration (*z*); costs (*a*); enforcement of orders (*b*). There are special rules as to judgment summonses (*c*); fees, powers of registrar etc. (*d*); default procedure (*e*).

Application of statutes.

663. The following Acts have been applied in whole or in part to the court: the Summary Procedure on the Uniformity of Process Act, 1832 (*f*); the Small Debts Act, 1845 (*g*); Bills of Exchange Act, 1855 (*h*); the Foreign Law Ascertainment Act, 1861 (*i*); the Borough and Local Courts of Record Act, 1872 (*j*); the Arbitration Act, 1889 (*k*); the Partnership Act, 1890 (*l*).

(*p*) By the Mayor's Court of London Rules, 1892, made in pursuance of the Mayor's Court of London Procedure Act, 1857 (20 & 21 Vict. c. clvii.), the Judicature Act, 1884 (47 & 48 Vict. c. 61), and the Debtors Act, 1869 (32 & 33 Vict. c. 62); see Glyn and Jackson, pp. 263—278.

(*q*) R. S. C., Ord. 48A, rr. 1—11; see titles PARTNERSHIP; PRACTICE AND PROCEDURE.

(*r*) R. S. C., Ord. 16, rr. 48—55; see p. 292, *post*, and title PRACTICE AND PROCEDURE.

(*s*) R. S. C., Ord. 22, rr. 1—9, 11; see p. 293, *post*, and title PRACTICE AND PROCEDURE.

(*t*) R. S. C., Ord. 25, rr. 1—4.

(*u*) R. S. C., Ord. 31, rr. 19A, 21—24; see title DISCOVERY, INSPECTION, AND INTERROGATORIES, Vol. XI., pp. 35 *et seq.*

(*x*) R. S. C., Ord. 32, rr. 4—7.

(*y*) R. S. C., Ord. 19, r. 7; Mayor's Court of London Rules, 1903; Glyn and Jackson, p. 279.

(*z*) R. S. C., Ord. 36, rr. 48—52, 52A, 53, 54, 55, 55A, 55B, 55C, see title ARBITRATION, Vol. I., pp. 484 *et seq.*

(*a*) R. S. C., Ord. 65, rr. 1, 2; see p. 295, *post*, and title PRACTICE AND PROCEDURE.

(*b*) R. S. C., Ord. 42, r. 24; see p. 295, *post*.

(*c*) Mayor's Court of London Rules, 1892, Ord. 9; see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 341 *et seq.*

(*d*) Mayor's Court of London Rules, 1892, Ord. 10, amended by Mayor's Court of London Rules, 1903; Glyn and Jackson, p. 279.

(*e*) Mayor's Court of London Rules, 1908, rr. 1—9; Glyn and Jackson, p. 281.

(*f*) 2 & 3 Will. 4, c. 39, s. 1, now repealed by the Civil Procedure Acts Repeal Act, 1879 (42 & 43 Vict. c. 59); see Order in Council of 20th November, 1863; Glyn and Jackson, p. 309.

(*g*) 8 & 9 Vict. c. 127, ss. 1, 3, 18; see Order in Council of 20th November, 1863; Glyn and Jackson, p. 308.

(*h*) 18 & 19 Vict. c. 67, except ss. 8—10; see Order in Council of 20th November, 1863; Glyn and Jackson, p. 307.

(*i*) 24 & 25 Vict. c. 11, ss. 1, 2; see Order in Council of 20th November, 1863; Glyn and Jackson, p. 309.

(*j*) 35 & 36 Vict. c. 86, part of the Schedule; Order in Council of 26th June, 1873 (Stat. R. & O. Rev., Vol. IV., 971).

(*k*) 52 & 53 Vict. c. 49, except s. 17; see Order in Council of 28th June, 1892; Glyn and Jackson, p. 378.

(*l*) 53 & 54 Vict. c. 39, s. 23; see Order in Council of 28th June, 1892; Glyn and Jackson, p. 379.

SECT. 3. **Practice and Procedure.**

Practice and procedure on equity side.

664. The practice and procedure on the equity side of the Mayor's Court is similar to that in vogue on the equity side of the old Court of Exchequer before 1841 (*a*), but the practice of the plaintiff stating himself in his bill to be a debtor and accountant to His Majesty, which formerly prevailed in the old Court of Exchequer, never existed on the equity side of the Mayor's Court.

SUB-SECT. 2.—*Commencement of Action.*

Commencement of action.

665. All proceedings in the Mayor's Court, except proceedings on the equity side of the court and in ejectment, are commenced by plaint (*b*).

"Action."

The first step is to enter at the Mayor's Court office a *præcipe* or note of action (sometimes by way of abbreviation called "action)," containing the date of entry, the names of all the parties (and their representative character, if any), and the amount sought to be recovered. A copy of this *præcipe* is then made, with a notice written thereunder containing a full description of the plaintiff's claim, and such particulars as would be contained in the indorsement on a specially indorsed writ in the High Court, and giving eight days' notice to the defendant to appear. This document is called the "plaint," and must be served on the defendant (*c*). Causes of action, of whatever kind, provided they are by and against the same parties and in the same rights, may be joined in the same suit, except in ejectment; but if the trial of different causes of action together would be inconvenient, the court may order separate records to be made up, and separate trials held (*d*).

'Plaint."

When twelve days' notice required.

666. In the case of proceedings under the Summary Procedure on Bills of Exchange Act, 1855 (*e*), the notice on the plaint note gives the defendant twelve days (*f*) in which to obtain leave from the court to appear, and states that such leave may be obtained on application to the court supported by affidavit showing that there is a defence to the action on its merits, or that it is reasonable that the defendant should be allowed to appear in the action (*g*).

Ejectment.

667. Actions of ejectment for the recovery of land or houses are commenced by a writ directed to the persons in possession by name, and to all persons entitled to defend the possession of the property claimed (*h*).

Proceedings on the equity side.

668. Proceedings on the equity side of the court are commenced by bill of complaint containing in a concise form an allegation of the

(*a*) See Court of Chancery Act, 1841 (5 Vict. c. 5), s. 1; Fowler, Practice of the Court of Exchequer upon Proceedings in Equity. As to proceedings on the equity side and in ejectment, see *infra*.

(*b*) See Glyn and Jackson, p. 24.

(*c*) See p. 291, *post*.

(*d*) Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 41. As to a "default" plaint, see Mayor's Court of London Rules, 1908, rr. 1—9, and Glyn and Jackson, pp. 25, 90 *et seq.*

(*e*) 18 & 19 Vict. c 67.

(*f*) *Ibid*, s. 2.

(*g*) See Statute Law Revision and Civil Procedure Act, 1883 (46 & 47 Vict. c. 49), s. 7.

(*h*) Common Law Procedure Act, 1852 (15 & 16 Vict. c, 76), ss. 168, 169.

material facts on which the plaintiff relies, and asking for the specific relief which he claims, and for general relief. The plaintiff then takes out a summons under the seal of the court directed to the defendant, calling upon him, upon a particular day, to appear to answer the bill, and giving him notice that, if he does not appear, attachment will issue against him for contempt of court.

669. Special rules as to actions by and against particular persons must be observed (*i*). Particular parties.

SUB-SECT. 3.—*Service.*

670. In every case where an action has been commenced a copy of the plaint note is sealed for service, and should there be two or more defendants, duplicate copies are sealed. Service of plaint.

671. Service should in every case in which it is practicable be personal. If, however, there is great difficulty in meeting with the defendant, or there is good reason to believe that he is keeping out of the way to evade service, an order may be made for substituted service (*k*). Substituted service.

672. If the defendant or one of the defendants resides or carries on business outside the jurisdiction of the court (that is, outside the City of London), an order for service out of the jurisdiction must be obtained on an *ex parte* application supported by an affidavit showing that the cause of action arose within the jurisdiction of the court, or stating the facts on which the jurisdiction is founded (*l*). Service out of the jurisdiction.

SUB-SECT. 4.—*Appearance.*

673. Appearance in an action on the common law side of the court is entered at the Mayor's Court office. A *præcipe* is filled up and signed either by the defendant or his solicitor. Notice of the appearance is then sealed for service, and should forthwith be Appearance. On the common law side.

(*i*) As to actions by and against infants, see Glyn and Jackson, pp 83, 182; title INFANTS and CHILDREN, Vol. XVII., pp 133 *et seq.* As to actions on behalf of and against lunatics and idiots, see Glyn and Jackson, p. 81, title LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., pp. 462 *et seq.* As to actions by and against married women, see Glyn and Jackson, p. 42; title HUSBAND AND WIFE, Vol XVI., pp. 153 *et seq.* As to actions by persons in a representative capacity, see Glyn and Jackson, pp 47, 205, 206, Form 39; and titles EXECUTORS AND ADMINISTRATORS, Vol XIV., pp. 330 *et seq.*, TRUSTS AND TRUSTEES As to actions by partners etc., see R. S C., Ord. 18A, rr. 1—11 inclusive, applied to the Mayor's Court by the Mayor's Court of London Rules, 1892, Ord. 1; Glyn and Jackson, p. 263, and see titles PARTNERSHIP; PRACTICE AND PROCEDURE.

(*k*) See *Hope* v. *Hope* (1854), 4 De G. M. & G. 328, 341; *Re Slade, Slade* v. *Hulme* (1881), 30 W. R. 28; *Jones* v. *Cargill* (1865), 11 L. T. 566; *Hobhouse* v. *Courtney* (1841), 12 Sim. 110; *Hornby* v. *Holmes* (1845), 4 Hare, 306; *Wolverhampton and Staffordshire Banking Co.* v. *Bond* (1881), 43 L. T. 721; *Williamson* v. *Maggs* (1858), 28 L. J. (EX.) 5.

(*l*) Glyn and Jackson, pp. 27, 288. As to service on a firm or on partners etc., see R. S. C., Ord. 48A, rr. 3, 4, applied to the Mayor's Court by Mayor's Court of London Rules, 1892, Ord. 1, rr. 3, 4; Glyn and Jackson, pp. 28, 263; as to service on corporations, see Glyn and Jackson, p. 27; on companies, *ibid.*, p. 27; in ejectment, *ibid.*, pp. 94, 334; in equity suits, *ibid.*, p. 22.

SECT. 3. Practice and Procedure.

served on the plaintiff, or on his solicitor if he is not proceeding in person (*m*).

On the equity side.

674. In an equity suit appearance is entered in a similar manner.

SUB-SECT. 5.—*Pleadings.*

Pleadings.

675. Pleadings in the Mayor's Court are regulated by the Common Law Procedure Acts, 1852 (*n*), 1854 (*o*), and 1860 (*p*), and are in practice governed by the *Regulæ Generales* of Hilary Term, 1853, Trinity Term, 1853, and Michaelmas Vacation, 1854 (*q*), although these rules have not been specifically applied to the Mayor's Court (*a*). The pleadings consist, in cases in which there is no counterclaim (*b*) or other complication, of declaration, plea, and replication.

On the common law side.

On the equity side.

676. On the equity side of the court the bill of complaint takes the place of the declaration (*c*), and the defence is raised by the answer. The answer must be filed within eight days from the appearance, or within such extended time as may be allowed by the court, and it must be sworn to by the defendant (*d*).

SUB-SECT. 6.—*Interpleader.*

Interpleader.

677. Interpleader is of two kinds: (1) interpleader in an action; (2) interpleader by the Serjeant-at-mace (equivalent to interpleader by the sheriff in the High Court) (*e*).

SUB-SECT. 7.—*Third Party Proceedings.*

Third party proceedings.

678. The third party procedure is the same as that of the High Court (*f*).

(*m*) As to appearance by infants, see Glyn and Jackson, p. 83; by lunatics, *ibid.*, p. 84; by partners, *ibid.*, p. 31; in ejectment, *ibid.*, p. 94; in third party procedure, *ibid.*, pp. 31, 265; under the Summary Procedure on Bills of Exchange Act, 1855 (18 & 19 Vict. c. 67), *ibid.*, pp. 103, 104; and see note (*l*), p. 291, *ante*.

(*n*) 15 & 16 Vict. c. 76.
17 & 18 Vict. c. 125.

(*o*) 23 & 24 Vict. c. 126.

(*q*) To be found in Bullen and Leake, Precedents of Pleadings, 3rd ed., 862, and the Law Journal for the year at the beginning of the Common Law Reports.

(*a*) See Bullen and Leake, Precedents of Pleading, 3rd ed.; Glyn and Jackson, p. 38. One of the most usual forms of declaration in the Mayor's Court is the customary count *sur concessit solvere*, which is applicable to all claims for a liquidated amount. One of the advantages of this count is that it alleges a promise to pay made within the jurisdiction. For the form of the count, see Glyn and Jackson, p. 205. The plea to this count is that the defendant "never was indebted as alleged"; as to the effect of the plea, see Glyn and Jackson, p. 247.

(*b*) As to counterclaims, see Glyn and Jackson, pp. 74 *et seq.*, and p. 288, *ante*. As to replication and subsequent pleadings, see Glyn and Jackson, pp. 79, 211.

(*c*) *Ibid.*, p. 21; and see p. 290, *ante*.

(*d*) For form of answer, see Glyn and Jackson, Form 61, p. 214; *Stanley* v. *Robinson* (1830), 1 Russ. & M. 527; *Harrison* v. *Borwell* (1839), 10 Sim. 380; *Hodgson* v. *Thornton* (1703), 1 Eq. Cas. Abr. 228; Daniell, Chancery Practice, 2nd ed., pp. 675—695.

(*e*) Interpleader in an action is regulated by the Mayor's Court of London Procedure Act, 1857 (20 & 21 Vict. c. clvii.), ss. 32—34, and interpleader by the Serjeant-at-mace by s. 35; see Glyn and Jackson, pp. 292, 293. As to interpleader generally, see title INTERPLEADER, Vol. XVII., pp. 577 *et seq.*

(*f*) R. S. C., Ord. 16, rr. 48—55, applied by Mayor's Court of London

SUB-SECT. 8.—*Payment into and out of Court.*

SECT. 3. Practice and Procedure.

Payment into and out of court.

679. The procedure as to payment into and out of court, and tender, is the same as that of the High Court (*g*).

SUB-SECT. 9.—*Interlocutory Proceedings.*

Interlocutory proceedings.

680. All applications in the nature of interlocutory proceedings are made upon notice in writing to the other side, served, when the party sues or defends by solicitor, by delivery at the office of such solicitor, and must be made returnable between twelve o'clock and two o'clock, except on Saturdays, when they must be made returnable between twelve o'clock and one o'clock. If the plaintiff sues in person, the notice is served at the address given in the plaint note by delivery at such address. If the defendant appears in person, the notice is served on him at the address given in the notice of appearance by delivery at such address. If the address given in the plaint note or notice of appearance is at a distance, service is generally allowed by sending the application in a prepaid letter through the post (*h*).

To whom applications made.

681. All applications respecting collateral matters and proceedings should be made in the first instance to the Assistant Judge or, if he is not sitting, to the Registrar.

Where applications may be heard.

682. The court may hear applications at any place within the local limits of its jurisdiction (*i*). Applications in chambers can be made by counsel or solicitors, but applications in open court can only be made by counsel (*j*).

Purposes for which applications are made.

683. Applications can be made for extension of time (*k*), for delivery of particulars (*l*), for stay on payment of an admitted amount (*m*), for judgment on admissions (*n*), for interrogatories (*o*), for discovery of documents (*p*), for inspection of property or documents (*q*), for a commission to examine witnesses (*r*), for leave to

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Rules, 1892, Ord. 2; Glyn and Jackson, pp. 265—267; and see title PRACTICE AND PROCEDURE.

(*g*) R. S. C., Ord. 22, rr. 1–9, 11, applied by Mayor's Court of London Rules, 1892, Ord. 3, Glyn and Jackson, pp. 268—270; and see title PRACTICE AND PROCEDURE.

(*h*) See Glyn and Jackson, p. 39.

(*i*) Mayor's Court of London Procedure Act, 1857 (20 & 21 Vict. c. clvii.), s. 22.

(*j*) See title BARRISTERS, Vol. II., p. 374.

(*k*) Glyn and Jackson, pp. 39, 53, 79.

(*l*) *Ibid.*, pp. 25, 30, 35, 51, 64, 95.

(*m*) *Ibid.*, p. 35.

(*n*) R. S. C., Ord. 32, r. 6, applied by Mayor's Court of London Rules, 1892, Ord. 6, r. 3; Glyn and Jackson, p. 272. As to proof of the admissions, see R. S. C., Ord. 32, r. 7, applied by Mayor's Court of London Rules, 1892, Ord. 6, r. 4.

(*o*) Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 51; R. S. C., Ord. 31, r. 21, applied by Mayor's Court of London Rules, 1892, Ord. 5, r. 2; Glyn and Jackson, pp. 125, 271; see *White* v. *Watts* (1862), 12 C. B. (N. S.) 267.

(*p*) Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), ss. 46, 47, 48, 50; Mayor's Court of London Rules, 1892, Ord. 5, r. 1; Glyn and Jackson, pp. 125, 271; Mayor's Court of London Procedure Act, 1857 (20 & 21 Vict. c. clvii.), s. 24.

(*q*) Glyn and Jackson, pp. 6, 123, 124, 279.

(*r*) *Ibid.*, pp. 115, 119.

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amend (*s*), for dismissal of an action (*t*), for striking out appearance or plea (*u*), for security for costs (*v*).

Applications on the equity side

684. On the equity side of the court the Registrar has the same powers as a master of the Chancery Division of the Supreme Court (*w*).

SUB-SECT. 10.—*Notice of Trial.*

When notice may be given

685. The plaintiff may give notice of trial as soon as the pleadings are closed. The record is then made up and the action entered for trial in the office of the court at least eight and not more than twelve days (*a*) before the day of trial. The cause can only be entered for some day appointed for the trial of actions (*b*).

Length of notice.

686. Full notice of trial is not more than twelve nor less than eight days; short notice of trial is four days.

Practice on the equity side.

687. On the equity side of the court, after issue has been joined, an application is made for directions as to trial, and the cause is directed to be set down on bill and answer, or if the defendant has failed to put in an answer, then it is directed to be set down and taken *pro confesso* (*c*). Notice of trial is given, and the cause is entered for trial as in the case of actions (*d*).

Notices to produce and admit.

688. Notices to produce and admit documents may be served by either party on the other side (*e*).

SUB-SECT. 11.—*Trial, Verdict, Judgment.*

Jury.

689. Trials are usually had before common juries. On the application of either party an order will be made for a special jury where the amount in dispute is £50 or upwards (*f*).

Right of audience.

690. Counsel have an exclusive right of audience in the Mayor's Court (*g*), except that a plaintiff or defendant in person may conduct his own case.

(*s*) Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 96; Mayor's Court of London Procedure Act, 1857 (20 & 21 Vict. c. clvii.), s. 23; Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126), s. 36. See also Mayor's Court of London Rules, 1903, Ord. 1, reproducing R. S. C., Ord. 19, r. 7; Glyn and Jackson, pp. 25, 34, 38, 40, 85, 102, 279.

(*t*) Glyn and Jackson, pp. 41, 56, 107.

(*u*) R. S. C., Ord. 36, r. 12; Mayor's Court of London Rules, 1903, Ord. 3; Glyn and Jackson, pp. 33, 41, 56, 107.

(*v*) See Glyn and Jackson, p. 183.

(*w*) See title PRACTICE AND PROCEDURE.

(*a*) Glyn and Jackson, p. 131; for form of entry, see *ibid.*, p. 221.

(*b*) *Ibid.*, p. 131. As to the defendant giving notice of trial or applying to have the action dismissed for want of prosecution, see Glyn and Jackson, pp. 132, 133, 280.

(*c*) Daniell, Chancery Practice, 2nd ed., p. 473; Glyn and Jackson, p. 22.

(*d*) Glyn and Jackson, p. 22.

(*e*) As to subpœnas, see Mayor's Court of London Procedure Act, 1857 (20 & 21 Vict. c. clvii.), s. 50; Glyn and Jackson, p. 129. As to notices to admit and produce, see Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), ss. 117—119; Glyn and Jackson, pp. 121, 218, 219.

(*f*) See title JURIES, Vol. XVIII., pp. 263, 264. As to a view, see Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 58; Glyn and Jackson, pp. 6, 213.

(*g*) See title BARRISTERS, Vol. II., p. 374.

691. At the sitting of the court the list of causes for the day is called over, and the undefended actions are taken first (*h*). Order of hearing.

692. The proceedings at the trial are identical with those in a High Court action (*i*). Proceedings.

The parties to any cause may, by consent in writing signed by them or their solicitors, leave the decision of any issue of fact to the court, provided the court, in its discretion, allow this to be done (*k*). Issues of fact.

Any case may be referred to arbitration by consent of the parties at any time before the jury is sworn, and after that, by order of the court (*l*). Reference.

693. Costs follow the event unless the judge for good cause orders otherwise (*m*). The judge has not the power, which a judge of the High Court has, to enter up judgment contrary to the finding of the jury (*n*). Costs.

694. On the equity side of the court the findings of the jury, if any, and the judgment of the court are embodied in a decree. Decree.

695. In actions for unliquidated damages, where interlocutory judgment has been signed for default of appearance or of plea, the practice is to refer the assessment of damages to the registrar (*o*). But, in lieu of this procedure, an inquiry before a jury may be had. Assessment of damages.

SUB-SECT. 12.—*Execution and Enforcement of Judgments.*

696. After the verdict is given and the record is entered up, the successful party is entitled to tax his costs and sign judgment on the next day. When final judgment (*p*) has been entered and the costs taxed, he is entitled to issue execution, in cases where the verdict is under £20, on the day following the allocatur, and in verdicts of £20 and upwards, at the expiration of forty-eight hours after the allocatur (unless speedy execution has been granted by the court in special circumstances) (*q*). Where the unsuccessful Execution.

(*h*) As to actions for amounts under £10 when the defendant withdraws his plea, see Mayor's Court of London Rules, Fees, and Costs, 1890, Sched. B; Glyn and Jackson, pp. 55, 253.

(*i*) As to certificate for counsel when the verdict is under £10 and as to costs on the higher scale, see Mayor's Court of London Rules, Fees, and Costs, 1890, r. 13; Glyn and Jackson, pp. 136, 248, 249 *et seq.*

(*k*) Mayor's Court of London Procedure Act, 1857 (20 & 21 Vict. c. clvii.), s. 51; compare Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 1. As to questions of law, see Mayor's Court of London Rules, 1892, Ord. 4.

(*l*) See Glyn and Jackson, p. 165, and p. 297, *post.*

(*m*) Mayor's Court of London Rules, 1892, Ord. 8; Glyn and Jackson, p. 274; see title PRACTICE AND PROCEDURE.

(*n*) *Roberts* v. *Bancroft* (1895), not reported, C. A. See Glyn and Jackson, p. 139, and *Pryor* v. *City Offices Co.* (1883), 10 Q. B. D. 504, C. A. As to leave at the trial to move on appeal to set aside a verdict or a nonsuit and to enter a verdict or a nonsuit, see Glyn and Jackson, pp. 148, 286 *et seq.*

(*o*) Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s 94.

(*p*) *Colbron* v. *Hall* (1837), 5 Dowl. 534.

(*q*) Mayor's Court of London Procedure Act, 1857 (20 & 21 Vict. c. clvii), s. 8; Glyn and Jackson, p. 139.

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party intends to appeal, leave to appeal and for stay of execution should be asked for at the close of the trial (*r*).

Fieri facias.

697. If the party against whom judgment has been given is resident or carries on business within the City, execution is had by the issue of a writ of *fieri facias* directed to the Serjeant-at-mace (*s*). A writ of execution only remains in force for one year from the teste of the writ, but may be renewed for another year, and so on from year to year (*t*), subject to the judgment, if more than six years old, being revived.

If the judgment debtor has property outside the City, execution may be had against it, even though he has other goods within the jurisdiction of the court upon which execution could be levied (*u*).

Removal to High Court.

698. In all cases, whether the amount recovered exceeds £20 or not, any writ of execution on a judgment, rule, or order for payment made by the Mayor's Court may be sealed by the sealer of writs in the High Court upon a *præcipe* being lodged with him, together with an affidavit verifying the judgment or order, and stating that the same remains unreversed and unsatisfied. Thereupon such writ of execution, judgment, rule, or order is of the same force, charge, and effect as if issued in the High Court, but no such judgment, rule, or order, when so removed, affects any lands or hereditaments, as to purchasers, mortgagees, or creditors, any further than it would have done if it had remained a judgment, rule, or order of the Mayor's Court, unless and until a writ of execution thereon is actually put into the hands of the sheriff (*v*). The enforcement of a judgment by writ of *elegit* is not applicable to a judgment in the Mayor's Court, unless it has been removed into the High Court.

Enforcement of any order.

699. Every order of the court can be enforced in the same manner as a judgment (*a*).

Examination of debtor.

700. If, after judgment obtained, it appears that the judgmen, debtor has no goods and chattels available for execution by *fieri facias*,

(*r*) Mayor's Court of London Procedure Act. 1857 (20 & 21 Vict. c. clvii.), s. 10; see p. 300, *post*.

(*s*) Glyn and Jackson, Forms 97, 98, p. 230. As t *fieri facias* generally, see title EXECUTION, Vol. XIV., pp. 37 *et seq.*

(*t*) Common Law Procedure Act, 1852 (15 & 16 Vict c. 76), s. 124.

(*u*) *Haywood* v. *Saint* (1875), 32 L. T. 566.

(*v*) Mayor's Court of London Procedure Act, 1857 (20 & 21 Vict. c. clvii.), s. 48; *Bridge* v. *Branch* (1876), 1 C. P. D. 633; *Paine* v. *Slater* (1883), 11 Q. B. D. 120, C. A. As to enforcing a judgment in Scotland or Ireland, see Inferior Courts Judgments Extension Act, 1882 (45 & 46 Vict. c. 31), ss. 4, 5; Judgments Extension Act, 1868 (31 & 32 Vict c. 54); title CONFLICT OF LAWS, Vol. VI., pp. 291, 294. As to enforcing a judgment of the Mayor's Court in a county court in the jurisdiction of which the judgment debtor possesses any goods, see Borough and Local Courts of Record Act, 1872 (35 & 36 Vict. c. 86), s. 6; Glyn and Jackson, Forms 100, 101, pp 231, 232.

(*a*) R. S. C., Ord. 42, r. 24, applied by Mayor's Court of London Rules, 1903, Ord. 4; Glyn and Jackson, p. 280. See title JUDGMENTS AND ORDERS, Vol. XIX., p. 219. As to enforcing judgments against individual members of a firm etc., see Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 23, applied to the Mayor's Court by Order in Council of 28th June, 1892; Glyn and Jackson, pp. 264, 379; and see title PARTNERSHIP.

the judgment creditor may apply to the court that the judgment debtor may be orally examined as to any, and what, debts are owing to him, and for the production of books and documents (*b*).

Garnishee proceedings.

701. Judgments can also be enforced by garnishee proceedings (*c*), if the garnishee is within the jurisdiction (*d*).

Judgment summons.

702. An application may be made for a judgment summons (*e*) against the debtor either on a judgment of the Mayor's Court or on a judgment of the High Court (*f*).

SUB-SECT. 13.—*Arbitration.*

Arbitration.

703. The proceedings (*g*) in case of arbitration in actions in the Mayor's Court are governed by the provisions of the Arbitration Act, 1889 (*h*).

SUB-SECT. 14.—*Costs.*

Costs.

704. Costs are regulated by rules of the Mayor's Court (*i*). The scale of costs is the same between party and party as between solicitor and client.

The general principles governing the taxation of costs are the same as those prevailing in the High Court (*k*).

(*b*) Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 60.

(*c*) *Ibid.*, ss. 61—65.

(*d*) *Martyn* v. *Kelly* (1871), 5 I. R. C. L. 404; and see title EXECUTION, Vol. XIV., p. 95.

(*e*) Glyn and Jackson, pp. 159, 241, 242, 275.

(*f*) See title BANKRUPTCY AND INSOLVENCY, Vol., II., p. 341; Glyn and Jackson, p. 157; Mayor's Court of London Procedure Act, 1857 (20 & 21 Vict. c. clvii.), s. 36. As to the procedure on a judgment summons, see Glyn and Jackson, p. 162.

(*g*) Order in Council of 28th June, 1892; Glyn and Jackson, pp. 165, 377.

(*h*) 52 & 53 Vict. c. 49; s. 17, as to powers of the Court of Appeal, has not been applied to the Mayor's Court; and see p. 289, *ante;* Glyn and Jackson, p. 272; see title ARBITRATION, Vol. I., pp. 477, 478; *Re Keighley, Maxsted & Co. and Durant & Co.*, [1893] 1 Q. B. 405, C. A.

(*i*) Mayor's Court of London Rules, Fees, and Costs, 1890 and 1892; Mayor's Court of London Rules, 1903; Glyn and Jackson, pp. 248—262. 274, 278, 280. As to costs when a plaintiff recovers less than £10 in an action which could have been brought in a county court, see County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 117. As to special certificates for costs, see Glyn and Jackson, pp. 185, 249; *Re Briggs (James) & Son*, [1903] 2 K. B. 156. Costs on the equity side of the court, where not specially provided for, are the same as those allowed in the Chancery Division of the High Court; see Glyn and Jackson, pp. 252, 261

(*k*) County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 117; R. S. C., Ord. 65, r. 1; Mayor's Court Rules, 1892, Ord. 8, r. 1; Glyn and Jackson, pp. 253, 274. As to costs in case of a plea of tender and payment into court, see Glyn and Jackson, pp. 35, 65, 68, 268. As to costs in cases of cross-verdicts and counterclaims, see *Baines* v. *Bromley* (1881), 6 Q. B. D. 691, C. A.; *Re Brown, Ward* v. *Morse* (1883), 52 L. J. (CH.) 524, C. A.; *McIlowan* v. *Middleton* (1883), 11 Q. B. D. 464, C. A.; *Mason* v. *Brentini* (1880), 15 Ch D. 287, C. A.; *Waring* v. *Pearman* (1884), 50 L. T. 633; *Shrapnel* v. *Laing* (1888), 20 Q. B. D. 334, C. A.; *Amon* v. *Bobbett* (1889), 22 Q. B. D. 543, C. A.; *Sauer* v. *Bilton* (1879), 11 Ch. D. 416; *Atlas Metal Co.* v. *Miller*, [1898] 2 Q. B. 500, C. A. As to costs of separate issues, see Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 75; R. S. C., Ord. 65, r. 2; Glyn and Jackson, pp. 137, 274. As to costs, where there are separate judgments against each of two or more defendants, see Mayor's Court of London Rules, Fees, and Costs, 1890, r. 6; Glyn and Jackson, p. 248. As to taxation of costs, see Glyn and Jackson,

SECT. 3. Practice and Procedure.

705. All taxations by the Registrar of bills of costs, whether as between party and party or between solicitor and client, are subject to review (*l*).

SUB-SECT. 15.—*Fees.*

Fees.

706. The fees of the Mayor's Court are regulated by the Mayor's Court of London Rules (Fees and Costs), 1890, Sched. A, as amended by the Mayor's Court of London Rules, 1892, and the Mayor's Court of London Rules, 1903 (*m*).

SECT. 4.—*Appeals.*

SUB-SECT. 1.—*In General.*

Appeals.

707. If upon the trial of an action either party is dissatisfied with the result, he may, subject to certain conditions, obtain redress either by appealing to the High Court or by making an application in the Mayor's Court to the judge who tried the action. An appeal lies only from a decision given on the trial of an action, not from interlocutory orders made in the Mayor's Court (*n*).

SUB-SECT. 2.—*In the Mayor's Court.*

In the Mayor's Court.

708. An appeal in the Mayor's Court itself is made by an application for a rule to show cause for arrest of judgment, or for judgment, or for granting a new trial, or for entering verdicts or nonsuits in causes pending in the court. In these two latter cases the application can only be made where leave to appeal was granted at the trial (*o*).

Application for a rule.

709. An application for a rule *nisi* may be made *ex parte* to the judge who tried the cause on motion by counsel, or, after notice to the other side, a similar application may be made for a rule absolute in the first instance. If a rule *nisi* is obtained, it is then served on the opposite side, and comes on for hearing at the next sittings of the court. The grounds on which the application is made (*p*) should be stated in the rule *nisi*, or in the notice previous to an application for a rule absolute.

Effect of obtaining leave on alternative right.

A party who has obtained leave to appeal to the High Court, is not prevented from applying to the judge of the Mayor's Court who tried the action for a new trial, on any point not raised in the High Court, either before or after the motion is made to the High Court (*q*). Where, however, leave is obtained in the Mayor's Court to move in the High Court to enter a nonsuit or for a new trial, and the party to whom such leave is given applies in

p. 248. As to taxation of bills of costs in actions by solicitors, see Glyn and Jackson, pp. 187, 239.

(*l*) Mayor's Court of London Rules, Fees, and Costs, 1890, r. 2; Glyn and Jackson, p. 248.

(*m*) See Glyn and Jackson, pp. 248 *et seq.*, 278, 280.

(*n*) *Berrio* v. *Thalheim* (1891), 92 L. T. Jo. 27.

(*o*) Mayor's Court of London Procedure Act, 1857 (20 & 21 Vict. c. clvii.), s. 22; *Roberts* v. *Bancroft* (1895), unreported, C. A.; Glyn and Jackson, p. 139.

(*p*) Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 33.

(*q*) *Lebeau* v. *General Steam Navigation Co.* (1873), L. R. 8 C. P. 129.

the Mayor's Court for a nonsuit or a new trial, that party has exhausted his right of appeal, and cannot afterwards, even with the leave of the judge, appeal to the High Court (*a*).

Notice of motion not a stay.

710. The notice of motion is not in itself a stay of execution, so that an application for this purpose should be made to the judge of the Mayor's Court at the end of the trial, or if this has not been done, then an application should be made, after notice to the other side, to the court or judge or, in the absence of the judge, to the Registrar (*b*).

New trial: costs of abortive trial.

711. When a new trial is granted on the ground that the verdict was against the weight of evidence, the costs of the abortive trial abide the event of the new trial, unless the court shall otherwise order (*c*). When it is granted on other grounds, the costs follow the event, unless the judge before whom the trial was held or the court shall otherwise order (*d*).

No power to direct judgment to be entered.

712. A judge of the Mayor's Court has not the same power as a judge of the High Court on a motion for a new trial to direct judgment to be entered for either of the parties (*e*).

Ruling as to stamp duty.

713. No new trial can be granted by reason of a ruling that a document is sufficiently stamped or does not require a stamp (*f*).

SUB-SECT. 3.—*From the Mayor's Court to the High Court.*

When leave required.

714. In actions where the sum sought to be recovered does not exceed £20, there is no appeal to the High Court except by leave of the judge by whom the cause was tried (*g*).

Where the sum sought to be recovered exceeds the sum of £20, either party, who is dissatisfied with the determination or direction of the court on a point of law, or upon the admission or rejection of any evidence, may appeal to the High Court, and no leave for this purpose is required (*g*).

Notice.

The party appealing must give notice to the other side, within two days (*h*) after such determination or direction, and give security within such time as the court directs, to be approved by the

(*a*) *Mears* v. *Chittick* (1882), 9 Q. B. D. 35.

(*b*) Mayor's Court of London Procedure Act, 1857 (20 & 21 Vict. c. clvii.), s. 41.

(*c*) Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 44.

(*d*) R. S. C., Ord. 65, r. 1; see Mayor's Court of London Rules, 1892, Ord. 8, r. 1; Glyn and Jackson, pp. 149, 274.

(*e*) *Roberts* v. *Bancroft* (1895), unreported, C. A.; Glyn and Jackson, p. 139, *Pryor* v. *City Offices Co.* (1883), 10 Q. B. D. 504, C. A. R. S. C., Ord. 40, r. 10, has not been applied to the Mayor's Court.

(*f*) Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 31.

(*g*) Mayor's Court of London Procedure Act, 1857 (20 & 21 Vict. c. clvii.), s. 8, see *Eder* v. *Levy* (1887), 19 Q. B. D. 210; *Williams* v. *Taperell* (1892), 27 L. J. N. C. 16.

(*h*) The High Court has no power to extend the time (*Kirby* v. *North British and Mercantile Insurance Co.*, [1896] 2 Q. B. 99, C. A.). The giving of the notice is a condition precedent to the right to appeal (*ibid.*); see *Milch* v. *Frankau & Co.*, [1909] 2 K. B. 100.

SECT. 4. Appeals.

Registrar of the court, for the costs of the appeal, and also for the amount of the judgment, if the appellant be the defendant (*i*).

Stay of execution.

If a stay of execution is desired, an application therefor should be made to the court, and if granted, may be made upon such terms as the judge who heard the action directs (*k*). The mere fact of an unsuccessful plaintiff giving security for the costs of the appeal does not operate as a stay of execution (*l*), nor does the fact that leave to appeal is obtained.

Effect of obtaining leave to appeal

715. If upon the trial the judge grants leave to appeal, it is not necessary to give notice of appeal within any particular time or to give security. Application for leave to appeal should therefore be made in all cases for this purpose, and upon leave being granted the appeal proceeds under the Rules of the Supreme Court (*m*) applicable to appeals from all inferior courts (*n*). The leave to appeal must be given at the trial or within a reasonable time (*o*) afterwards; and if not made at the trial, notice of the application for leave to appeal must be given to the opposite party.

To a Divisional Court.

716. The appeal lies, except where otherwise stated (*p*), to a Divisional Court of the King's Bench Division (*q*).

Effect of point being reserved at trial.

717. If a point is reserved at the trial, then in all cases of rules to enter a verdict or nonsuit, if the rule to show cause be refused or granted and then discharged or made absolute, the party against whom the decision has been given may appeal to a Divisional Court (*a*); but no appeal lies from any decision of a judge of the Mayor's Court granting or refusing a new trial (*b*).

SUB-SECT. 4.—*From the Mayor's Court to the Court of Appeal.*

To Court of Appeal.

718. In the case of error (*c*) appearing on the face of the proceedings the Court of Appeal is the proper court to which to appeal, not the Divisional Court (*d*).

(*i*) Mayor's Court of London Procedure Act, 1857 (20 & 21 Vict. c. clvii.), s. 8.

(*k*) As to obtaining a stay by giving a deposit or security, see title COUNTY COURTS, Vol. VIII., p. 606.

(*l*) *Green* v. *Isaacs* (1906), 96 L. T. 122.

(*m*) R. S. C., Ord. 59; see title COUNTY COURTS, Vol. VIII., pp. 601 *et seq.*

(*n*) As to procedure, see *ibid.*, p. 605; as to notice of motion, see *ibid.*, p. 605.

(*o*) *Folkard* v. *Metropolitan Rail. Co.* (1873), L. R. 8 C. P. 470.

(*p*) See the text, *infra*.

(*q*) As to the powers of the Divisional Court on the appeal being heard, see title COUNTY COURTS, Vol. VIII., pp. 608, 609. As to production of judge's notes, see *ibid.*, p. 608. As to appeals from the Divisional Court to the Court of Appeal, see *ibid.*, p. 609; *Appleford* v. *Judkins* (1878), 3 C. P. D. 489, C. A.

(*a*) Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 34.

(*b*) *Ibid.*, s. 36, not having been applied to the Mayor's Court.

(*c*) Mayor's Court of London Procedure Act, 1857 (20 & 21 Vict. c. clvii.), s. 4; Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), ss. 146—167; Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), ss. 32, 41; Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126), ss. 4—11.

(*d*) *Pryor* v. *City Offices Co.* (1883), 10 Q. B. D. 504, C. A.; *Le Blanch* v. *Reuter's Telegram Co* (1876), 1 Ex. D. 408; *Darlow* v. *Shuttleworth*, [1902] 1 K. B. 721, 732. 733.

SECT. 5.—*Removal of Actions.*

SECT. 5. Removal of Actions.

719. Actions may be transferred to the High Court in cases where there is a counterclaim involving matters outside the extended jurisdiction of the Mayor's Court (*e*). In such a case, it seems, the application should be made by way of summons in chambers to a judge of that division of the High Court to which it is proposed to transfer the proceedings.

Removal of actions to High Court.

Counterclaim outside jurisdiction.

720. If either party to an action in the Mayor's Court so desires, he may within one month of the service of the plaint or before the action is entered for trial (*f*) apply to the High Court for a writ of *certiorari* to remove the action into that court. There is no absolute right to the writ, which will now only be granted if it appears to a judge of the High Court that the action is fit to be tried there, *i.e.*, more fit to be tried in the High Court than in the Mayor's Court (*g*).

Certiorari.

721 If a writ of *certiorari* is granted by the High Court, a copy of the order and the original writ are lodged, by the solicitor of the party to whom it has been granted, with the Registrar of the Mayor's Court, and a return to the writ is forthwith made by him and handed to the solicitor of such party. The lodgment of the writ acts as a stay of proceedings, and all matters done in the cause thereafter are in contempt of the writ, and are utterly null and void to all intents and purposes (*h*).

Return to writ.

Effect of lodgment.

After transfer the practice and procedure of the High Court are to be followed (*i*); the pleadings must be recommenced (*k*).

Effect of transfer.

722. Causes on the equity side of the court cannot be removed into the Chancery Division without a special order of the Lord Chancellor, the Master of the Rolls, or a judge of the Chancery Division, and no such order can be made if the judge, to whom the application is made, considers that the matters in question are fit to be tried in the Mayor's Court (*l*).

Practice on the equity side.

SECT. 6.—*Prohibition.*

723. Prohibition cannot be granted to forbid the Mayor's Court from entertaining an action in which the debt or damages claimed

Prohibition.

When it does not lie.

(*e*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 90; and see p. 288, *ante*.

(*f*) Mayor's Court of London Procedure Act, 1857 (20 & 21 Vict. c. clvii.), s. 17; see *Prim* v. *Smith* (1888), 20 Q. B. D. 643; and *Price* v. *Shaw* (1898), unreported; and see Glyn and Jackson, p. 113.

(*g*) Borough and Local Courts of Record Act, 1872 (35 & 36 Vict. c. 86), s. 12; Order in Council of 26th June, 1873, Stat. R. & O. Rev., Vol. IV., 971; *Cherry* v. *Endean* (1886), 55 L. J. (Q. B.) 292; *Hope* v. *Hume-Webster* (1886), 2 T. L. R. 415; *Simpson* v. *Shaw* (1886), 56 L. J. (Q. B.) 92; *Banks* v. *Hollingsworth*, [1893] 1 Q. B. 442; see title CROWN PRACTICE, Vol. X., pp. 157, 179, 180, 199, 200, and the cases there cited. As to the practice, see *ibid.*, pp. 200–203.

(*h*) Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 226; compare *Davies* v. *James* (1786), 1 Term Rep. 371.

(*i*) *Davies* v. *Williams* (1879), 13 Ch. D. 550; see title CROWN PRACTICE, Vol. X., pp. 202, 203.

(*k*) See titles CROWN PRACTICE, Vol. X., p. 203; PLEADING.

(*l*) Mayor's Court of London Procedure Act, 1857 (20 & 21 Vict. c. clvii.), s. 20; Judicature Act, 1873 (36 & 37 Vict. c. 66), ss. 16, 34. As to the meaning of "fit to be tried," see title CROWN PRACTICE, Vol. X., pp. 157, 180, note (*q*).

SECT. 6. Prohibition.

do not exceed £50, and where the defendant or one of the defendants carries on business, or within six months before action brought dwelt or carried on business, in the City of London, or its liberties, or where the cause of action either wholly or in part arose therein (*m*).

When it lies

Where, however, the before-mentioned conditions do not exist, prohibition is not affected, as the right of the superior court to prohibit the inferior court can only be taken away by express words (*n*).

Effect of appearance.

724. Prohibition can be granted, although the defendant has failed in the Mayor's Court on a plea to the jurisdiction (*o*). Where, however, he appears and contests the case, the court will decline to interfere (*p*).

To whom granted.

725. The writ of prohibition may be granted on the application of the defendant himself, and it is not necessary, as it was formerly the practice, to apply for it in the name of a stranger (*q*). If the plaintiff consents to abandon so much of his claim as is outside the jurisdiction, the court will refuse, in the exercise of its discretion, to grant prohibition (*r*). Prohibition will not lie on account of irregularity in practice and procedure (*s*).

(*m*) Mayor's Court of London Procedure Act, 1857 (20 & 21 Vict. c. clvii.), ss. 12, 15; *Hawes* v. *Pawley* (1876), 1 C. P. D. 418, C. A., *per* JESSEL, M.R., at p. 420. As to the time for applying for prohibition, see title CROWN PRACTICE, Vol. X., pp. 146, 149, and see cases cited *ibid.*, pp. 149, note (*a*), 150, note (*d*). As to the grounds for granting the writ, see *ibid.*, pp. 111, 142, 147, 148; see also title INJUNCTION, Vol. XVII., p. 261.

(*n*) *Hawes* v. *Pawley*, *supra*, at p. 421; see also *London Corporation* v. *Cox* (1867), L. R. 2 H. L. 239; *Jacobs* v. *Brett* (1875), L. R. 20 Eq. 1.

(*o*) *Marsden* v. *Wardle* (1854), 3 E. & B. 695; and see *Chew* v. *Holroyd* (1882), 8 Exch. 249.

(*p*) *Moore* v. *Hamgee* (1890), 25 Q. B. D. 241; *Sachan* v. *Warner* (1901), 17 T. L. R. 494. As to the effect of an objection which is not apparent on the proceedings, see title CROWN PRACTICE, Vol. X., p. 147. As to granting prohibition after judgment, see *ibid.*, pp. 146, 147. As to the effect of entry of appearance by the applicant in certain cases, see *ibid.*, p. 148; and see title COUNTY COURTS, Vol. VIII., pp. 612, 614.

(*q*) *Jacobs* v. *Brett*, *supra*; *Hawes* v. *Pawley*, *supra*; *London Corporation* v. *Cox*, *supra*, at p. 278.

(*r*) *Ellis* v. *Fleming* (1876), 1 C. P. D. 237. So if the plaintiff has alternative modes of proof and may succeed without showing that any part of the cause of action arose within the jurisdiction, the court will refuse to grant prohibition on the plaintiff undertaking to rely on the mode of proof which shows a cause of action within the jurisdiction (*Josolyne* v. *Roberts*, [1908] 2 K. B. 349).

(*s*) *R.* v. *London Corporation and Stock* (1893), 62 L. J. (Q. B.) 589.

MEADOW AND ANCIENT PASTURE.

See AGRICULTURE.

MEASURE.

See MARKETS AND FAIRS; WEIGHTS AND MEASURES.

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See DAMAGES.

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See FOOD AND DRUGS; SALE OF GOODS.

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See FACTORIES AND SHOPS; MASTER AND SERVANT; TRADE AND TRADE UNIONS; WORK AND LABOUR.

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See FACTORIES AND SHOPS; LOCAL GOVERNMENT; MASTER AND SERVANT; MEDICINE AND PHARMACY; PUBLIC HEALTH AND LOCAL ADMINISTRATION.

MEDICINE AND PHARMACY.

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Part I.—Physicians and Surgeons.

SECT. 1.—*Physicians.*

SUB-SECT. 1.—*Meaning of Physician.*

"Physician."

726. The term "physician" has not been judicially defined, except by contradistinction to surgeon (*a*). Broadly speaking, it may be said that a physician is one who treats patients for disease and internal ailments. Long before the Medical Acts (*b*), the courts drew a very practical distinction between physicians and surgeons by declining to allow the physician to sue for his fees (*c*), the presumption being that, like a barrister, he worked for an honorarium. But a physician who acted as a surgeon could always recover his charges (*d*). Now that all physicians (except fellows of the Royal

(*a*) See *Allison* v. *Haydon* (1828), 4 Bing. 619.

(*b*) The Medical Acts are the following:—The Medical Act (21 & 22 Vict. c. 90), amended by the Medical Act, 1859 (22 Vict. c. 21); the Medical Acts Amendment Act, 1860 (23 & 24 Vict. c. 66); the Medical Practitioners Act, 1876 (39 & 40 Vict. c. 40), the Medical Act, 1876 (39 & 40 Vict. c. 41); the Medical Act, 1886 (49 & 50 Vict. c. 48).

(*c*) *Poucher* v. *Norman* (1825), 3 B. & C. 744; see title BARRISTERS, Vol. II., p. 391.

(*d*) *Little* v. *Oldaker* (1842), Car & M. 370.

College of Physicians (*e*)) can sue for their fees (*f*), this distinction between the two great branches of the medical profession no longer obtains. Another reason why the distinction is of less importance than formerly is that no man can become a legally qualified medical practitioner unless he possesses the double qualification (*g*). SECT. 1. Physicians.

In modern practice it may be said that the term "physician" connotes a person who practises medicine. Modern meaning

SUB SECT. 2.—*The Royal College of Physicians.*

727. The institution known as the Royal College of Physicians of London was founded as a college in 1518 (*h*), "to check men who profess physic rather from avarice than good faith to the damage of credulous people," it being the determination of the King to found a college of the learned men practising physic in London and within seven miles thereof. The College has a perpetual succession and a common seal (*i*), may make bye-laws (*j*), and may purchase and hold personal property and land to the annual value of £1,000 without licence in mortmain (*k*). The Crown has power to grant a new charter giving to the College the new title of Royal College of Physicians of England (*l*), or confirming the present title and powers and duties of the College (*m*). Foundation.

728. The Royal College of Physicians is one of the bodies which sends a representative to the General Council of Medical Education and Registration (hereafter referred to as "the General Medical Council") (*n*), and has power to conduct examinations and grant diplomas in medicine (*o*). Privileges.

729. The council which governs the Royal College of Physicians consists of the president, the censors, the treasurer, the representative of the College on the General Medical Council, the representatives of the College on the Senate of the University of London (*p*), and twelve other fellows (*q*). Four elected members of the council go out of office each year (*r*). The council Government. The council.

(*e*) See p. 310, *post*.
(*f*) See p. 310, *post*.
(*g*) See pp. 311, 325, *post*.
(*h*) Charter dated 23rd September, 1518 (10 Hen. 8). The charter, bye-laws, and regulations of the Royal College of Physicians of London are printed and published by the College, and can be obtained at its offices, Pall Mall East, London, S.W.
(*i*) Charter, 1518.
(*j*) *Ibid.*
(*k*) Local and Personal Act (1814), 54 Geo. 3, c. cxviii., s. 2.
(*l*) Medical Act (21 & 22 Vict. c. 90), s. 47. This power has not been exercised
(*m*) Medical Act, 1860 (23 & 24 Vict. c. 66), s. 3.
(*n*) Medical Act, 1886 (49 & 50 Vict. c. 48), s. 7 (1); see p. 315, *post*.
(*o*) See pp. 311, 325, *post*. A person, who, though a physician, is not a member, has no right to inspect the books of the College (*West* v. *Physicians' College* (or *R.* v. *West*) (undated), cited in argument in *R.* v. *Purnell* (1749), 1 Wils. 239, 240).
(*p*) See title EDUCATION, Vol. XII., pp. 95, 96.
(*q*) Bye-law lxviii. This and the following extracts from the bye-laws are taken from the regulations of the College, 1908 ed.
(*r*) *Ibid.*, lxix.

SECT. 1. Physicians.

nominates councillors (*s*), fellows (*t*), censors (*u*), the treasurer (*x*), and the examiners (*a*).

Censors. Duties.

730. Censors are elected annually at a meeting of the president and fellows (*b*). It is the duty of the censors to inquire into any alleged misconduct by fellows, members, or licentiates (*c*). Any trusts which are bequeathed to the College become vested in the censors (*d*).

President. Duties.

731. The president, who must be a prudent person, and one skilled in the science and practice of physic (*e*), is elected annually by the fellows from amongst those who have been fellows for at least ten years (*f*). The president summons all meetings of the fellows, of the censors' board, and of the council (*g*), and is a member of all committees (*h*). In his absence he must appoint a fellow to act as president (*i*).

Censors' board.

732. The censors and the president form a board for inquiring into and testing the qualifications of all candidates for membership before such candidates are proposed to the fellows for election (*k*).

Fellows. Qualifications.

733. Fellows are elected from members of at least four years' standing who have distinguished themselves in the practice of medicine, or in the pursuit of medical or general science or literature, and who have been nominated by the council (*l*). A fellow must be elected by a majority of the fellows present at a meeting (*m*).

Restrictions affecting fellows.

734. No fellow may sue for fees (*n*), nor may he be engaged in trade, nor dispense medicines, nor practise medicine or surgery in partnership, nor sell his practice (*o*).

Members.

735. A candidate for membership must be at least twenty-five years of age (*p*) and of good moral character (*q*). He must also have had a good general education (*r*). He must not be engaged in trade, nor may he dispense medicine, nor may he be a candidate

(*s*) Bye-law lxx.
(*t*) *Ibid.*, lxxi.
(*u*) *Ibid.*, lxxii.
(*x*) *Ibid.*, lxxiii.
(*a*) *Ibid.*, lxxiv.
(*b*) *Ibid.*, xlviii. As to fellows, see the text, *infra*.
(*c*) Bye-law l.
(*d*) Medical Act, 1860 (23 & 24 Vict. c. 66), s. 5.
(*e*) Charter, 1518.
(*f*) Medical Act, 1860 (23 & 24 Vict. c. 66), s. 6; bye-laws xliv., xlv.
(*g*) Bye-law xlvi.
(*h*) *Ibid.*, xlvii.
(*i*) *Ibid.*, civ.
(*k*) *Ibid.*, xvii.
(*l*) *Ibid.*, xl.
(*m*) *Ibid.*, xli.
(*n*) *Ibid.*, clxxii., pursuant to the Medical Act, 1886 (49 & 50 Vict. c. 48), s. 6.
(*o*) Bye-law clxxviii. As to rules of conduct for fellows and members when in consultation, see *ibid.*, clxxvi.
(*p*) *Ibid.*, cxii.
(*q*) *Ibid.*, cxiii.
(*r*) *Ibid.*, cxvi.

if he practises medicine or surgery in partnership (*a*). He must also undertake to make known the composition of any remedy he uses (*b*). Unless admitted by graduation, or by grace of the College, he must before being admitted to examination for membership give proof of having passed the examinations required for the licence of the College (*c*). Having passed the examination, he is admitted a member of the College at the next general meeting of fellows (*d*).

Qualification of candidates.

Restrictions affecting candidates.

736. A member may not be engaged in trade, nor dispense medicines nor practise medicine in partnership, nor be a party to the transfer of patients or of the goodwill of a practice to or from himself for a pecuniary consideration (*e*). He may not take the title of "doctor" unless he has a degree entitling him to do so (*f*).

Restrictions affecting members.

In prescribing for a patient, a member of the College must write on his prescription the date thereof, the name of the patient, and the initial letters of his own name (*g*).

737. By virtue of an agreement between the Royal College of Physicians and the Royal College of Surgeons (*h*), these two bodies have established a joint examination board. Every candidate who passes the final examination conducted by this board is entitled to receive the licence of the Royal College of Physicians and the diploma of membership of the Royal College of Surgeons (*i*). A candidate for such licence must produce satisfactory evidence of having passed a preliminary examination in subjects of general education, must be twenty-one years of age, and must have completed five years of professional study (*k*).

Licentiates.

Qualifications

738. A licentiate must not offer medical aid to nor prescribe for any patient whom he knows to be under the care of another legally qualified medical practitioner (*l*); nor may he compound medicines except for patients under his own care (*m*).

Restrictions affecting licentiates.

SECT. 2.—*Surgeons.*

SUB-SECT. 1.—*Meaning of Surgeon.*

739. The business of a surgeon is, properly speaking, with external ailments and injuries of the limbs (*n*). In former times the work of a surgeon was completely severed from that of a

"Surgeon."

(*a*) Bye-law CXIV.
(*b*) *Ibid.*, CXV.
(*c*) *Ibid.*, CXIX.
(*d*) *Ibid.*, CXXIII. The fee for admission as a member is forty guineas, except when the candidate for membership is a licentiate of the college, in which case the fee already paid for the licence is deducted (*ibid.*, CLXV.).
(*e*) *Ibid.*, CLXXVIII.
(*f*) *Ibid.*, CLXXIX.
(*g*) *Ibid.*, CLXXV.
(*h*) Dated February, 1883, under the provisions of the Medical Act (21 & 22 Vict. c. 90), s. 19; see p. 327, *post*.
(*i*) See p. 327, *post*.
(*k*) Bye-laws CXXVII., CXXVIII., CXXIX., CXXX. The fee payable for the licence to practise physic as a licentiate of the College is twenty guineas (*ibid.*, CLXVII.).
(*l*) *Ibid.*, CLXXVII.
(*m*) *Ibid.*, CLXXXII.
(*n*) *Allison* v. *Haydon* (1828), 4 Bing. 619, *per* BEST, C.J., at p. 621. In that case "lowering a typhus" was said to be the work of a physician.

SECT. 2. Surgeons.

physician, so much so that a surgeon could not recover fees for medical, unless it was ancillary to surgical, treatment (*o*). As has already been shown (*p*), the distinction between physicians and surgeons is now of but little practical importance, although most specialists are known either as "physicians" or "surgeons."

SUB-SECT. 2.—*The Royal College of Surgeons.*

Nature and constitution.

740. The Royal College of Surgeons of England (*q*) consists of a president, two vice-presidents, a council, a court of examiners, fellows, and ordinary members. It is a body corporate having a perpetual succession and a common seal; it may sue and be sued in the corporate name in all courts (*r*); and it may take and hold, without licence in mortmain, lands and tenements not exceeding the yearly value of £20,000 (*s*).

The council.

741. The governing body of the College is a council consisting

(*o*) *Illsley* v. *Haydon* (1828), 4 Bing. 619, *per* BEST, C.J., at p. 621 "Dropsy" was held to be not altogether a surgical case, although part of the treatment might be surgical and such as a surgeon might charge for (*Battersby* v. *Lawrence* (1841), Car. & M. 277). For form of articles of apprenticeship to a surgeon, see Encyclopædia of Forms and Precedents, Vol. II., p. 71.

(*p*) See pp 308, 309, *ante*.

(*q*) This is the name given to the College by the Charter of 1843, s. 1. The following is a brief sketch of the history of the College:—Although the Royal College of Surgeons is a comparatively new institution, the practice of examining surgeons who are to be allowed to practice extends to very early times. Formerly the Companies of Barbers and Surgeons were united in one company, but owing to dissensions between the barbers and the surgeons this company was dissolved in 1744 by stat. 18 Geo. 2, c. 15. The barbers retained all the corporate property, real and personal, with the exception of the Arris Bequest and Gales Annuity for Anatomy Lectures, which had been founded in 1646 and 1655 respectively. These trusts were vested by stat. 18 Geo. 2, c. 15, in the Company of Surgeons, and are now administered by the Royal College of Surgeons. The same statute incorporated the surgeons under the name of the Master, Governors, and Commonalty of the Art and Science of Surgeons of London. The governing body consisted of twenty-one assistants appointed for life, of whom one was to be master, and two governors or wardens selected annually. Ten were to be examiners for life. In addition to examining surgeons for the navy, the examiners were also required to examine all candidates for the posts of surgeon or surgeons in the army. The Charter of (1800) 40 Geo. 3 definitely severed the connection of the College with the Corporation of the City of London. It provided that the Court of Assistants should still consist of twenty one members, from whom the examiners should be chosen; the master and two wardens or governors being also selected from the court. Members of the old company were entitled to become members of the College, and any person thereafter desiring to become a member was required to pass an examination and obtain letters testimonial of his qualification to practise the art and science of surgery under the common seal of the College. The titles "master" and "governors" were changed to "president" and "vice-president" in 1822, while the Court of Assistants was styled the "Council" of the College. By the Charter of 1843 a new class of members called "fellows" was instituted, the constitution of the court of examiners was changed, and the president and vice president were to be chosen from amongst all the members of the council, whether examiners of the College or not. The Calendar of the Royal College of Surgeons of England (Lincoln's Inn Fields, London, W.C.) contains all the bye-laws and regulations of the College, and may be obtained from Messrs. Taylor and Francis, Red Lion Court, Fleet Street, London, E.C., after the 1st August in each year.

(*r*) Charter, 1800.

(*s*) Charter, 1888, s. 1.

of twenty-four members. Three elected members of the council go out of office by rotation each year, but are eligible for re-election (*t*). Vacancies are filled up from time to time (*a*). Members of the council are elected by the fellows of the College (*b*) voting in person (*c*), or by voting papers (*d*), at a meeting convened for the purpose. There must be at least six fellows present at the meeting exclusive of members of the council (*e*). Fellows of ten years' standing and members of twenty years' standing are eligible for election (*f*).

Election.

742. The council has power to make bye-laws for the regulation and government of the College (*g*).

Powers as to bye-laws.

743. Any fellow or member of the College who is found by the council to be guilty of disgraceful conduct in any professional respect (*h*) is liable to be removed by the council (*i*). Any fellow or member who is convicted of any criminal offence, or has his name removed from the Medical Register by the General Medical Council, may be removed from being a fellow or a member (*k*).

Disciplinary powers.

744. The president and vice-presidents of the council are appointed annually from among the members of the council (*l*).

President and vice-presidents.

745. Examiners in surgery, to the number of ten, are appointed by the council (*m*), from among the fellows or members of the College (*n*). Each examiner goes out of office at the end of five years from the date of his election, but may be re-elected (*o*). Any number of examiners, not being less than six, is sufficient to form a court of examiners (*p*).

Examiners: (1) in surgery;

746. The council may appoint a board for examining persons in dentistry, and granting certificates for fitness to practise as dentists (*q*). This board consists of at least six persons, of whom three must be members of the court of examiners. The others must be persons skilled in dental surgery, and duly registered as dentists (*r*).

(2.) in dentistry.

(*t*) Charter, 1843, ss. 12, 13.
(*a*) *Ibid*, s. 14.
(*b*) *Ibid*, s 15.
(*c*) *Ibid.*
(*d*) Charter, 1888, s 2
(*e*) Bye-laws, s. XIV, 7.
(*f*) Charter, 1888, ss 2, 4
(*g*) Charter, 1843, *passim*, and see note (*q*), p 312, *ante*. It has also power, pursuant to the Medical Act, Royal College of Surgeons of England, 1875 (38 & 39 Vict. c. 43), s. 1, to make a bye-law with regard to the double qualification; see p. 311, *ante*, and p. 327, *post*.
(*h*) See p. 321, *post*.
(*i*) Bye-laws, s. XVI.
(*k*) *Ibid.*
(*l*) Charter, 1843, s. 21.
(*m*) *Ibid.*, s. 20.
(*n*) *Ibid*
(*o*) Charter, 1852, s. 16
(*p*) Charter, 1843, s. 21. As to the election and meetings of examiners, see Bye-laws, ss. VIII.—XI.
(*q*) Charter, 1859, s. 1. The College may grant licences in dental surgery (Charter, 1859); and as to dentists, see p. 357, *post*.
(*r*) Charters, 1859, s. 2; 1888, ss. 8, 9; and see p 365, *post*.

SECT. 2. **Surgeons.**

Fellows.

In general.

747. By the Charter of 1843 (*s*) it was declared that a portion of the members of the College should be known by the name or style of "The Fellows of the Royal College of Surgeons of England" (*t*). The fellows of the College now consist of the following:—(1) Fellows *ad eundem*; (2) fellows by election; (3) fellows by examination (by far the largest class); and (4) honorary fellows.

Fellows and members *ad eundem*.

748. Fellows, members, and licentiates of the Royal College of Surgeons in Ireland, the Royal College of Surgeons in Edinburgh and the Faculty of Physicians and Surgeons of Glasgow, may be admitted to membership or fellowship without examination, provided they are in *bonâ fide* practice in England or Wales, and have obtained their respective diplomas or licences after examination (*u*).

Fellows by election.

749. The council may in each and every year admit any two persons, being members of the College of not less than twenty years' standing, to the fellowship of the College (*a*). Such admissions are made subject to the rules and regulations of the College (*b*), and a member seeking admission to this fellowship must be recommended by six members of the council (*c*).

Fellows by examination.

750. A person is entitled to the diploma of fellow who (1) produces evidence satisfactory to the council that he has attained the age of twenty-five; (2) has passed the joint examination (*d*), or possesses a qualification or qualifications in medicine and surgery recognised by the council in lieu thereof; (3) has passed the fellowship examination (*e*). The fellowship examination is divided into two parts, and, before being admitted to either part, candidates must show that they have been engaged for certain periods of time in the acquirement of professional knowledge (*f*).

Honorary fellows.

751. The council may from time to time elect persons to be honorary fellows of the College, whether British subjects or not, and whether of the age of twenty-five or not (*g*); but the number of honorary fellows must not exceed fifty (*h*). Honorary fellows are not eligible as members of the council or of the court of examiners of the College, nor are they entitled to vote at the election of members of the council (*i*). Honorary fellowship does not confer

Charter, 1843, s. 1.

(*t*) By virtue of this Charter the council had power to appoint a number of persons to be fellows of the College; see note (*q*), p. 312, *ante*. As the persons so appointed have all passed away it is unnecessary to refer to them.

(*u*) Charter, 1852, s. 6. As to the rules and regulations of the College with regard to such admissions, see Bye-laws, s. XXII. According to the Calendar for 1910 there is only one *ad eundem* fellow on the books of the College.

(*a*) Charter, 1852, s. 5.

(*b*) *Ibid.*

(*c*) Bye-laws, s. XXI. A fee of ten guineas is payable on election (*ibid.*).

(*d*) See pp. 325, 327, *post*.

(*e*) Bye-laws, s. XX.

(*f*) *Ibid.*

(*g*) Charter, 1899, s. 1.

(*h*) *Ibid.*

(*i*) *Ibid.*, s. 4.

any right to practise surgery or to be registered under the Medical Acts (*k*). SECT. 2. Surgeons.

752. To become a member of the College a person must be twenty-one years of age, and must pass the examination which is held by the examining board appointed by the Royal College of Surgeons and the Royal College of Physicians (*l*). Members.

Part II.—The General Medical Council.

SECT. 1.—*Constitution.*

SUB-SECT. 1.—*Membership.*

753. The General Medical Council (*m*) is a body corporate having a perpetual succession and a common seal (*n*). It may hold land for the purposes of the Medical Acts (*o*). Constitution.

754. The members of the Council, who must be qualified to be registered (*p*), are chosen for a term not exceeding five years, and may be reappointed. Members.

A member may resign by a letter addressed to the president. The vacancy may be filled up, but the Council may continue its work while there is a vacancy (*q*).

755. The Council consists of the following members (*r*):— Description of members.

(1) Five persons nominated by the King with the advice of the Privy Council, three for England, one for Scotland, and one for Ireland.

(2) One person nominated by each of the following bodies:— Royal College of Physicians, London; Royal College of Surgeons, England; Apothecaries Society of London; University of Oxford; University of Cambridge; University of London; University of Durham; Victoria University, Manchester; Royal College of Physicians, Edinburgh; Royal College of Surgeons, Edinburgh; the Faculty of Physicians and Surgeons of Glasgow; University of Edinburgh; University of Glasgow; University of Aberdeen; University of St. Andrews; King's and Queen's College of Physicians in Ireland; Apothecaries Hall of Ireland; University of

(*k*) Charter, 1899, s. 5 As to the Medical Acts, see note (*b*), p. 308, *ante*

(*l*) An arrangement to hold joint examinations was entered into by the two,

SECT. 1. Constitution.

Dublin; Royal College of Surgeons, Ireland; Royal University of Ireland (*s*); University of Leeds (*t*); University of Sheffield (*a*).

(3) Direct representatives, that is to say, representatives elected by registered medical practitioners, three for England, one for Scotland, and one for Ireland (*b*).

Direct representatives. Election.

756. The direct representatives must be registered medical practitioners. They are elected for five years, and may be re-elected. Upon the death or resignation of any one of them, another registered practitioner may be elected in his place (*c*).

Position on branch council.

Each direct representative is a member of the branch council (*d*) of that part of the United Kingdom for which he is elected, and is entitled to fees and travelling expenses to the same extent as other members of the General Medical Council (*e*).

Returning officer.

757. The president of the General Medical Council (*f*) is the returning officer for the election of direct representatives. Within not less than six weeks and not more than two months before the day when the term of office of a direct representative expires, or as soon as conveniently may be after the death or resignation of a direct representative, the president issues his precept to the branch council to fill the vacancy (*g*). The election takes place within twenty-one days of the receipt of the precept (*h*).

Voting.

758. The nomination paper for a direct representative must be signed by at least twelve registered practitioners (*i*). Voting papers are sent to all the registered medical practitioners in that part of the United Kingdom for which the election is held, and each voter may vote for as many candidates as there are representatives to be elected (*j*). The branch council then certifies the name or names of the elected representative or representatives to the returning officer (*k*). The expenses of the election are part of the expenses of the branch council (*l*).

Revision of constitution as regards membership.

759. In order that the constitution of the Council may be changed if a change is necessary or desirable, the Council may represent to the Privy Council:—(1) that it is expedient to confer on any

(*s*) By virtue of the Medical Act, 1886 (49 & 50 Vict. c. 48), s. 7, which replaced the Medical Act (21 & 22 Vict. c. 90), ss. 4, 5.

(*t*) University of Leeds Act, 1904 (4 Edw. 7, c. xxxv.), s. 9; and see title EDUCATION, Vol. XII., p. 96.

(*a*) University of Sheffield Act, 1905 (5 Edw. 7, c. clii.), s. 8; and see title EDUCATION, Vol. XII., p. 96.

(*b*) Medical Act, 1886 (49 & 50 Vict. c. 48), s. 7 (1).

(*c*) *Ibid.*, s. 8 (1).

(*d*) See p. 318, *post*.

(*e*) Medical Act, 1886 (49 & 50 Vict. c. 48), s. 8 (2). As to fees, see p. 317, *post*.

(*f*) See p. 317, *post*.

(*g*) Medical Act, 1886 (49 & 50 Vict. c. 48, s. 8 (8). As to branch councils, see p. 318, *post*.

(*h*) Medical Act, 1886 (49 & 50 Vict. c. 48), s. 8 (3).

(*i*) *Ibid.*, s. 8 (4) (a).

(*j*) *Ibid.*, s. 8 (4) (b), (c).

(*k*) *Ibid.*, s. 8 (5). *Ibid.*, s. 8 (6) provides for the election of a direct representative to replace one who has died or who resigns.

(*l*) *Ibid.*, s. 8 (7).

university or other body granting medical diplomas the power of returning a member to the General Medical Council, either separately or in conjunction with some other body; (2) that it is expedient to allow a constituent body returning a member in conjunction with another body to be separately represented; (3) that it is expedient to allow an additional direct representative to be returned for any part of the United Kingdom; (4) that it is expedient either to take away the power of electing a sole representative from any constituent body, or else to allow such body to return a representative in conjunction with some other body. Any such representation must be laid before Parliament, and, if not objected to, the Privy Council may give effect to it by order (*m*).

SUB-SECT. 2.—*Meetings and Committees.*

Time and place of meeting.

760. The General Medical Council may make rules as to the time and place of meeting. In the absence of any rule as to the summoning of a meeting, the president may summon a meeting by letter addressed to each member. In the absence of the president, a member chosen by the other members acts as president. All acts of the Council are decided by the majority, the president having a casting vote. Eight members constitute a quorum.

Decisions.

Quorum.

Executive committee.

The Council may appoint an executive committee, of which the quorum is not to be less than three, and this committee may exercise such of the powers of the Council as the Council thinks fit, other than the powers of making representations to the Privy Council (*n*).

Fees for attendance.

761. Members of the Council are paid such fees for attendance and such reasonable travelling expenses as may be fixed by the Council, subject to the approval of the Treasury (*o*).

SUB-SECT. 3.—*Officers.*

President.

762. On the occurrence of a vacancy in the office of president, the General Medical Council must elect one of its number to fill the post for a term not exceeding five years, but not extending beyond the term for which he has been made a member of the Council (*p*).

Registrar and other officers.

763. The Council must appoint a registrar, who may also act as treasurer, if no one is appointed for that office; and also clerks and servants. Every person so appointed is removable at the pleasure of the Council, and receives such salary as the Council may think fit (*q*).

SUB-SECT. 4.—*Expenses.*

Expenses of the council.

764. The moneys received by the General Medical Council and the branch councils are paid to the respective treasurers,

(*m*) Medical Act, 1886 (49 & 50 Vict. c. 48), s. 10.
(*n*) Medical Act (21 & 22 Vict. c. 90), s. 9.
(*o*) *Ibid.*, s. 12.
(*p*) Medical Act, 1886 (49 & 50 Vict. c. 48), s. 9.
(*q*) Medical Act (21 & 22 Vict. c. 90), s. 10. The registrar acts as registrar for England and as secretary of the General Medical Council (*ibid.*); see p. 318, *post*. In the event of the death of the registrar of the Council or his incapacity from illness, the executive committee may appoint a person temporarily to perform his duties (Standing Orders, 1908, ch. vii. (7)).

SECT. 1. Constitution.

separate accounts being kept of the expenses of the General Medical Council and of the branch councils. The expenses of the General Medical Council, including those of keeping the register, are paid by means of a percentage rate on all moneys received by the branch councils. Returns are made by the registrars of all moneys received by them, and the necessary percentage having been deducted, the expenses of the branch councils are defrayed out of the balance (*r*).

SUB-SECT. 5.—*Branch Councils.*

Constitution.

765. The members chosen by the medical corporations and universities of England, Scotland, and Ireland, and the members nominated by the King for such parts of the United Kingdom respectively, together with the direct representatives (*s*) for such parts respectively, constitute the branch councils for such parts respectively (*t*). The president is an *ex-officio* member of each branch council (*a*). These bodies may exercise such functions as are delegated to them by the General Medical Council (*b*).

Officers.

766. The registrar of the General Medical Council acts as registrar for England and as secretary of the English branch council (*c*); but the branch councils for Scotland and Ireland must appoint their own registrars and other clerks and officers, who are paid such salaries as the branch councils think fit (*d*).

SECT. 2.—*Functions and Powers.*

SUB-SECT. 1.—*Keeping and Publication of Registers.*

The Medical Register. Publication.

767. The Medical Register, which is printed and published every year by the registrar of the General Medical Council (*e*), under the supervision of the executive committee of the Council (*f*), contains the names and residences of persons appearing on the general register as existing on the 1st January in each year. It also contains the medical titles, diplomas, and qualifications duly conferred on any practitioner by any corporation or university or other body.

Copies of register.

768. A copy of the register purporting to be printed and published by authority is *primâ facie* evidence that a particular practitioner is registered; but in order to meet the needs of

(*r*) Medical Act (21 & 22 Vict. c. 90), s. 13. As to the finances of the Council, see, further, Standing Orders, 1908, ch. vi.

(*s*) Medical Act, 1886 (49 & 50 Vict. c. 48), s. 8 (2); see p. 316, *ante*.

(*t*) Medical Act (21 & 22 Vict. c. 90), s. 6.

(*a*) *Ibid.*

(*b*) *Ibid.* The English branch council performs the duties imposed on the General Medical Council by the Midwives Act, 1902 (2 Edw. 7, c. 17); see *ibid.*, s. 17, and p. 366, *post*.

(*c*) Medical Act (21 & 22 Vict. c. 90), s. 10. He also, if no other treasurer for the General Medical Council has been appointed, acts as treasurer for the English branch council; otherwise, the treasurer for the former Council acts as treasurer for the latter (*ibid.*).

(*d*) *Ibid.*, s. 11.

(*e*) Medical Act (21 & 22 Vict. c. 90), s. 27. The Medical Register is published in the form prescribed in *ibid.*, Sched. D.

(*f*) Standing Orders, 1908, ch. viii. (8). As to the executive committee, see p. 317, *ante*.

persons whose names have not yet been printed in the Medical Register, a certified copy of the entry of the name of such person in the general or local register is evidence that such person is duly registered (*g*). A person making application for a certificate of registration must file a statutory declaration in the prescribed form (*h*).

Who keeps the register.

769. The general register is kept by the general registrar (*i*). The branch registrars for Scotland and Ireland keep the registers in these two countries (*k*).

Duty of registrars.

770. The registrars must keep their registers correct, and for that purpose must erase the names of all registered persons who have died (*l*), and must, from time to time, alter addresses, diplomas, and qualifications as required. A registrar may write to any registered practitioner inquiring whether he has ceased to practise, or has changed his address. If no reply is received within six months, the name may be erased; but the Council may, by order, restore it (*m*).

Entry on register.

771. Where an applicant for registration produces satisfactory evidence of his qualifications, the registrar must place his name on the register: he has no option in the matter (*n*). The form of the register may be prescribed by the Council (*o*).

If application is made to a branch registrar, he must enter the name in a local register in the proper form, and he must send a copy of the entry so made to the general regisrar. The general registrar then causes a corresponding entry to be made in the general register (*p*).

Entry of qualifications.

A qualification may not be entered on the register unless the registrar is satisfied by proper evidence that the applicant is entitled to it (*q*). If a registered person obtains any higher degree or qualification, he is entitled to be registered in respect of it (*r*).

Proof of qualification.

An applicant for registration must produce to the registrar the documents conferring or proving each of the qualifications in respect of which he desires to be registered. He may post to the registrar his name, address, and the evidence of such qualifications (*s*).

(*g*) Medical Act (21 & 22 Vict. c. 90), s. 27; see *Pedgrift* v. *Chevallier* (1860), 8 C. B. (N. S.) 246; *Moises* v. *Thornton* (1799), 8 Term Rep. 303; and see title EVIDENCE, Vol. XIII., p. 524.

(*h*) Standing Orders, 1908, ch xiii.

(*i*) Medical Act (21 & 22 Vict. c. 90), s. 10; see p. 317, *ante*.

(*k*) Medical Act (21 & 22 Vict. c. 90), s. 11; see p. 318, *ante*.

(*l*) Registrars of deaths are bound to transmit a certificate of the death of any medical practitioner to the registrar of the General Medical Council and to the registrar of the branch council (Medical Act (21 & 22 Vict. c. 90), s. 45).

(*m*) *Ibid.*, s. 14; and see, further, p. 324, *post*.

(*n*) *R.* v. *General Council of Medical Education* (1861), 3 E. & E. 525, *per* CROMPTON, J., at p. 526

(*o*) Medical Act (21 & 22 Vict. c. 90), s. 16.

(*p*) *Ibid.*, s. 25.

(*q*) *Ibid.*, s. 26.

(*r*) *Ibid.*, s. 30.

(*s*) *Ibid.*, s. 15.

SECT. 2. **Functions and Powers.**

Striking out and rectifying qualifications.

772. Where the registrar, at the instance of the branch council, and without giving notice to the applicant, strikes out a qualification, which the evidence before the registrar shows the applicant had not obtained, the court will not order the registrar to reinsert it (*a*). The several colleges and other bodies who grant qualifications may, and generally do, simplify matters by sending lists of the persons who, in respect of the qualifications granted by such bodies, are entitled to be registered. The registrar may act on such information provided the fees are paid.

Appeals.

An appeal from the decision of the registrar may be decided by the General Medical Council, or the council for England, Scotland, or Ireland, as the case may be (*b*).

Offences connected with registration.

773. Any registrar falsifying, or causing the register to be falsified, is guilty of a misdemeanour punishable by imprisonment (*c*). Any person procuring, or attempting to procure, himself to be registered by making any false or fraudulent declaration, whether written or verbal, or any person aiding or abetting him, is deemed guilty of a misdemeanour. In either case the person convicted may be imprisoned for a term not exceeding twelve months (*d*).

SUB-SECT. 2.—*Disciplinary Powers* (*e*).

(1) *Punishment for Professional Misconduct.*

Penal jurisdiction.

774. If a registered medical practitioner is convicted, in England or Ireland, of any felony or misdemeanour, or, in Scotland, of any crime or offence, or if, after due inquiry, he is judged by the General Medical Council to have been guilty of infamous conduct in any professional respect, whether before or after registration (*f*), the Council may direct the registrar to erase his name from the register (*g*).

Absolute power of General Medical Council.

775. The Council is the sole judge of whether a medical practitioner has been guilty of infamous conduct in a professional respect, and the court will not interfere where the Council, after due inquiry, has found anyone guilty (*h*). The Council need not allow the accused to be represented by counsel at the inquiry (*i*), although this permission is customary. Mandamus will not lie

(*a*) *R.* v. *Steele* (1861), 13 I. C. L. R. 398.
(*b*) Medical Act (21 & 22 Vict. c. 90), s. 26.
(*c*) *Ibid.*, s. 38.
(*d*) *Ibid*, s. 39; but see Perjury Act, 1911 (1 & 2 Geo. 5, c. 6), which will come into force on the 1st January, 1912, by which the offender may be fined in the alternative, or in addition, to imprisonment (*ibid.*, ss. 6, 7).
(*e*) As to disciplinary powers in relation to dentists, see p. 361, *post*.
(*f*) *R.* v. *General Council of Medical Education* (1861), 3 E. & E. 525. As to such conduct, see p. 321, *post*.
(*g*) Medical Act (21 & 22 Vict. c. 90), s. 29. The name of a practitioner cannot be struck off merely because he has adopted any theory of medicine or surgery (*ibid.*, s. 28). Should the General Medical Council not exercise its jurisdiction, it may be exercised by two or more of the Lords of the Privy Council (Medical Act, 1886 (49 & 50 Vict. c. 48), ss. 19, 22).
(*h*) *Ex parte La Mert* (1863), 4 B. & S. 582.
(*i*) *Ibid.*

to compel the Council to restore a name to the register if it has properly exercised its discretion (*k*).

Proceedings of the council privileged.

776. Not only will the court decline to review the decision of the Council as to what is infamous conduct, but it will protect the Council from any action for libel which might be brought as a consequence of a case having been heard by it (*l*), on the ground that the public are interested in knowing the grounds upon which the Council acts, and it is important that, if a person's name is erased, accurate information should be given to the public of the cause of the erasure.

Reason for privilege.

The medical man whose name is erased is not disqualified from practising, and old patients and other medical men invited to meet him in consultation might reasonably desire to know the nature of the offence in respect of which the erasure was made, in order to determine whether they would still continue to employ or meet him (*m*). If the nature of the offence were not stated, the medical man might complain that the public were left to infer that he had been convicted of felony or misdemeanour.

Erroneous exercise of functions.

777. The functions of the Council are judicial and not merely ministerial, and the Council is not liable to an action for the erroneous exercise of those functions without malice (*n*).

(ii.) *Infamous Conduct in a Professional Respect.*

Conduct must be infamous "professionally."

778. Where it is shown that a medical man, in the pursuit of his profession, has done something which may be reasonably regarded as disgraceful or dishonourable by his professional brethren of good repute and competency, it is open to the General Medical Council to say that he has been guilty of "infamous conduct in a professional respect" (*o*). The question is not merely whether what the medical man has done would be an infamous

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(*k*) *Allbutt* v. *General Council of Medical Education and Registration* (1889), 23 Q. B. D. 400, 408, C. A. In that case the plaintiff had published a work called "The Wife's Handbook." The Council, having regard to the nature of this work and the low price at which it was sold, came to the conclusion that he was guilty of infamous conduct, and erased his name. He brought an action for a mandamus to compel them to restore his name, for damages for removing it, and for an injunction against, and damages for, printing and publishing of him a libel that he had been guilty of such conduct. The libel was alleged to be contained in the published minutes of the Council. The plaintiff failed on all points. The court held, in the first place, that it had no jurisdiction to interfere with the finding of infamous conduct. LOPES, L.J., said, at p. 409, quoting COCKBURN, C.J., in *Ex parte La Mert* (1863), 4 B. & S. 582: "This court has no more power to review their decision than they would have, in the present mode of proceeding, of determining whether the facts had justified a conviction for felony or misdemeanour under the first branch of the section." As to mandamus, see title CROWN PRACTICE, Vol. X., pp. 77 *et seq.*

(*l*) *Allbutt* v. *General Council of Medical Education and Registration, supra.*

(*m*) See *ibid.*, *per* LOPES, L.J., at p. 409.

(*n*) *Partridge* v. *General Council of Medical Education and Registration of the United Kingdom* (1890), 25 Q. B. D. 90, C. A., *per* Lord ESHER, M.R., at p. 96.

(*o*) See Medical Act (21 & 22 Vict. c. 90), s. 29.

SECT. 2 Functions and Powers.

thing for anyone else to do, but whether it is an infamous act for a medical man to do.

"Professional," distinguished from "private," conduct.

779. An act done by a medical man may be infamous though the same act done by anyone else would not be infamous; but, on the other hand, an act which is not done in a professional respect does not come within the above provision (*p*). Much importance attaches to the words "in a professional respect."

The private life of a medical man may leave much to be desired; yet so long as his professional character is unsullied he cannot be said to be infamous. For instance, it would be regarded as infamous for a practitioner to advertise his skill as a surgeon; but, if he were to write a novel, he might advertise himself as author to any extent he chose.

(iii.) *Who may take part in the Disciplinary Proceedings.*

The hearing

780. Disciplinary cases are heard by the Council, and, at the hearing, the Council is attended by its solicitor, or is generally aided by counsel attending as legal or judicial assessor.

The prosecution.

The prosecution of persons before the Council is usually undertaken by medical and other societies, for example, the British Medical Association or the Medical Defence Union.

The fact that a member of the Council is a member of the society which is conducting the prosecution does not disqualify him from taking part in the proceedings (*q*); but it is undesirable that members of the Council who take part should be subscribers to the society which has instituted and is conducting the proceedings (*r*).

(iv.) *Procedure on Disciplinary Inquiry.*

Complaint supported by statutory declaration.

781. When the Council has information that a practitioner has been convicted of an offence, or has been under the censure of a judicial or other competent authority in relation to his professional character, or has been guilty of conduct which is *primâ facie* infamous, the registrar makes an abstract of the information and submits it to the president (*s*). Where the information is a complaint by a person or body alleging infamous conduct in a professional respect, it must be put into writing and supported by one or more statutory declarations (*t*). A declaration must state the name and address of the declarant, and, where the facts are not within his personal knowledge, he must state the source of his information (*u*).

(*p*) *Allinson* v. *General Council of Medical Education and Registration*, [1894] 1 Q. B. 750, C. A.

(*q*) *Leeson* v. *General Council of Medical Education and Registration of the United Kingdom* (1889), 59 L. J. (CH.) 233, C. A.; *Allinson* v *General Council of Medical Education and Registration*, *supra*.

(*r*) *Leeson* v. *General Council of Medical Education and Registration of the United Kingdom*, *supra*, *per* BOWEN, L.J., at p. 241.

(*s*) Standing Orders of the General Medical Council, 1908, ch. xiv. (1).

(*t*) *Ibid.*, ch. xiv. (2).

(*u*) *Ibid.*, ch. xiv. (3).

782. The abstract, complaint, and other documents having been submitted to the president, he may direct the registrar to ask the practitioner for his explanation. All the documents, together with the explanation, are then put before the penal cases committee, who may cause further investigation to be made, take the advice of the solicitor to the Council, and instruct him to take the opinion of counsel. If the committee think that no *primâ facie* case is made out, the matter proceeds no further, but if they resolve that an inquiry should be held, the president directs the solicitor to take steps for the institution of an inquiry (*a*).

Primâ facie case to be made out.

783. An inquiry with a view to the removal of a name from the register under the provision above referred to (*b*) is instituted by a notice in writing to the practitioner specifying the nature of the charge, the day on which the inquiry is to be held, and asking him to answer the charge in writing and to attend before the Council on the day in question (*c*). Either party to the inquiry (that is, the complainant or the practitioner) is entitled to be supplied by the solicitor to the Council with copies of any statutory declarations or other documents given or sent to the Council by the other party (*d*). All documents which are to be laid before the Council as evidence are printed, and copies are furnished to each member of the Council before the hearing (*e*).

How an inquiry is instituted.

784. The complainant and the practitioner may be represented by a solicitor with or without counsel (*f*).

Appearance.

785. If the complainant appears personally or by counsel, the solicitor to the Council reads the notice of inquiry, and the complainant (or his legal representative) may then state his case and produce proofs in support of it. The practitioner is then invited to state his case by himself or his legal representative and produce his proofs in support of it. He may address the Council once, either before or at the conclusion of his proofs. If the practitioner produces evidence, the complainant has a right of reply.

Procedure if the complainant appears.

786. Witnesses produced by either party may be cross-examined. The Council may refuse to admit any statutory declaration in evidence unless the declarant submits himself to cross-examination. The president, any member of the Council through the president, and the judicial assessor may put questions to the witnesses.

Evidence.

787. If no complainant appears, the solicitor to the Council states the facts of the case, and produces the evidence by which it is supported. The practitioner or his legal representative addresses the Council and produces his proofs. The Council's solicitor may then be heard in reply (*g*).

Procedure if the complainant does not appear.

(*a*) Standing Orders of the General Medical Council, 1908, ch. xiv. (4).
(*b*) See p. 322, *ante*.
(*c*) Standing Orders of the General Medical Council, 1908, ch. xiv. (6).
(*d*) *Ibid.*
(*e*) *Ibid.*, ch. xiv. (8).
(*f*) *Ibid.*, ch. xiv. (9).
(*g*) *Ibid.*, ch. xiv. (11).

SECT. 2. Functions and Powers.

Procedure on conviction of felony.

788. In a case where a practitioner has been charged with having been convicted of a felony, misdemeanour etc., the president puts the following resolution: "That, A. B. having been proved to have been convicted of felony" (or as the case may be) "the registrar be directed to erase his name from the register" (*h*).

Procedure on charge of infamous conduct.

789. In the case of a practitioner charged with infamous conduct, a resolution is first put to the effect that the Council shall proceed to decide whether the facts alleged have been proved. If this resolution is not carried, the further hearing of the case stands adjourned. If this resolution is carried, a resolution is proposed to the effect that the facts alleged in the notice of inquiry have been proved. If in its turn the latter resolution is carried, the Council may either proceed to judge whether on the facts proved the accused practitioner has been guilty of infamous conduct and direct the erasure of his name, or it may postpone judgment and adjourn the case until the next or some other session (*i*).

Adjournments.

790. Where hearing or judgment is postponed to another session, the Council may again hear the complainant and the practitioner and receive further evidence (*k*). At the conclusion of an adjourned case a vote is taken on the same resolutions as at the original hearing (*l*).

(v.) *Restoration of Name to the Register.*

Restoration of name to register.

791. Where a name has once been removed from the register, it seems that the Council cannot be compelled to restore it, even though it be alleged that the name of the practitioner affected was removed because of an erroneous conviction. Probably the Council has a discretion to rehear, but there is no duty imposed on it to do so (*m*).

SUB-SECT. 3.—*Publication of the British Pharmacopœia.*

Publishers.

792. The General Medical Council publishes the British Pharmacopœia, which contains a list of medicines and compounds and the manner of preparing them, together with the true weight and measures by which they are to be prepared and mixed (*n*).

Right of publication.

Subject to the price at which it is sold being approved by the Privy Council, the General Medical Council has the exclusive right of publishing, printing, and selling the Pharmacopœia (*o*).

Admissibility as evidence

A copy of the Pharmacopœia printed by such person as shall be named in a notice published in the *London Gazette* is to be received in evidence in all courts (*p*).

(*h*) Standing Orders of the General Medical Council, 1908, ch. xiv. (12).
(*i*) *Ibid.*, ch. xiv. (13).
(*k*) *Ibid.*
(*l*) *Ibid.*, ch. xiv. (14).
(*m*) *Ex parte C. A. B.* (1900), *Times*, 20th June.
(*n*) Medical Act (21 & 22 Vict. c. 90), s. 54. As to compounding medicines otherwise than in accordance with the Pharmacopœia, see title FOOD AND DRUGS, Vol. XV., p. 21; and p. 356, *post*.
(*o*) Medical Act, 1862 (25 & 26 Vict. c. 91), s. 2.
(*p*) *Ibid.*, s. 3; and see title EVIDENCE, Vol. XIII., p. 479.

Part III.—Medical Practitioners.

SECT. 1.—*Qualifications.*

SUB-SECT. 1.—*Examinations for Qualification.*

Subjects.

793. No one can be registered as a qualified medical practitioner unless he has passed a qualifying examination in medicine, surgery, and midwifery (*q*).

Qualifying examination.

794. A qualifying examination means an examination in medicine, surgery, and midwifery held for the purpose of granting a diploma or diplomas conferring the right of registration.

Examining body.

The bodies entitled to hold examinations are (i.) the universities and medical corporations legally qualified to grant diplomas in medicine and surgery (including the Royal College of Physicians (*r*)); (ii.) combinations of two or more medical corporations in the same part of the United Kingdom, who may agree to hold a joint examination in medicine, surgery, and midwifery, of which corporations at least one must be competent to grant a diploma in surgery, and at least one must be competent to grant a diploma in midwifery; (iii.) combinations of universities, or of universities and medical corporations (*s*).

Standard of proficiency.

795. The standard of proficiency must be such as sufficiently to guarantee the possession of the knowledge and skill requisite for the efficient practice of medicine, surgery, and midwifery. The General Medical Council has to maintain this standard; and with that object it must appoint inspectors to attend at the examinations (*t*).

Inspectors.

796. An inspector so appointed must not interfere with the conduct of any examination, but must report to the General Medical Council as to the sufficiency or insufficiency thereof. A copy of the report is to be sent to the examining body and to the Privy Council (*u*). Examiners receive such remuneration as the General Medical Council determines, and it pays their salaries (*x*).

Who are entitled to be registered.

797. Persons possessed of one or more of the following qualifications are entitled to be registered:—fellow, member, licentiate, or extra licentiate of the Royal College of Physicians of London (*y*); fellow or licentiate of the Royal College of Physicians of Edinburgh; fellow or licentiate of the King's and Queen's College of Physicians

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(*q*) Medical Act, 1886 (49 & 50 Vict. c. 48), s. 2.

(*r*) *Royal College of Physicians* v. *General Medical Council* (1893), 62 L. J. (Q. B.) 329. For the Royal College of Physicians and these corporations, see p. 309, *ante*, and the text, *infra*.

(*s*) Medical Act, 1886 (49 & 50 Vict. c. 48), s. 3 (1). As to such combinations, see p. 327, *post*.

(*t*) Medical Act, 1886 (49 & 50 Vict. c. 48), s. 3 (2).

(*u*) *Ibid.*, s. 3 (3).

(*x*) *Ibid.*, s. 3 (4). The General Medical Council, 299, Oxford Street, London, W., issues the Medical Register, which contains all the rules of the General Medical Council, and may be obtained at the above address.

(*y*) As to the Royal College of Physicians, see p. 309, *ante*.

SECT 1. Qualifications.

of Ireland; fellow, or member, or licentiate in midwifery of the Royal College of Surgeons of England (*a*); fellow or licentiate of the Royal College of Surgeons of Edinburgh; fellow or licentiate of the Faculty of Physicians and Surgeons of Glasgow; fellow or licentiate of the Royal College of Surgeons in Ireland; licentiate of the Society of Apothecaries, London (*b*); licentiate of the Apothecaries' Hall, Dublin; doctor, or bachelor, or licentiate of medicine, or master in surgery of any university of the United Kingdom; doctor of medicine by doctorate granted prior to the 1st October, 1858, by the Archbishop of Canterbury (*c*); doctor of medicine of any foreign or colonial university or college, practising as a physician in the United Kingdom before the 1st October, 1858, who produces certificates to the satisfaction of the General Medical Council of his having taken his degree of doctor of medicine after regular examination, or who satisfies the Council, in accordance with the provision hereafter referred to (*d*), that there is sufficient reason for admitting him to be registered (*e*). Persons holding the diploma of the Leeds (*f*), Sheffield (*g*), or Bristol (*h*) University may also be registered in respect thereof.

Special diplomas.

798. Persons holding the diploma of member of the King's and Queen's College of Physicians of Ireland or the degree of master of obstetrics of any university in the United Kingdom are also entitled to be registered in respect thereof (*i*); while a diploma in sanitary science, public health, and state medicine, may, if it appears to the General Medical Council or the Privy Council to be deserving of such recognition, be added to the register (*k*).

Withdrawal of right to hold examinations.

799. If the General Medical Council is of opinion that the standard of proficiency, required from candidates by any body, in medicine, surgery, and midwifery, is too low, it may make representation to that effect to the Privy Council. The Privy Council may, after hearing the objection of the examining body concerned, by order, declare that these examinations shall not be deemed qualifying. The order may be revoked on a further representation by the General Medical Council (*l*). While the order is in force, no diploma granted by the body affected entitles the party receiving it to be registered, and the body is disqualified from electing a member of the General Medical Council; and, if it already has a representative on the General Medical Council, he is suspended

(*a*) As to the Royal College of Surgeons, see p. 312, *ante*.
(*b*) As to the Society of Apothecaries, see p. 315, *post*.
(*c*) See title ECCLESIASTICAL LAW, Vol. XI., p. 387, note (*s*).
(*d*) Medical Act (21 & 22 Vict. c. 90) s. 46; see p. 329, *post*.
(*e*) Medical Act (21 & 22 Vict. c. 90), s. 15, and Sched. A. as amended by the Medical Act, 1859 (22 Vict. c. 21), ss. 4, 5.
(*f*) University of Leeds Act, 1904 (4 Edw. 7, c. xxxv.), s. 8. As to this university, see title EDUCATION, Vol. XII., p. 96.
(*g*) University of Sheffield Act, 1905 (5 Edw. 7, c. clii.), s. 7. As to this university, see title EDUCATION, Vol. XII., p. 97.
(*h*) University of Bristol Act, 1909 (9 Edw. 7, c. xlii.), s. 7. As to this university, see title EDUCATION, Vol. XII., p. 97.
(*i*) Medical Act, 1886 (49 & 50 Vict. c. 48), s. 20.
(*k*) *Ibid.*, s. 21.
(*l*) *Ibid.*, s. 4 (1).

from taking part in its proceedings, unless he also represents some body other than that against which the order has been made (*m*).

Union of bodies for examinations.

800. Any two or more colleges or examining bodies may, with the sanction of the General Medical Council, unite or co-operate in conducting the examinations required for qualifications (*n*).

Special provisions for the Royal College of Surgeons.

801. If the Royal College of Surgeons of England takes advantage of the above provision, the council of the College may, by bye-law, provide that no person shall become a fellow, or member, or licentiate in midwifery unless, in addition to complying with the conditions of the bye-laws of the College, he shall have passed the joint examinations (*o*). Every person passing the joint examinations is entitled to receive letters testimonial of his qualification, and to become and be constituted a member of the College (*o*).

Appointment of assistant examiners by General Medical Council.

802. If a medical corporation fails to enter into a combination for the purpose of examinations for qualifications on reasonable terms, the General Medical Council may appoint examiners to assist at the examinations held by such corporation (*p*), and such assistant examiners must see that the proper standard is maintained. Examinations so held are qualifying examinations (*q*).

Assistant examiners thus appointed are entitled to such remuneration, to be paid by the medical corporation, as the General Medical Council may determine (*r*).

Defects in course of study prescribed by qualifying body.

803. If the General Medical Council is of opinion that the course of study and examinations of any of the qualifying bodies are not such as to secure the possession, by persons obtaining such qualification, of the requisite knowledge and skill for the efficient practice of their profession, the matter may be represented to the Privy Council (*s*), and the Privy Council may, by order, direct that any qualification granted by such body shall not confer any right to be registered (*t*). Such order may be revoked on a further representation by the General Medical Council that the course of study and examinations for the qualification are satisfactory (*t*).

(*m*) Medical Act, 1886 (49 & 50 Vict. c. 48), s. 4 (2).

(*n*) Medical Act (21 & 22 Vict. c. 90), s. 19. If the University of London co-operates pursuant to this provision, then, in spite of anything in any statute or charter contained, the University may make a bye-law that no person shall become a doctor, or bachelor, or licentiate of medicine, or master in surgery of the University, unless, in addition to the ordinary examination, he shall have passed such examination for qualification to be registered under the Medical Act, and complied with such conditions relating thereto as may be agreed between the university and the co-operating body (Medical Act (University of London), 1873 (36 & 37 Vict. c. 55), s. 1).

(*o*) Medical Act, Royal College of Surgeons of England, 1875 (38 & 39 Vict. c. 43), s. 1. This provision, however, does not limit nor affect the power of the Royal College of Surgeons to appoint fellows without examination Bye-laws made pursuant to this provision must be approved by the Privy Council (*ibid.*); and as to this College see, further, p. 312, *ante*

(*p*) Medical Act, 1886 (49 & 50 Vict. c. 48), s. 5 (1).

(*q*) *Ibid.*, s. 5 (2).

(*r*) *Ibid.*, s. 5 (3).

(*s*) Medical Act (21 & 22 Vict. c. 90), s. 20.

(*t*) *Ibid.*, s. 21.

SECT. 1. Qualifications.

The revocation, however, does not entitle any person to be registered in respect of any qualification granted before such revocation (*u*).

Prohibition of restrictions as to theory of medicine or surgery.

804. If any qualifying body imposes upon any candidate offering himself for examination an obligation to adopt, or refrain from adopting, any particular theory of medicine or surgery as a test of admitting him to examination or of granting a certificate, the General Medical Council may represent the matter to the Privy Council. The Privy Council may then issue an injunction to such body directing it to desist from such practice, and, if it refuses, its power of granting certificates may be withdrawn so long as the imposition continues (*v*).

Default of General Medical Council in maintaining standard of proficiency or in appointing assistant examiners.

805. If the General Medical Council fails to maintain the standard of proficiency at any qualifying examinations, or to appoint assistant examiners, or to exercise or perform any other power or duty imposed on it, the Privy Council may notify their opinion to the General Medical Council, and if the Privy Council then give directions with which the General Medical Council fails to comply, the Privy Council may, of their own motion, do anything which under statute they are empowered to do in pursuance of a representation or suggestion from the General Medical Council (*a*).

SUB-SECT. 2.—*Colonial and Foreign Practitioners* (*b*).

Registration of colonial practitioners with recognised diplomas.

806. A person holding a recognised medical diploma or diplomas (*c*) granted to him in a British possession (*d*), who is of good character, and by law entitled to practise medicine, surgery, and midwifery in such British possession, is entitled, on application to the registrar (who must satisfy himself as to the above facts), and on payment of a fee not exceeding £5, to be registered in the United Kingdom without examination as a "colonial practitioner" (*e*).

(*u*) Medical Act (21 & 22 Vict. c. 90), s. 22.

(*v*) *Ibid.*, s. 23.

(*a*) Medical Act, 1886 (49 & 50 Vict. c. 48), s. 19. The powers vested in the Privy Council may be exercised by any two or more members of that body, and the acts of the Privy Council are sufficiently signified by an instrument signed by the clerk (*ibid.*, s. 22).

(*b*) The Medical Act (21 & 22 Vict. c. 90), s. 46, also affected colonial practitioners, but as it is of a transitory nature it is not considered necessary to make further allusion to it here. The Medical Act (21 & 22 Vict. c. 90) does not prevent any colonial practitioner from holding an appointment as a medical officer in any vessel registered in that colony (Medical Act, 1886 (49 & 50 Vict. c. 48), s. 18; and see p. 329, *post*. As to the disability of practitioners holding foreign diplomas to vaccinate, see p. 340, *post*.

(*c*) "Such medical diploma or diplomas as may be recognised for the time being by the General Council as furnishing a sufficient guarantee of the possession of the requisite knowledge and skill for the efficient practice of medicine, surgery, and midwifery" (Medical Act, 1886 (49 & 50 Vict. c. 48), s. 13 (1)).

(*d*) Where any part of a British possession is under a central as well as a local legislature, the King may, by Order in Council, declare that the part which is under the local legislature shall be deemed a separate British possession (Medical (1886) Amendment Act, 1905 (5 Edw. 7, c. 14), s. 1).

(*e*) Medical Act, 1886 (49 & 50 Vict. c. 48), s. 11.

807. Such person must, however, if he requires to be registered as a colonial practitioner, show to the satisfaction of the registrar either (1) that the diploma or diplomas in question were granted at a time when he was not domiciled in the United Kingdom, or in the course of a period of not less than five years during which he resided out of the United Kingdom; or (2) that he was practising medicine or surgery in the United Kingdom on the prescribed day (*f*); or that he had been in practice, either in the United Kingdom or elsewhere, for not less than ten years immediately preceding the prescribed day (*g*). Qualifications for registration as colonial practitioner.

808. If a person desires to be registered as a foreign practitioner, he must satisfy the registrar that he holds a recognised foreign medical diploma or diplomas (*h*) granted in a foreign country (*i*), that he is of good character, and that he is by law entitled to practise medicine, surgery, and midwifery in that foreign country. He is then entitled to be registered in England without examination if he can prove either (1) that he is not a British subject; or (2) that, being a British subject, the foreign diploma was granted at a time when he was not domiciled in the United Kingdom, or in the course of a period of not less than five years during which he resided out of the United Kingdom; or (3) that, being a British subject, he had practised surgery for a period of not less than ten years before the prescribed day (*k*). Qualification for registration as foreign practitioner.

809. If the General Medical Council refuses to recognise a colonial or foreign diploma, the Privy Council may, if they think fit, after communication with the General Medical Council, order it to recognise the diploma (*l*). Refusal to recognise colonial or foreign diploma.

810. If a person is refused registration as a colonial or foreign practitioner on any ground other than that the medical diploma held by him is not recognised by the General Medical Council, the registrar must state the reason of such refusal in writing. The person concerned may then appeal to the Privy Council, who may either dismiss the appeal or order the General Medical Council to register the appellant (*m*). Refusal to register colonial or foreign practitioner.

811. A person properly entitled may be registered both as a colonial and as a foreign practitioner (*n*). The Medical Register Colonial and foreign register.

(*f*) The "prescribed day" means, as respects any British possession or foreign country, the day on and after which the Medical Act, 1886 (49 & 50 Vict. c. 48), is declared by Order in Council to apply to such British possession or foreign country (*ibid.*, s. 17 (1)).

(*g*) *Ibid.*, s. 11 (1), (2).

(*h*) See note (*c*), p. 328, *ante*.

(*i*) The King may, by Order in Council, direct that on and after a prescribed day this part of the Act shall apply to any British possession or foreign country which affords to English medical practitioners such privileges of practising in the said British possession or foreign country as to the King may seem just. Any order made pursuant to this provision may be revoked (Medical Act, 1886 (49 & 50 Vict. c. 48), s. 17).

(*k*) *Ibid.*, s. 12. As to meaning of "prescribed day," see note (*f*), *supra*.

(*l*) Medical Act, 1886 (49 & 50 Vict. c. 48), s. 13 (2).

(*m*) *Ibid.*, s. 13 (3).

(*n*) *Ibid.*, s. 13 (4).

SECT. 1. Qualifications.

must contain separate lists of the names and addresses of colonial and foreign practitioners (*o*). Any person whose name appears on this register may have any new qualification added to his name (*p*). The penal provisions of the Medical Acts (*q*) relate to such practitioners (*o*).

Registration of foreign degrees held by British practitioners

812. A registered practitioner, whose name is on the register by virtue of a British qualification, may have a description of any foreign degree which he possesses added to his name in the register, provided he satisfies the General Medical Council that he obtained such degree after proper examination, and before 25th June, 1886 (*r*).

SUB-SECT. 3.—*Admission of Women.*

Admission.

813. The powers of all the bodies (*s*) entitled (*t*) to grant qualifications for registration extend to the grant of qualifications to women (*u*); but none of the bodies referred to is under compulsion to exercise such powers, nor does a woman who acquires the right to be registered become entitled, by virtue of such registration, to take any part in the government, management, or proceedings of any of the universities or corporations (*v*) already mentioned (*a*). Women may also be admitted to examination for the licence of the Society of Apothecaries (*b*).

Women take no part in government

SECT. 2.—*Responsibility.*

SUB-SECT. 1.—*Civil Responsibility.*

Implied undertaking as to possession of knowledge and skill.

814. A medical practitioner, whether he be registered or not (*c*), impliedly undertakes that he is possessed of a reasonable amount of knowledge and skill necessary for the performance of any professional task upon which he enters (*d*), and any such person who

(*o*) Medical Act, 1886 (49 & 50 Vict. c. 48), s. 14.
(*p*) *Ibid.*, ss. 15, 16.
(*q*) As to these Acts, see note (*b*), p. 308, *ante*.
(*r*) Medical Act, 1886 (49 & 50 Vict. c. 48), s. 16. The registrar will require satisfactory proof of the date of the grant of the degree (Standing Orders of the General Medical Council, 1908, ch. xiii. (4)).
(*s*) A list of these bodies is set out on pp. 325, 326, *ante*.
(*t*) By virtue of the Medical Act (21 & 22 Vict. c. 90), s. 15.
(*u*) Medical Act, 1876 (39 & 40 Vict. c. 41), s. 1.
(*v*) *Ibid.*
(*a*) See p. 325, *ante*; *i.e.*, those mentioned in the Medical Act (21 & 22 Vict. c. 90).
(*b*) See p. 317, *post*.
(*c*) *Ruddock* v. *Lowe* (1865), 4 F. & F. 519 (where the defendant, who was unqualified, administered an improper medicine (namely, mercury) and made the plaintiff worse instead of better); *Jones* v. *Fay* (1865), 4 F. & F. 525 (where the defendant, a chemist, was sued for negligence as a "surgeon and apothecary"). It is submitted that where an action for negligence is brought against an unregistered person the jury may take into consideration the fact that the plaintiff had voluntarily submitted himself to the manipulation of an unskilled person. As to negligence in general, see title NEGLIGENCE. As to the liability of a medical man for examining a patient against the will of the latter, see title TRESPASS.
(*d*) *Seare* v. *Prentice* (1807), 8 East, 348; *Lanphier* v. *Phipos* (1832), 8 C. & P. 475.

for reward (*e*) or in the performance of a duty (*f*), either through negligence or ignorance, causes injury to the patient (*g*), is liable in damages for the consequences resulting therefrom (*h*).

(*e*) Stat. (1542-3) 34 & 35 Hen. 8, c. 8.

(*f*) The duty may be one imposed upon the medical man himself by a voluntary act. The confidence induced by undertaking any service for another is a sufficient legal consideration to create a duty in the performance of it (see *Coggs* v. *Bernard* (1703), 2 Ld. Raym. 909; *Whitehead* v. *Greetham* (1825), 2 Bing. 464); and where there is a duty, although the treatment is undertaken without reward, the practitioner is liable to the patient for negligence (*Pippin* v. *Sheppard* (1822), 11 Price, 400; see *Donaldson* v. *Haldane* (1810), 7 Cl. & Fin. 762, H. L. (attorney)). In *Shells* v. *Blackburne* (1789), 1 Hy. Bl. 159, HEATH, J., at p. 161, said: "If a man applies to a surgeon to attend him in a disorder for a reward, and the person treats him improperly, there is gross negligence; and the surgeon would also be liable for such negligence, if he undertook gratis to attend a sick person, because his situation implies skill in surgery; but if the patient applies to a man, of a different employment or occupation, for his gratuitous assistance, who either does not exert all his skill, or administers improper remedies to the best of his ability, such person is not liable. It would be attended with injurious consequences, if a gratuitous undertaking of this sort should subject the person who made it, and who acted to the best of his knowledge, to an action;" see also *R.* v. *Macleod* (1874), 12 Cox, C. C. 534. It is not necessary, in order to support an action for negligence, to prove an express contract; it is sufficient to prove that the defendant was retained and entered upon the case (*Gladwell* v. *Steggall* (1839), 5 Bing. (N. C.) 733). There must, however, be a duty towards the patient; thus, in *Pinn* v. *Roper* (1862), 2 F. & F. 783, where a surgeon, who had been employed by a railway company to examine an injured passenger, formed the opinion that the injuries were slight and told the passenger so, and the passenger accepted a small sum in compensation, it was held that, even assuming the injuries were greater than those advised by the surgeon, no action lay against him for negligence.

(*g*) *Thompson* v. *Schmidt* (1891), 8 T. L. R. 120, C. A., *per* Lord ESHER, M.R.

(*h*) *Scare* v. *Prentice* (1801), 8 East, 348; *Slater* v. *Baker and Stapleton* (1769), 2 Wils 359; *Lanphier* v. *Phipos* (1838), 8 C. & P. 475. As to injuries resulting from the negligence of an assistant, whether qualified or not, see *Hancke* v. *Hooper* (1835), 7 C. & P. 81 (the facts of which case are given in note (*q*), p. 332, *post*); *Farquhar* v. *Murray* (1901), 38 Sc. L. R. 612 (where the defendant, a registered medical practitioner, prescribed an ointment for the plaintiff, who was suffering from erysipelas in one of his fingers. The defendant told the plaintiff to continue using the ointment until he should call again. As the defendant did not come for some time, the plaintiff asked his wife to write, after which the defendant's *locum tenens* arrived, and said that he was looking after the defendant's practice while the defendant was away on holiday. It appeared that the defendant had left no instructions with regard to the plaintiff's case. Subsequently, owing to the improper treatment, it became necessary to amputate the plaintiff's finger. It was held that, assuming the above facts could be established, they were sufficient to found a charge of negligence against the defendant); see also *Peronousky* v. *Freeman* (1866), 4 F. & F. 977 (where an action was brought against two surgeons at St. George's Hospital for alleged negligence in the treatment of a patient there, by placing him in a bath heated to an excessively high temperature and keeping him there for an improper length of time, whereby he was severely scalded. The defence was that it arose from the negligence of the nurses, over whose appointment and dismissal the defendants had no control. It was proved that it was the usual practice to leave the baths to the nurses. COCKBURN, C.J., in leaving the case to the jury, said, at p. 982: "The defendants cannot be held liable for the negligence of the nurses unless they were near enough to be aware of it and prevent it. No doubt persons who go as patients into hospitals are not to be treated with negligence, but, on the other hand, medical gentlemen who give their services gratuitously are not to be made liable for negligence for which they are not personally responsible." A verdict was returned for the defendants); see also note (*d*),

SECT. 2. **Responsibility.**

Degree of skill or knowledge required.

815. No general rule as to the degree of skill or knowledge so required can be laid down, and the question in each case must depend upon the particular circumstances which surround it (*i*). The practitioner need not, however, bring to the performance of his duties the highest possible degree of skill (*k*), and where it can be shown that he exercised reasonable care and average skill (*l*) his duties have been sufficiently discharged (*m*). Accordingly, he is not responsible merely because some other practitioner of greater skill and superior knowledge might have prescribed a different treatment (*n*) or operated in a different manner (*o*); nor would a mere charge of unskilfulness without negligence (*p*), nor the fact that the injuries happened through some variation from the normal in the particular patient, render the practitioner liable (*q*).

Responsibility in case of operations.

816. Where during an operation a practitioner forms an opinion that it is necessary, in order to save the patient's life, to

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p. 334, *post*. In such actions for negligence the questions generally left to the jury are: Did the defendant undertake to treat the plaintiff for his disorder? Did he treat him either negligently or ignorantly? Did the negligent or ignorant treatment cause injury to the plaintiff? See, further, title NEGLIGENCE; and *Harmer* v. *Cornelius* (1858), 5 C. B. (N. S.) 236.

(*i*) See *Rich* v. *Pierpoint* (1862), 3 F. & F. 35, *per* ERLE, C.J., at p. 40, where the degree of skill was stated to be undefinable. It has been said, however, that the locality in which the medical man practises should be taken into consideration, whether it is remote from or adjacent to the facilities of a large city, and whether the means of communication therewith are easy or difficult: it has also been held that a greater degree of skill is required in one who holds himself out to be an expert in some particular branch than in one who follows the ordinary profession of a general practitioner; and this would include the responsibility of a nurse who is charged with the carrying out of the expert's instructions during his absence (*Feeney* v. *Spalding* (1896), 89 Maine Reports, 111).

(*k*) *Lanphier* v. *Phipos* (1838), 8 C. & P. 475, *per* TINDAL, C.J., at p. 479: "Every person who enters into a learned profession undertakes to bring to it the exercise of a reasonable degree of care and skill; he does not, if he is a surgeon, undertake to cure the patient, nor even to use the highest degree of skill, as there may be persons of higher education and greater advantages than himself; but he undertakes to bring a fair, reasonable, and competent degree of skill; and in an action against him by a patient the question for the jury is whether the injury complained of must be referred to the want of a proper degree of skill in the defendant or not"; *Rich* v. *Pierpoint*, *supra*.

(*l*) See *Lanphier* v. *Phipos*, *supra*; *Seare* v. *Prentice* (1807), 8 East, 348.

(*m*) *Seare* v. *Prentice*, *supra*.

(*n*) *Rich* v. *Pierpoint*, *supra*.

(*o*) *Ibid*.

(*p*) *Urquhart* v. *Grigor* (1864), 3 Macph. (Ct. of Sess.) 283; *Hupe* v. *Phelps* (1819), 2 Stark. 480; *Seare* v. *Prentice*, *supra*.

(*q*) *Hancke* v. *Hooper* (1835), 7 C. & P. 81. In that case the plaintiff, a white-smith, entered the shop of the defendant, a surgeon, and asked to be bled, stating that he had found relief from it before. He was bled by the defendant's apprentice and injured. TINDAL, C.J., in addressing the jury, said, at p. 84: "If, from accident or some variation in the frame of a particular individual, an injury happens, it is not a fault in the medical man. It does not appear that the plaintiff consulted the defendant as to the propriety of bleeding him; he took that upon himself, and only required the manual operation to be performed. The plaintiff must show that the injury was attributable to want of skill; you are not to infer it. If there were no indications in the plaintiff's appearance that bleeding would be improper, the defendant would not be liable for the bleeding not effecting the same result as at other times, because it might depend on the constitution of the plaintiff." As to liability of medical men for their assistants' acts, see note (*h*), p. 331, *ante*.

SECT. 2. Responsibility.

remove some organ or limb, and accordingly removes the organ or limb whereby the patient is injured, the practitioner cannot be charged with negligence for having taken that step, unless there is evidence that express instructions were given by the patient that no organ nor limb should be so removed, and that the operation was performed negligently, and it is for the jury to consider whether such instructions were communicated or not (*r*). Nor will negligence be admitted in an operation involving possibilities of danger to the patient, if it can be shown that the nature of the operation and the possible dangers were communicated to the patient who expressly or tacitly signified his assent thereto (*s*). Further, it is submitted that, where an operation of a new or unusual nature is performed, no negligence is to be imputed to the practitioner if the operation be performed in accordance with modern science, and the peculiarities and the possible results of the operation have been previousiy communicated to the patient who has submitted himself thereto (*t*).

Nature of operation.

817. No action can be brought against a physician or surgeon for negligence except by the patient himself, even though he be an infant (*a*), unless the result of the negligence is fatal, in which case an action may be brought for the benefit of the wife, husband, parent, or child of the deceased, and the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties for whom the action is brought (*b*). Such injury must be a pecuniary loss, and the jury may not give damages as a *solatium* (*c*).

Parties to bring the action.

(*r*) In *Beatty* v. *Cullingworth* (1896) (not reported, but noted in the Transactions of the Medico-Legal Society, Vol. VI. (1909), p. 132, and in the *British Medical Journal*, 21st November, 1896) the plaintiff underwent an operation for ovarian cyst. Before the operation she told the defendant, a surgeon, who was to operate, that she would not consent to the removal of both ovaries, as she was going to be married, saying: "If you find both ovaries diseased you must remove neither." He replied: "You may be sure I shall not remove anything I can help." The right ovary was found to be cystic, and was removed. The left was found to be in an early stage of the same process, and the defendant, forming the opinion that it was necessary to remove it in order to save the patient's life, did so remove it. She brought an action for negligence. In summing up, HAWKINS, J., observed: "If a medical man, with a desire to do his best for the patient, undertakes an operation, I should think it is a humane thing for him to do everything in his power to remove the mischief, provided that he has no definite instructions not to operate. There was here no question as to the propriety of the operation, and the defendant always told the plaintiff she must give him a free hand. If you think tacit consent was given you must find for the defendant." The jury found for the defendant.

(*s*) *Slater* v. *Baker and Stapleton* (1767), 2 Wils. 359. In this case the defendant, though he had been first surgeon at St. Bartholomew's for over twenty years and read lectures in surgery, was successfully sued for negligence. It appeared that he made an experiment upon his patient with a heavy steel instrument with teeth in order to obtain an extension of a limb. There was evidence that it was improper to perform such an operation without the patient's consent, and that he was not informed of what was about to be done.

(*t*) *Slater* v. *Baker and Stapleton*, *supra*.

(*a*) *Pippin* v. *Sheppard* (1822), 11 Price, 400 (by his next friend); see title INFANTS AND CHILDREN, Vol. XVII., pp. 133 *et seq.*

(*b*) Fatal Accidents Act, 1846 (9 & 10 Vict. c. 93) (Lord Campbell's Act); and see title NEGLIGENCE.

(*c*) *Duckworth* v. *Johnson* (1859), 4 H. & N. 653.

SECT. 2. **Responsibility.**

Liability of hospitals and public institutions.

818. Hospitals and public institutions are not liable for injuries to patients or other inmates arising from the negligence of physicians or surgeons, or their nurses or assistants, officiating therein, provided it is shown that due care and skill were exercised in the selection of their staff (*d*). Nor are corporations, who are under a statutory obligation (*e*) to provide a registered physician or surgeon for the purposes of their undertaking, liable to passengers or others for injuries arising from such negligence, on proof that due care was exercised in the selection of the physician or surgeon and that an adequate supply of medicines and instruments was provided as required by law (*f*). The medical officer, however, is himself liable, in such circumstances, for the consequences of his negligent acts, and the result will be the same whether the services are gratuitous or for reward (*g*).

Negligence as a defence to an action for fees.

819. Professional negligence in the treatment of a case, if proved, is a sufficient answer to a claim by the practitioner for his fees (*h*). But it is not enough for the patient to allege that the treatment was ineffective (*i*) or mistaken (*k*) unless such mistaken treatment was the result of ignorance or negligence. Nor is it negligence on the part of a medical practitioner to give an opinion, which is afterwards found to be erroneous, provided it is not given negligently (*l*).

SUB-SECT. 2.—*Criminal Responsibility.*

No distinction between qualified and unqualified practitioners

820. At common law, when death or injury arises from treatment, there is no distinction either in civil or criminal proceedings (*m*)

(*d*) *Hillyer* v. *St. Bartholomew's Hospital* (*Governors*), [1909] 2 K. B. 820, C. A., *per* KENNEDY, L.J., at p. 829: "I see no ground for holding it to be a right legal inference from the circumstances of the relation of hospital and patient that the hospital authority makes itself liable in damages, if members of its professional staff, of whose competence there is no question, act negligently towards the patient in some matter of professional care or skill, or neglect to use or use negligently in his treatment the apparatus or appliances which are at their disposal"; see also *Evans* v. *Liverpool Corporation*, [1906] 1 K. B. 160, where WALTON, J., expressed a similar view as to the liability of a public body carrying on a hospital.

(*e*) *E.g.*, Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 268, 303; see title SHIPPING AND NAVIGATION.

(*f*) *Allan* v. *State Steamship Co.* (1892), 28 American State Reports, 556, and see title CORPORATIONS, Vol. VIII., pp. 389, 390.

(*g*) See note (*f*), p. 331, *ante*. As to the time limit in case of an action against a medical officer of a public authority, see titles LIMITATION OF ACTIONS, Vol. XIX., pp. 176 *et seq.*; PUBLIC AUTHORITIES AND PUBLIC OFFICERS.

(*h*) *Kannen* v. *M'Mullen*. (1791), Peake, 83 [59], where Lord KENYON, C.J., said. "If a man is sent for to extract a thorn which might be pulled out with a pair of nippers, and through his misconduct it becomes necessary to amputate the limb, shall it be said that he may come into a court to recover his fees for the cure of the wound which he himself has caused." See further, title WORK AND LABOUR.

(*i*) *Ely* v. *William* (1887), reported as a note to *Holtzman* v. *Hoy* (1886), 59 American Reports, 390, 392; compare *Hill* v. *Featherstonhaugh* (1831), 7 Bing. 569, 574.

(*k*) *Hupe* v. *Phelps* (1819), 2 Stark. 480.

(*l*) *Urquhart* v. *Grigor* (1864), 3 Macph. (Ct. of Sess.) 283.

(*m*) See, generally, title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 584, 585. As to evidence, see *ibid.*, pp. 588, 589, note (*c*). As to liability for assault on patients, see *ibid.*, p. 607.

between those who are qualified or regular practitioners and those who are not, for the gist of the proceedings is the actual maltreatment, whether arising through ignorance or negligence. Ignorance, therefore, is no excuse in the case of an unqualified practitioner, just as qualification is no excuse in the case of a qualified practitioner.

SECT. 2. Responsibility.

821. Any person, whether a registered medical practitioner or not, who deals with life or health, is bound to have competent skill (*n*), and, if a patient under his charge dies for want of such skill, he is guilty of manslaughter (*o*). Similarly, a person, whether he has received a medical education or not, who is guilty of gross carelessness in the application of a remedy, is liable to be convicted of manslaughter if death ensues in consequence of his act (*p*); but he can only be convicted if he has been guilty of the grossest ignorance or of criminal inattention (*q*).

Manslaughter.

Gross carelessness.

822. To justify a charge of criminal negligence it is not sufficient to show mere want of care and caution; there must be gross negligence and want of that degree of skill which everyone, who undertakes the exercise of any particular art or profession, is bound to bring in each particular case; thus an injudicious and indiscreet administering of medicine will not make a man guilty of manslaughter; there must at least be gross negligence on his part (*r*). So, on a charge of manslaughter by administering poison in mistake for some other drug, the prosecution must show that the poison got into the mixture in consequence of the gross negligence of the accused: it is not sufficient to show that the accused, who supplied his own drugs, supplied a mixture which contained a large quantity of strychnia (*s*).

The fact that qualified medical assistance is available is an element to be taken into consideration when a charge of negligence is made against an unqualified person (*t*).

What justifies a charge of criminal negligence.

Gross negligence essential.

SECT. 3.—*Recovery of Charges.*

823. A registered medical practitioner is entitled to practise medicine, surgery, and midwifery in the United Kingdom, and, subject to any local law, in any other part of His Majesty's dominions, and to recover, in due course of law in respect of such

Recovery of charges by registered practitioner.

(*n*) See p. 332, *ante*.

(*o*) *R.* v. *Spiller* (1832), 5 C. & P. 333; *R.* v. *Simpson* (*Nanny*) (1829), 1 Lew. C. C. 172; *R.* v. *Ferguson* (1830), 1 Lew. C. C. 181.

(*p*) *R.* v. *Long* (1830), 4 C. & P. 398; (1831), 4 C. & P. 423.

(*q*) *R.* v. *Williamson* (1807), 3 C. & P. 635.

(*r*) See *R.* v. *Tessymond* (1828), 1 Lew. C. C. 169; and title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 585, note (*o*).

(*s*) *R.* v. *Spencer* (1867), 10 Cox, C. C. 525. In *R.* v. *Markuss* (1864), 4 F. & F. 356, the accused, who was found guilty, was a herbalist who had given to a patient six ounces of brandy in which he had put an ounce of colchicum seeds; see also *R.* v. *Williamson*, *supra*; *R.* v. *Chamberlain* (1867), 10 Cox, C. C. 486.

(*t*) *R.* v. *Webb* (1834), 1 Mood. & R. 405 (where the accused had caused the deceased to take twenty ounces of gamboge, twenty ounces of aloes, and twenty ounces of other noxious substances made up in the form of pills as a remedy for smallpox).

SECT. 3. **Recovery of Charges.**

practice, any expenses, charges in respect of medicaments or other appliances, or any fees to which he may be entitled, unless he is a fellow of a college of physicians the fellows of which are prohibited by the bye-law of the college from recovering at law their expenses, charges, or fees, in which case such prohibitory bye-law, so long as it is in force, may be pleaded in bar of any legal proceeding instituted by such fellow for the recovery of expenses, charges, or fees (*u*).

Implied contract.

824. A registered medical practitioner can recover his fees even in the absence of an express contract, the presumption being that he attends for fees the payment of which can be enforced by action (*v*), and not for an honorarium (*w*). Where the fees are not arranged beforehand, the practitioner is entitled to what a jury think reasonable, having regard to his eminence and the distance which he had to travel (*a*).

No recovery by unregistered practitioner.

825. The plaintiff cannot recover unless he was registered at the time the services were rendered (*b*), nor can an unregistered practitioner sue a registered practitioner for medicines supplied to or attendance upon the patients of the latter at his request (*c*). Again, if medicines are administered by an unregistered practitioner to a patient, under a guarantee for payment given by a third person, neither the principal debtor nor the surety can be sued (*d*).

Apart altogether from the Medical Acts (*e*), an unregistered practitioner may be unable to recover any charges, thus, for example, where one professed to cure disorders within a specified

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(*u*) Medical Act, 1886 (49 & 50 Vict. c. 48), s. 6, replacing the Medical Act (21 & 22 Vict. c. 90), s. 31. Under the earlier provision a person could only practise and recover fees "according to his qualification." Therefore, if he only had a medical qualification, he could not practise surgery; and if he was only a surgeon, he could not sue for fees for attending a medical case (*Leman* v. *Fletcher* (1873), 28 L. T. 499, *per* BLACKBURN, J.). Now, however, any registered practitioner (except a fellow of the Royal College of Physicians) may sue for fees for attendance given by him. The provision which enables the Royal College of Physicians to prohibit fellows from suing for their fees (see p. 310, *ante*) is a recognition of the old common law under which a physician had no right of action for fees (*Chorley* v. *Bolcot* (1791), 4 Term Rep. 317), although he could always recover on express agreement (*Veitch* v. *Russell* (1842), 3 Gal. & Dav. 198). The Royal College of Physicians has passed a bye-law (see p. 310, *ante*) that no fellow of the college may sue, but this does not extend to members of the college (*Gibbon* v. *Budd* (1863), 2 H. & C. 92). As to recovery of fees by apothecaries, see p. 351, *post*.

(*v*) *Gibbon* v. *Budd*, *supra*.

(*w*) As was formerly the case in respect of a physician; see p. 308, *ante*.

(*a*) It was formerly held that where a surgeon furnished a bill to his patient, and he left a blank for his charge for attendances, the amount tendered by his patient should be regarded as the amount due (*Tuson* v. *Batting* (1800), 3 Esp. 192). Having regard to the Medical Act, 1886 (49 & 50 Vict. c. 48), s. 6, it is submitted that this is not good law. It is of interest to note that in the case referred to the plaintiff relied on a custom to charge £1 1*s*. per mile for each attendance out of London.

(*b*) See Medical Act, 1886 (49 & 50 Vict. c. 48), s. 6; *Leman* v. *Houseley* (1874), L. R. 10 Q. B. 66; compare *Hatfield* v. *Mackenzie* (1860), 10 I. C. L. R. 289; *Turner* v. *Reynall* (1863), 14 C. B. (N. S.) 328.

(*c*) *De la Rosa* v. *Prieto* (1864), 16 C. B. (N. S.) 578.

(*d*) *Ibid.*, *per* BYLES, J., at p. 582.

(*e*) For a list of the Medical Acts, see note (*b*), p. 308, *ante*.

time by means of sovereign remedies, and so by fraud induced another to employ him (*f*). Again, a quack who passed himself off as "M.D.," or called himself "doctor," was held to have no right to recover fees (*g*). SECT. 3. Recovery of Charges.

If the services for which the practitioner seeks to recover were in fact performed by an unqualified assistant, he can recover nothing in respect of them (*h*). Services by unqualified assistant.

SECT. 4.—*Privileges and Exemptions.*

SUB-SECT. 1.—*In General.*

826. Registered medical practitioners are excused from service on juries (*i*), at inquests, in all corporate, parochial and other offices, and in the militia (*k*). Exemption from jury service etc.

827. A practitioner who signs a reception order, or a medical certificate to the effect that a person is of unsound mind, is not liable to any civil or criminal proceedings if he acts in good faith and with reasonable care (*l*). Protection in respect of lunacy certificates.

828. A medical practitioner, when called as a witness, is bound if asked, and if the question is pressed and allowed, to disclose every communication, however private and confidential, which has been made to him while attending a patient in his professional character (*m*). Not privileged in giving evidence.

(*f*) *Hupe* v. *Phelps* (1819), 2 Stark. 480.

(*g*) *Lipscombe* v. *Holmes* (1810), 2 Camp. 441.

(*h*) Thus, where a duly qualified medical practitioner established a branch practice in a neighbouring town, which was managed by his brother, who was unqualified, it was held that the former could recover nothing in respect of attendances by his brother in cases which the former had not himself seen (*Howarth* v. *Brearley* (1887), 19 Q. B. D. 303).

(*i*) See title JURIES, Vol XVIII., p. 232.

(*k*) Medical Act (21 & 22 Vict. c. 90), s. 35.

(*l*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 330 (1). It was held in *Hall* v. *Semple* (1862), 3 F. & F. 337, that a medical man was not liable in trespass merely for signing a certificate in support of an order for the reception of a private patient, but that if he signed such certificate without due care and making due inquiries, and if not satisfied on his own personal examination, he would be liable for the consequences, although he acted *bonâ fide*, honestly believing in the truth of his certificate and that he was acting in pursuance of and under authority of the statute. See also title LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., p. 530.

(*m*) *Kingston's (Duchess) Case* (1776), 20 State Tr. 355, 537; *Wilson* v. *Rastall* (1792), 4 Term Rep. 753, *per* BULLER, J., at p. 760; *Greenough* v. *Gaskell* (1833), 1 My. & K. 98, *per* Lord BROUGHAM, L.C., at p. 103; *R.* v. *Gibbons* (1823), 1 C. & P. 97; *Broad* v. *Pitt* (1828), 3 C. & P. 518, *per* BEST, C.J.; see titles DISCOVERY, INSPECTION, AND INTERROGATORIES, Vol. XI., p. 80; EVIDENCE, Vol. XIII., pp. 571, 572. When summing up to the jury in *Kitson* v. *Playfair* (1896), *Times*, 28th March, HAWKINS, J., said: "I can quite understand a case, especially in a civil cause, where a doctor is quite justified in refusing to divulge questions of professional secrecy. . . . The judge might in some cases refuse to commit a medical man for contempt in refusing to reveal confidences. Every case must be governed by particular circumstances, and the ruling of the judge will be the test." This ruling appears to be in conflict with the principle laid down in the cases cited at the beginning of this note, and it does not appear to be supported by any authority; see also *A. B.* v. *C. D.*, [1905] 7 F. (Ct. of Sess.) 72.

SECT. 4.

SUB-SECT. 2.—*Eligibility for Appointments.*

Privileges and Exemptions.

Appointments only open to medical practitioners

829. Unless he is a registered medical practitioner, no person may hold an appointment as a physician in the army or navy or in an emigrant or other vessel, or in any hospital infirmary, dispensary, or lying-in hospital not supported wholly by voluntary contributions, or in any lunatic asylum, gaol, workhouse, or other public establishment, body or institution, or to any friendly or other society for affording mutual relief in sickness, infirmity, or old age; nor may he act as a medical officer of health (*n*). All certificates required by any Act of Parliament to be given by a medical practitioner must be given by a registered medical practitioner (*o*).

SECT. 5.—*Statutory Duties* (*p*).

SUB-SECT. 1.—*Notification of Infectious Diseases.*

Duty to notify certain diseases.

830. A medical practitioner attending on or called in to visit a patient suffering from certain infectious diseases (*q*) must send a certificate (*r*) to the medical officer of health of the district (*s*) stating the name of the patient, the situation of the building, and the infectious disease from which, in the opinion of such medical practitioner, the patient is suffering (*a*). Failure on the part of the practitioner to send a certificate may involve a fine not exceeding 40*s*. (*b*).

Payment of fees.

For every certificate the practitioner is entitled to a fee of 2*s*. 6*d*. to be paid by the local authority (*c*), if the case has occurred in his private practice, but if it has occurred in his practice as medical officer of any institution, he is entitled to a fee of 1*s*. only (*d*).

(*n*) Medical Act (21 & 22 Vict. c. 90), s. 36; and see title LOCAL GOVERNMENT, Vol. XIX., p. 276. A colonial practitioner may, however, hold an appointment as medical officer in any vessel which is registered in the colony; see note (*b*), p. 328, *ante*.

(*o*) Medical Act (21 & 22 Vict. c. 90).

(*p*) As to the duty of a medical practitioner to attend at a coroner's inquest, see title CORONERS, Vol. VIII., pp. 268, 293; as to medical inspection and attendance in public elementary schools, see title EDUCATION, Vol. XII., pp. 18, 31, 32.

(*q*) The infectious diseases of which notice must be given include small-pox, cholera, diphtheria, membranous croup, erysipelas, scarlatina or scarlet fever, and typhus, typhoid, enteric, relapsing, continued or puerperal fevers (Infectious Disease (Notification) Act, 1889 (52 & 53 Vict. c. 72), s. 6), and any infectious disease to which the Act has been applied by local authority (*ibid.*, s. 7).

(*r*) A form of certificate to be filled up by a medical practitioner is scheduled to a General Order of the Local Government Board, issued on the 12th September, 1889. For form of certificate for removal of infectious patient, see Encyclopædia of Forms and Precedents, Vol. X., p. 407. For form of certificate for removal of infectious patient from lodging-house, see *ibid.*, p. 330; and see *ibid.*, pp. 406, 413.

(*s*) See title LOCAL GOVERNMENT, Vol. XIX., pp. 275, 276.

(*a*) Infectious Disease (Notification) Act, 1889 (52 & 53 Vict. c. 72), s. 3 (1) (b). This Act was formerly an adoptive Act, but was extended to every urban, rural, and port sanitary district in England and Wales by the Infectious Disease (Notification) Extension Act, 1899 (62 & 63 Vict. c. 8); see title PUBLIC HEALTH AND LOCAL ADMINISTRATION. As to the time limit in respect of claims against medical practitioners acting in pursuance of a statutory duty, see *Salisbury* v. *Gould* (1904), 68 J. P. 158; title LIMITATION OF ACTIONS, Vol. XIX., p. 176.

(*b*) Infectious Disease (Notification) Act, 1889 (52 & 53 Vict. c. 72), s. 3 (2).

(*c*) See title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*d*) Infectious Disease (Notification) Act, 1889 (52 & 53 Vict. c. 72), s. 4 (2).

831. Payments of this nature do not disqualify the practitioner for serving as a county or borough councillor, or as a member of a sanitary authority, or as a guardian of a union, or in any municipal or parochial office (*e*).

Effect of receipt of fees.

SUB-SECT. 2.—*Notification of Births.*

Ordinary notification of births.

832. While the duty of registering the birth of a child falls primarily on the father and mother (*f*), it may devolve upon the registered medical practitioner who is present at the time, as, in case of default on the part of the father and mother and of the occupier of the house, he must give to the registrar, within forty-two days next after the birth, information of the particulars required to be registered concerning the birth, and must sign the register in the presence of the registrar (*g*).

Early notification of births.

833. In addition to the notification of birth which may thus be required from the practitioner, an adoptive Act (*h*) imposes other duties with regard to the registration of births. In the case of every child born (*i*) in an area in which the statute has been adopted, it is the duty of any person in attendance on the mother at the time of, or within six hours after, the birth to give notice in writing of the birth to the medical officer of health of the district in which the child is born (*k*). The notice must, within thirty-six hours of the birth, be given either by letter, or by delivering a written notice at the office or residence of the medical officer within the same time (*l*). The local authority supplies, without charge, addressed and stamped postcards containing the form of notice, to any medical practitioner or midwife, residing or practising in its area who applies for them (*m*).

SUB-SECT. 3.—*Certificates of Death.*

Death certificates.

834. In case of the death of any person who has been attended during his last illness by a registered medical practitioner, that practitioner must sign and give to some person required to give information concerning the death (*n*) a certificate stating, to the best of his knowledge and belief, the cause of death (*o*). Forms of certificates of the cause of death may be obtained free of charge from the local registrar by any registered medical practitioner residing or practising in the registrar's district (*p*).

(*e*) Infectious Disease (Notification) Act, 1889 (52 & 53 Vict. c. 72), s. 11.
(*f*) Births and Deaths Registration Act, 1874 (37 & 38 Vict. c. 88), s. 1.
(*g*) *Ibid* ; see, generally, title REGISTRATION OF BIRTHS, MARRIAGES, AND DEATHS.
(*h*) Notification of Births Act, 1907 (7 Edw. 7, c. 40)
(*i*) The Act only applies to children delivered after the twenty-eighth week of pregnancy, whether alive or dead (*ibid.*, s. 1 (5)).
(*k*) *Ibid.*, s. 1 (1).
(*l*) *Ibid.*, s. 1 (2). Penalty for default, not exceeding £1.
(*m*) *Ibid.*
(*n*) As to the persons required to give information of death, see title REGISTRATION OF BIRTHS, MARRIAGES, AND DEATHS.
(*o*) Births and Deaths Registration Act, 1874 (37 & 38 Vict. c. 88), s. 20 (2).
(*p*) *Ibid.*, s. 20 (1).

SECT. 5. Statutory Duties.

If default is made by any person so required to give information as above mentioned (*q*), it is the duty of any person present at the death of a person in a house, within five days from that event, to give, to the best of his knowledge and belief, to the registrar, information and particulars required to be registered concerning such death, and, in the presence of the registrar, to sign the register (*r*).

SUB-SECT. 4.—*Vaccination.*

Vaccination.

835. The parent of every child born in England must, within six (*s*) months after the birth of such child, cause it to be vaccinated by some registered medical practitioner (*t*), unless within four months the parent makes a statutory declaration that he believes vaccination would be prejudicial to the health of the child (*u*). A person holding a foreign diploma cannot perform the vaccination (*x*). If the medical practitioner is of opinion that the child is not in a fit and proper state to be vaccinated successfully he must give a certificate (*a*) to that effect, which must be renewed every two months until the child is fit to be vaccinated (*b*). If the practitioner finds that a child, whom he has three times unsuccessfully vaccinated, is insusceptible of successful vaccination, or has already had the small-pox, he must give a certificate to that effect (*c*).

Vaccination certificate.

836. A medical practitioner, not being a public vaccinator, who inspects a child to ascertain the result of vaccination, must, as soon as he has ascertained that it has been successfully performed, deliver to the parent a certificate of successful vaccination in the proper form duly signed and filled up by him (*d*). Failure to comply with this provision involves liability to a penalty not exceeding 20*s*. (*e*).

SECT. 6.—*The Practice of Anatomy.*

SUB-SECT. 1.—*Who may be Licensed.*

Object of legislation.

837. With a view to the prevention of the commission of crime for the purpose of obtaining bodies for dissection (*f*), and in order to ensure a sufficient supply of bodies for the purpose of anatomical

(*q*) See note (*n*), p. 339, *ante*.

(*r*) Births and Deaths Registration Act, 1874 (37 & 38 Vict. c. 88), s. 10. As to penalties for declining to give the necessary information for the purposes of registration, see *R.* v. *Price* (1840), 11 Ad. & El. 727.

(*s*) Vaccination Act, 1898 (61 & 62 Vict. c. 49), s. 1; and see title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*t*) Vaccination Act, 1867 (30 & 31 Vict. c. 84), s. 16; Vaccination Act, 1898 (61 & 62 Vict. c. 49), s. 1, and Sched.

(*u*) Vaccination Act, 1907 (7 Edw. 7, c. 31), s. 1 (1).

(*x*) *Cromack* v. *Brennand* (1873), 37 J. P. 276.

(*a*) This certificate is not conclusive with the justices, though it is an element for their consideration (*Allen* v. *Worthy* (1870), L. R. 5 Q. B. 163).

(*b*) Vaccination Act, 1867 (30 & 31 Vict. c. 84), s. 18.

(*c*) *Ibid.*, s. 20.

(*d*) Vaccination Act, 1871 (34 & 35 Vict. c. 98), s. 7.

(*e*) *Ibid.*

(*f*) A man named Burke was executed for a murder committed with this object in 1829. As to the unlawful disposal of dead bodies, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 552, 553.

examination, provision has been made to regulate schools of anatomy (*g*); but this provision does not in any way affect nor prohibit any *post-mortem* examination of a human body required or directed to be made by any competent legal authority (*h*).

Who may be licensed.

838. The Home Secretary (*i*) (in England and Scotland) and the Chief Secretary for Ireland may license the following to practise anatomy: (1) Any fellow or member of any college of physicians or surgeons; (2) any graduate or licentiate in medicine; (3) any person lawfully qualified to practise medicine in any part of the United Kingdom (*j*); (4) any professor, lecturer of anatomy, or student attending any school of anatomy.

Grant of licence.

A licence will be granted to any of the above-mentioned persons on his making application, and it must be countersigned by two justices of the peace for the county or town in which he resides, they certifying that to their knowledge and belief the party applying is about to practise anatomy (*k*).

SUB-SECT. 2.—*Inspectors.*

Anatomical inspectors.

839. Inspectors of places where anatomy is carried on are appointed by the Home Secretary (*l*). Each inspector holds office for one year, or until he is removed, or until he refuses to act (*m*); and a district is allotted to him by the Home Secretary (*n*). He receives a salary of not more than £100 per annum and an allowance for expenses (*o*).

Functions.

He may visit any place in his district in respect of which notice (*p*) has been given that it is intended to practise anatomy (*q*), and he makes a quarterly return relating to the body of every deceased person which has been removed to any separate place in his district, giving the sex, name, and age of each such person (*r*).

SUB-SECT. 3.—*Permission for Dissection.*

When dissection allowed.

840. An executor, or other party (*s*) (for example, the master of a workhouse (*t*)) having lawful possession of a body, not being an

(*g*) See Anatomy Act, 1832 (2 & 3 Will. 4, c. 75).
(*h*) *Ibid.*, s. 15. As to *post-mortem* examinations ordered by coroners, see title CORONERS, Vol. VIII., p. 268.
(*i*) See title CONSTITUTIONAL LAW, Vol. VII., p 82.
(*j*) This means any registered medical practitioner. As to *post-mortem* examinations ordered by coroners, see title CORONERS, Vol. VIII., p. 268; Medical Act (21 & 22 Vict. c. 90), s. 34.
(*k*) Anatomy Act, 1832 (2 & 3 Will. 4, c. 75), s. 1.
(*l*) *Ibid.*, s. 2.
(*m*) *Ibid.*
(*n*) *Ibid.*, s. 3.
(*o*) *Ibid.*, s. 6.
(*p*) As provided for by *ibid.*, s. 12; see p. 313, *post.*
(*q*) Anatomy Act, 1832 (2 & 3 Will. 4, c. 75), s. 5.
(*r*) *Ibid.*, s. 4.
(*s*) This term includes any number of persons or any society, whether created by charter or otherwise (*ibid.*, s. 19); and see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 240.
(*t*) The master of a workhouse was charged with disposing of certain dead bodies for the purpose of dissection. For the purpose of preventing the relatives of the deceased making the statutory requirement, and leading them to suppose

SECT. 6. **The Practice of Anatomy.**

undertaker or other person entrusted with the body for the purpose only of interment, may permit the body to be dissected, unless the deceased stated in writing during his life, or in the presence of two witnesses during the illness of which he died, that he did not wish his body to undergo such examination (*a*), or unless the surviving husband or wife or any known relative of the deceased requires interment without such examination (*b*).

Anatomical examination directed by deceased.

If a person, either in writing during his life, or in the presence of two witnesses during the illness from which he died, desired that his body should be anatomically examined, the person having lawful possession of the body must cause the examination to be made, unless the husband or wife or nearest known relative requires interment without such examination (*c*).

SUB-SECT. 4.—*Removal of Body for Dissection.*

Conditions as to removal.

841. A body must not be removed for examination until forty-eight hours after death, nor until twenty-four hours after notice to the inspector of the district of such intended removal. If there is no such inspector appointed, this notice must be given to some physician, surgeon, or apothecary in the district. Nor can such removal be carried out until the medical man who attended the deceased has signed the death certificate. If no medical man attended the deceased the certificate must be signed by some other medical man, who, however, must not be concerned in examining the body after removal (*d*).

Burial of remains.

842. The death certificate must be delivered with the body to the person who is to make the examination (*d*). Prior to removal the remains must be placed in a decent coffin or shell, and provision must be made for their interment in consecrated ground used for persons of the religious persuasion to which the deceased belonged (*e*). A certificate of such interment must be sent to the inspector within six weeks of the time when the body was received; but this period may be extended by the Home Secretary (*f*).

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that the bodies were buried without dissection, he exhibited the bodies to them in coffins, and caused the appearance of a funeral to be gone through. It was held that, in spite of the fraud, the defendant was not unjustified in what he did, as no statutory request had been proferred (*R.* v. *Feist* (1858), Dears. & B. 590). *Quære* whether he and the undertaker could not have been indicted for conspiracy; see *ibid.*, *per* POLLOCK, C.B., at p. 596. It may be observed that the governor of a prison has no power similar to that conferred by the above provision on the master of a workhouse (*R.* v. *Cundick* (1822), 1 Dow. & Ry. (M. C.) 356); see titles POOR LAW; PRISONS.

(*a*) A person could not, at common law, by will or otherwise, legally dispose of his body after death; see title BURIAL AND CREMATION, Vol. III., p. 405. To exhume a body for the purposes of cremation is an indictable offence (*R.* v. *Gilles* (1820), Russ. & Ry. 366, n.; *R.* v. *Lynn* (1788), 2 Term Rep. 733).

(*b*) Anatomy Act, 1832 (2 & 3 Will. 4, c. 75), s. 7.

(*c*) *Ibid.*, s. 8.

(*d*) *Ibid.*, s. 9.

(*e*) *Ibid.*, s. 13.

(*f*) *Ibid.*, read together with the Anatomy Act, 1871 (34 & 35 Vict. c. 16), s. 2. It is obvious that if portions of a subject had to be kept for preservation in a museum the date of interment would have to be indefinitely postponed

SUB-SECT. 5.—*Conduct of Examination.* SECT. 6.

The Practice of Anatomy.

843. A duly licensed (*g*) person may receive and possess a body for examination, and may examine it, if permitted or directed to do so by a party who had, at the time of giving such permission or direction, lawful possession of the body, and who had power to allow it to be so examined (*h*). No licensed person is liable to any prosecution or forfeiture for receiving or examining a dead body (*i*). Licensed persons may conduct examinations.

844. A person receiving a dead body must demand and receive with it the death certificate, and must within twenty-four hours transmit such certificate to the inspector, together with a return stating the time he received it, and the date, place of death, sex, age etc. of the subject. If there is no inspector, he must send these particulars to some medical man residing at or near the place to which the body is removed. He must also enter a copy of the certificate and return in a book to be kept by him for the purpose (*k*). Duty of the person receiving the body.

Subjects can only be received for examination and examined at places in respect of which notice has been given to the Home Secretary (*l*). Notification of places.

SUB-SECT. 6.—*Offences.*

845. A person offending against the foregoing provisions is guilty of a misdemeanour, and may be punished by imprisonment not exceeding three months, or by a fine not exceeding £50 (*m*). Offences.

SECT. 7.—*Proceedings against Unqualified Persons.*

846. The Medical Acts (*n*) do not prohibit the practice of medicine and surgery by unqualified persons, but the legislature has declared that it is expedient that persons requiring medical aid should be enabled to distinguish qualified from unqualified practitioners (*o*). Practice by unqualified persons not prohibited.

847. For the purpose of preventing unqualified persons from assuming deceptive titles, any person who wilfully and falsely pretends to be, or takes or uses the name or title of, a physician, doctor of medicine, licentiate in medicine and surgery, bachelor of medicine, surgeon, general practitioner or apothecary, or any name, title, addition, or description implying that he is registered, or that he is recognised by law as a physician, or surgeon, or licentiate in medicine and surgery, or a practitioner in medicine, or an apothecary, is, upon summary conviction, liable to a penalty not exceeding £20 (*p*). Penalty for falsely assuming titles.

(*g*) See p. 341, *ante*.
(*h*) Anatomy Act, 1832 (2 & 3 Will. 4, c. 75), s. 10.
(*i*) *Ibid.*, s. 14. As to penalties etc., see p. 345, *post*.
(*k*) Anatomy Act, 1832 (2 & 3 Will. 4, c. 75), s. 11.
(*l*) *Ibid.*, s. 12.
(*m*) *Ibid.*, s. 18.
(*n*) For a list of the Medical Acts, see note (*b*), p. 308, *ante*.
(*o*) Medical Act (21 & 22 Vict. c. 90), preamble.
(*p*) *Ibid.*, s. 40.

SECT. 7. **Proceedings against Unqualified Persons.**

848. Although the question whether a man commits a breach of the preceding provision is primarily one of fact (*q*), the following principles may be deduced from the cases. It must be shown that the title was assumed by the defendant "wilfully and falsely" (*r*), although an offence may be committed by one who takes a title under a mistaken claim of right (*s*). The unlawful addition of the letters "M.D.," or any other group of letters which are usually appended to the name of a registered medical practitioner, constitutes an offence (*t*).

What amounts to an offence.

Deception.

849. The title must be assumed and advertised in such a manner as to deceive the public, it having been held that the use of an improper title in a partnership deed was not unlawful (*a*).

Offences by registered medical practitioners.

850. An offence may be committed by a registered medical practitioner who assumes a title for which he has no qualification (*b*). Thus a licentiate of the Society of Apothecaries cannot describe himself as a physician (*c*); but where a dentist described himself as a surgeon and mechanical dentist, it was held that he did not unlawfully take the title of surgeon, it being held as a fact by the magistrates that the word "surgeon" was merely used to indicate what branches of dentistry the defendant carried on (*d*).

(*q*) *Andrews* v. *Styrap* (1872), 26 L. T. 704.

(*r*) *Ellis* v. *Kelly* (1860), 6 H. & N. 222.

(*s*) *Andrews* v. *Styrap*, *supra*, where BRAMWELL, J., modified an opinion to the contrary effect which he had expressed in *Ellis* v. *Kelly*, *supra*; see also *R.* v. *Baker* (1891), 56 J. P. 406; *Carpenter* v. *Hamilton* (1877), 37 L. T. 157.

(*t*) See, *e.g.*, *Steel* v. *Ormsby* (1894), 10 T. L. R. 483, where the defendant added "M.D.B.C.," to his name; see also *R.* v. *Aston, Birmingham, Justices* (1891), 8 T. L. R. 123.

(*a*) *Davies* v. *Makuna* (1885), 29 Ch. D. 596, C. A., *per* PEARSON, J., at p. 601: "I do not think that the use of one of those titles by an unqualified practitioner, either in a private agreement with another medical man, or on a brass plate not exposed to the public view, would be an infringement of this section"; see also *R.* v. *Lewis and Frickhart*, *R.* v. *Lewis and Bridgwater* (1896), 60 J. P. 392, *per* COLLINS, J., at p. 393. A person cannot be convicted of falsely pretending to be a surgeon if the only indication of his pretence to be registered is the exhibition of his name on the door of a house in which he lives, together with the name of a registered surgeon living in the same house, and the addition, below the two names, of the words "surgeon accoucheur" etc.; for he may have had a diploma from some learned body which might enable him to assume the name of a surgeon (*Pedgrift* v. *Chevallier* (1860), 6 Jur. (N. S.) 1341); compare *Brown* v. *Whitlock* (1904), 67 J. P. 451, decided under the corresponding provision of the Dentists Act, 1878 (41 & 42 Vict. c. 33), s. 3; see p. 358, *post*.

(*b*) *R.* v. *Baker* (1891), 56 J. P. 406, *per* Lord COLERIDGE, C.J., at p. 407: "A person who may be an excellent doctor of medicine, may be an absolutely incompetent surgeon, and if he put surgeon after his name when he is "M.D." only, it would be misleading people; and that is a thing this Act of Parliament was intended to prevent."

(*c*) *Hunter* v. *Clare*, [1899] 1 Q. B. 635. It is probable that this decision is now of little value, having regard to the Apothecaries Act, 1907 (7 Edw. 7, c. xxii); see p. 348, *post*.

(*d*) *Ladd* v. *Gould* (1860), 24 J. P. 357. The decisions under the Medical Act (21 & 22 Vict. c. 90), s. 40, may be thus summarised. An offence was held to have been committed in the following cases:—Where a man

SECT. 7. Proceedings against Unqualified Persons.

851. Penalties may be recovered summarily (*e*), and the proceedings may be instituted either by the General Medical Council or by any private person (*f*). All sums of money arising from convictions or the recovery of penalties are paid to the treasurer of the Council (*g*), to be applied towards the expenses of registration and the execution of the Medical Acts (*h*).

Recovery of penalties.

Part IV.—Apothecaries.

SECT. 1.—*The Society of Apothecaries.*

SUB-SECT. 1.—*Meaning of Apothecary.*

Development in meaning of the term.

852. An apothecary in former times was a mere compounder of prescriptions, that being, in the view of the legislature, his most important function (*i*). Later on he became known as a person who professed to judge of internal disease by its symptoms and applied himself to cure that disease by medicine (*k*). He was thus entrusted with more responsible duties than a chemist or druggist (*l*); and since 1858 the apothecary has, in effect, taken his place in the ranks of the medical profession. Like all registered medical practitioners, he must be qualified in medicine, surgery, and midwifery (*m*).

SUB-SECT. 2.—*Constitution of the Society.*

Constitution.

853. The Society of Apothecaries was incorporated by Royal Charter (*n*) as "The Master, Wardens, and Society of the Art and

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who described himself as "Thomas Andrews, M.D.," had no qualification but a diploma which he purchased from the University of Philadelphia (*Andrews* v. *Styrap* (1872), 26 L. T. 704); where an L.S.A. (London) described himself as "M.D." (*Hunter* v. *Clare*, [1899] 1 Q. B. 635); where a collier took the letters "M.D.B.C.," the letters meaning M.D. of the Botanic College (*Steel* v. *Ormsby* (1894), 10 T. L. R. 483). In that case WRIGHT, J., said: "If he had described himself in terms as 'Botanic Physician' or 'Doctor of a Botanical College' it might have been otherwise." In the following cases there was held to be no offence:—Where a man described himself as "Botanic Surgeon, Boston, U.S.A.," "J. Hamilton, Surgeon" and "Anti-registered Surgeon" (*Steele* v. *Hamilton* (1860), 3 L. T. 322); where a man registered as "M.R.C.S., L.S.A.," called himself Dr. Kelly, having also a diploma of the University of Erlangen in Bavaria (*Ellis* v. *Kelly* (1860), 6 H. & N. 222).

(*e*) In manner provided by the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43); see title MAGISTRATES, Vol. XIX., pp. 602 *et seq.*; Medical Act (20 & 21 Vict. c. 90), s. 41.

(*f*) *Clarke* v. *M'Guire*, [1909] 2 I. R. 681.

(*g*) Medical Act (21 & 22 Vict. c. 90), s. 42; see p. 317, *ante*.

(*h*) Medical Act (21 & 22 Vict. c. 90), s. 43.

(*i*) *Apothecaries' Co.* v. *Warburton* (1819), 3 B. & Ald. 40, 43.

(*k*) *Apothecaries' Co.* v. *Lotinga* (1843), 2 Mood. & R. 495.

(*l*) See the definition of chemists, p. 351, *post*. In *Re Palmer, Ex parte Crabb* (1856), 2 Jur. (N. S.) 628, a surgeon who made up medicines for his patients, but not from prescriptions of others, was treated as an apothecary; see also *Re Bridon, Ex parte Dawbeny* (1836), 3 Mont. & A. 16.

(*m*) See p. 348, *post*.

(*n*) The charter was confirmed by the Apothecaries Act, 1815 (55 Geo. 3, c. 194); and see title COMPANIES, Vol. V., pp. 746, 750. The office of the Society is at Water Lane, Blackfriars, London.

SECT. 1. The Society of Apothecaries.

Mystery of Apothecaries of the City of London," and is referred to in this part of the title as "the Society." It consists of a master, two wardens, twenty-one assistants, a common clerk, and a beadle.

General powers.

854. The Society has perpetual succession, may hold lands in fee simple and perpetuity or for terms of years, and may dispose of the same. It may also hold and dispose of goods and chattels of any kind whatsoever (*o*). The Society has a common seal, and may sue and be sued. It is one of the bodies who are entitled to grant licences to persons who desire to become registered medical practitioners (*p*). It sends a representative to the General Medical Council (*q*), and, in this respect, is on an equal footing with the Royal College of Physicians and the Royal College of Surgeons.

SUB-SECT. 3.—*Duties of the Society.*

Duties.

855. It is the duty of the master and wardens of the Society to superintend the execution of the Apothecaries Act, 1815 (*r*), which was passed because much mischief and inconvenience had arisen owing to the great number of persons exercising the functions of an apothecary who were wholly ignorant and utterly incompetent to exercise such functions.

Inspection of drugs.

856. The master and wardens of the Society, and their deputies (*s*), or any examiner appointed by them, may enter the shop of any apothecary and test and examine his drugs. If such drugs are found stale or unwholesome they may be destroyed; and the person having them in his possession may be fined £5 for a first offence, £10 for the second offence, and £20 for the third and every other offence (*t*).

SECT. 2.—*Examinations and Certificates.*

Examiners.

857. Twelve persons are chosen by the master and wardens to form a court of examiners. The court has full power to examine apothecaries and assistants to apothecaries, and to grant or refuse certificates, and meets to hold examinations at least once a week (*a*). It appoints a chairman, who has a casting vote (*b*). Each examiner must take an oath in the prescribed form (*c*). He continues in office for one year, unless removed from office before,

(*o*) Charter, *passim*, see note (*n*), p. 345, *ante*.
(*p*) Medical Act (21 & 22 Vict c. 90), s. 15, Sched. A. As to such licensing bodies generally, see pp. 325, 326, *ante*.
(*q*) Medical Act (21 & 22 Vict. c. 90), ss. 4, 5, repealed and re-enacted by the Medical Act, 1886 (49 & 50 Vict c. 48), s. 7; see p. 315, *ante*.
(*r*) Apothecaries Act, 1815 (55 Geo. 3, c. 194), s. 7.
(*s*) *Ibid.*, s. 6.
(*t*) *Ibid.*, s. 3.
(*a*) Apothecaries Act, 1815 (55 Geo. 3, c. 194), s. 9, as amended by the Apothecaries Act Amendment Act, 1874 (37 & 38 Vict. c. 34), s. 2. Examinations may now be held conjointly with other bodies who have power to examine in surgery; see p. 348, *post*.
(*b*) Apothecaries Act, 1815 (55 Geo. 3, c. 194), s. 10.
(*c*) *Ibid.*, s. 11.

and may be reappointed for another year after the end of that term (*d*). If he dies or resigns, or is removed from office, his place may be filled by the master and wardens (*e*).

Examinations.

858. The examiners must examine any person over the age of twenty-one applying to them, to ascertain his skill in the science and practice of medicine, and his fitness to practise as an apothecary (*f*). In order to enable the Society to examine in surgery, it is empowered either to combine with some body or bodies qualified to examine in surgery (*g*) or, failing such combination, it may obtain the appointment by the General Medical Council of assistant examiners to conduct such examinations (*h*). Four fellows of the Royal College of Surgeons, appointed by the General Medical Council on the nomination of the livery, now conduct this part of the Society's examination.

Steps to be taken by intending apothecary.

859. Any person intending to qualify himself to act as an apothecary must give notice to the clerk of the Society and subsequently submit himself for examination (*i*). He must first produce testimonials of a sufficient medical education and of good moral conduct (*k*).

If he fails to pass, he may submit himself again, but not within six months of the first examination (*l*). A person who fails to pass the assistants' examination may submit himself for examination again, but not until three months have elapsed (*m*).

Admission of women.

860. The Society is not relieved of any obligation to admit women to the examinations required for certificates to practise as apothecaries, or to enter, on the list of licentiates, any woman who passes the examination and fulfils the other conditions imposed on persons seeking to obtain from the Society a qualification for registration under the Medical Acts (*n*).

Fees and their application.

861. On obtaining a certificate, an apothecary, who intends to practise in the City of London, or within ten miles thereof, must pay £10 10*s*. to the Society. If he intends to practise elsewhere in

(*d*) Apothecaries Act, 1815 (55 Geo. 3, c. 194), s. 12.
(*e*) *Ibid.*, s. 13.
(*f*) *Ibid.*, s. 14. As to the privileges of persons holding certificates, see p. 349, *post*. It is to be observed that a person who holds nothing but a medical diploma cannot now be registered. He must be qualified in medicine, surgery, and midwifery (Medical Act, 1886 (49 & 50 Vict. c. 48), s. 2; see p. 325, *ante*.
(*g*) *Ibid.*, s. 3; see p. 325, *ante*.
(*h*) *Ibid.*, s. 5; see p. 327, *ante*.
(*i*) Apothecaries Act, 1815 (55 Geo. 3, c. 194), s. 16. In practice the notice here referred to is given to the secretary of the court of examiners.
(*k*) Apothecaries Act, 1815 (55 Geo. 3, c. 194), s. 15, as amended by Apothecaries Act Amendment Act, 1874 (37 & 38 Vict. c. 34), s. 2.
(*l*) Apothecaries Act, 1815 (55 Geo. 3, c. 194).
(*m*) *Ibid.*, s. 22; as to assistants, see p. 348, *post*.
(*n*) Apothecaries Act Amendment Act, 1874 (37 & 38 Vict. c. 34), s. 5. For a list of the Medical Acts, see note (*b*), p. 308, *ante*. As to admission of women to the medical profession generally, see p. 330, *ante*.

SECT 2. Examinations and Certificates.

England or Wales, he must pay £6 6s. (o). Moneys paid on the grant of certificates become the absolute property of the Society (p).

List of licentiates. Removal of names from list.

862. The Society must publish a list of licentiates each year (q). It may erase from the list the name of any person convicted in England or Ireland of felony or misdemeanour, or in Scotland of any crime or offence, or who shall after due inquiry be judged by the General Medical Council to have been guilty of infamous conduct in any professional respect (r). The General Medical Council must be notified of the name of the person so struck off (s). The name may be restored by the Society, with the written consent of the General Medical Council.

SECT. 3.—*Qualifications.*

The degree of "L.M.S.S.A."

863. Every person who passes a qualifying examination in medicine, surgery, and midwifery held by the Society in combination with another medical corporation or a university (t), or with the assistance of examiners appointed by the General Medical Council (u), is entitled to the qualification of "Licentiate in Medicine and Surgery of the Society of Apothecaries, London" (a). This title may be entered in the Medical Register (b). A licentiate is subject to the jurisdiction of the General Medical Council.

Assistants to apothecaries.

864. No one may act as an assistant to an apothecary—except a person who has been apprenticed to an apothecary for five years—unless he obtains a certificate from the court of examiners, or from five apothecaries appointed by the master and wardens (c). These five apothecaries may be appointed for every county in England and Wales except within the City of London and the liberties or suburbs thereof. They have full power to grant or refuse certificates. They meet once a month, three constituting a quorum, and the chairman having a casting vote (d).

(o) An apothecary was formerly held entitled to recover fees for business done in London, if he had a general certificate from the Society of his fitness to practice, although he paid but £6 6s. for it (*Chadwick* v. *Bunning* (1825), 2 C. & P. 106).

(p) Apothecaries Act, 1815 (55 Geo. 3, c. 194), s. 24.

(q) *Ibid.*, s. 23.

(r) See p. 321, *ante*.

(s) Apothecaries Act Amendment Act, 1874 (37 & 38 Vict. c. 34), s. 4. As to the exercise of this jurisdiction by the General Medical Council, see p. 321, *ante*.

(t) See p. 325, *ante*.

(u) See p. 327, *ante*.

(a) Apothecaries Act, 1907 (7 Edw. 7, c. xxii.), s. 3. Persons who passed the above examination prior to the 4th July, 1907, are entitled to a certificate or diploma conferring the above qualification on payment of the prescribed fee (*ibid.*, s. 4).

(b) *Ibid.*, s. 5.

(c) Apothecaries Act, 1815 (55 Geo. 3, c. 194), s. 17.

(d) *Ibid.*, s. 18.

SECT. 4.—*Duties and Privileges.*

The right to practise.

865. A person (*e*) may practise as an apothecary (*f*) in England and Wales only if he has been examined and has received a certificate from the court of examiners (*g*) of his being duly qualified to practise (*h*).

What constitutes practising.

866. The following acts have been held to constitute "practising": Mixing medicines prescribed by a physician or other person, or by the apothecary himself (*i*); an unqualified person dispensing medicines on his own advice (*k*); a chemist and druggist attending the sick and giving them medicines for reward (*l*); the apprentice of an apothecary looking after premises and seeing patients in the absence of his master, who resided eight miles away (*m*); a certificated chemist giving advice and medicine from behind his counter, but never leaving the shop to see patients (*n*).

What does not constitute "practising."

The act of administering medicines, however, is not of itself enough to justify the conclusion that the person so acting practised as an apothecary (*o*); nor would the fact that a man professed to cure local maladies justify a charge that he practised as an apothecary (*p*).

A question of fact.

The question whether a man practises as an apothecary is in all cases one of fact for the court to decide (*q*).

(*e*) An exception in favour of persons in practice in 1815 need not now be considered having regard to the distance of time. A man who acted for three years as house apothecary in a public infirmary was held to be entitled to call himself an apothecary (*Wogan* v. *Somerville* (1817), 1 Moore (C. P.), 102). The diploma of "M. D. of St. Andrews, Scotland," was held to be no defence to an action for penalties (*Apothecaries' Co.* v. *Collins* (1833), 5 C. & P. 519). As to persons practising before the Act, see *Apothecaries' Co.* v. *Roby* (1822), 1 Dow. & Ry. (K. B.) 564.

(*f*) For the definition, see p. 345, *ante*.

(*g*) *Steavenson* v. *Oliver* (1841), 8 M. & W. 234; *Walmsley* v. *Abbott* (1824), 5 Dow. & Ry. (K. B.) 62.

(*h*) Apothecaries Act, 1815 (55 Geo. 3, c. 194), s. 14; as to the fees payable on obtaining a certificate, see pp. 347, 348, *ante*. The object of this restriction is to protect the public against persons not duly qualified to practise as apothecaries, and not merely to protect the rights of the Apothecaries Society and the security of their revenue (*Young* v. *Geyer* (1848), 6 C. B. 541, *per* COLTMAN, J., at p. 548. The provision is directed against an habitual or continuous course of conduct and not against an individual act. Therefore if a person who holds no certificate prescribes and dispenses medicines to more than one person on the same day, he is only guilty of one offence (*Apothecaries Co.* v. *Jones*, [1893] 1 Q. B. 89, decided on the analogy of *Crepps* v. *Durden* (1777), 2 Cowp. 640, where it was held that a baker selling loaves on Sunday to many persons was only guilty of one offence). The point had been left doubtful in *Re Apothecaries Co.* v. *Burt* (1850), 5 Exch. 363.

(*i*) *Woodward* v. *Ball* (1834), 6 C. & P. 577.

(*k*) *Apothecaries Co.* v. *Allen* (1833), 4 B. & Ad. 625; *Wise* v. *Wilson* (1815), 1 Car. & Kir. 662.

(*l*) *Apothecaries' Co.* v. *Greenough* (1841), 1 Q. B. 799.

(*m*) *Apothecaries' Co.* v. *Greenwood* (1831), 2 B. & Ad. 708; compare *Brown* v. *Robinson* (1824), 1 C. & P. 264.

(*n*) *Apothecaries' Co.* v. *Nottingham* (1876), 34 L. T. 76. As to certificated chemists, see pp. 351 *et seq.*, *post*.

(*o*) *Apothecaries' Co.* v. *Warburton* (1819), 3 B. & Ald. 40.

(*p*) *Thompson* v. *Lewis* (1828), Mood. & M. 255.

(*q*) *Apothecaries Society* v. *Gregory* (1908), 25 T. L. R. 37, where the

SECT. 4. Duties and Privileges.

Penalties for practising without qualification.

867. Any person practising without having obtained a certificate is liable for each offence (*r*) to forfeit £20. A person acting as an assistant to an apothecary without having obtained a certificate is liable to forfeit £5 (*s*).

Burden of proof.

The burden of proving that he has a certificate is on the defendant, for the prosecutor, although he must allege, need not prove, absence of the certificate (*t*).

Use of title.

868. A licentiate of the Society is entitled to describe himself as a physician and surgeon (*a*), but he may not use the letters "M.D." after his name (*b*).

Duty to compound medicines.

869. An apothecary must compound and sell medicines as and when prescribed by a physician (*c*), and, if he fails to discharge this duty without lawful excuse, he is liable upon conviction to a fine, and on committing a third offence he becomes liable to be deprived of his certificate (*d*).

Recovery of penalties.

870. Penalties exceeding £5 may be recovered in the name of the Society in any court of record. If such penalty or forfeiture amounts to less than £5, it is levied and recovered by distress and sale, by warrant under the hand and seal of a justice of the peace. The overplus of the money arising by such distress and sale must be returned on demand to the owner of the goods distrained. If sufficient distress is not found, or the penalties are not paid, the justice may, by warrant under his hand, commit the offender to prison (*e*).

Application of penalties.

Of the moneys arising from conviction and recovery of penalties for offences, one half is paid to the informer and the other half to the Society (*f*).

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defendant, a fish salesman, had bathed the thumb of a patient and applied to it a plaster composed of various ingredients according to a recipe handed down in his family. The county court judge held that he had acted merely as a surgeon in a minor surgical case, and not as an apothecary, and the Divisonal Court refused to disturb the finding.

(*r*) As to the meaning of "each offence," see *Apothecaries Co.* v. *Bentley* (1824), 1 C. & P. 538.

(*s*) Apothecaries Act, 1815 (55 Geo. 3, c. 194), s. 20.

(*t*) *Apothecaries Co.* v. *Bentley*, *supra*.

(*a*) Notwithstanding *Hunter* v. *Clare*, [1899] 1 Q. B. 635, cited in note (*d*), p. 345, *ante*. The Apothecaries Act, 1907 (7 Edw. 7, c. xxii.), makes it plain that an apothecary is entitled to call himself a "physician and surgeon"; see p. 348, *ante*.

(*b*) See *R.* v. *Baker and Clarke* (1891), 66 L. T. 416. The *ratio decidendi* of that case was that, as the defendant was trying to establish a right, he could not be said to be wilfully taking a misleading title. As to offences committed under a mistaken claim of right, see also p. 344, *ante*.

(*c*) Apothecaries Act, 1815 (55 Geo. 3, c. 194), s. 5; *Apothecaries' Co.* v. *Warburton* (1819), 3 B. & Ald. 40, *per* BEST, J. It follows from this that one licentiate of the Society of Apothecaries could call on another to compound a medicine as prescribed. It should be noted, however, that no fellow nor member of the Royal College of Physicians may dispense medicine, nor may a licentiate of that body compound or dispense medicine except for patients under his own care; see p. 311, *ante*.

(*d*) Apothecaries Act, 1815 (55 Geo. 3, c. 194), s. 5.

(*e*) *Ibid.*, ss. 26, 27. As to the enforcement of orders of justices, see title MAGISTRATES, Vol. XIX., pp. 602 *et seq.*

(*f*) Apothecaries Act, 1815 (55 Geo. 3, c. 194), s. 24.

Recovery of fees by apothecaries.

871. No apothecary may recover any charges claimed by him in a court of law unless he proves that he has obtained a certificate (*g*). A challenge of his right to sue is sufficiently met by production of a copy of the Medical Register containing his name (*h*); but he must have been on the register when the services were rendered (*i*).

Part V.—Pharmaceutical Chemists and Chemists and Druggists.

SECT. 1.—*In General.*

Who are chemists and druggists.

872. A chemist is one who sells medicines which are asked for; whereas an apothecary selects the medicines and determines what ought to be given (*j*). According to the statutes, chemists and druggists are (1) persons who, at any time before the 31st July, 1868, had carried on the business of chemist and druggist in the keeping of open shop for compounding medical prescriptions; (2) all assistants and associates who were duly registered under the Pharmacy Act, 1852 (*k*); and (3) persons duly registered under the Pharmacy Act, 1868 (*l*).

(*g*) Apothecaries Act, 1815 (55 Geo. 3, c. 194), s. 21. The cases decided with reference to recovery of fees by apothecaries before the Medical Acts (see note (*b*), p. 308, *ante*), may be thus summarised. The right of an apothecary to charge for attendances is not a matter of law, but of contract express or implied (*Smith* v. *Chambers* (1847), 2 Ph. 221). In the absence of a certificate he could not recover the cost of phials in which he sent his medicines (*Steed* v. *Henley* (1824), 1 C. & P. 574); nor the cost of journeys made to visit a patient (*Veitch* v. *Russell* (1842), 3 Gal. & Dav 198). If he had a certificate, however, he could charge both for medicines and attendances (*Gensham* v. *Germain* (1825), 11 Moore (C. P.), 1; *Towne* v. *Gresley* (*Lady*) (1829), 3 C. & P. 581; *Handey* v. *Henson* (1830), 4 C. & P. 110; *Morgan* v. *Hallen* (1838), 8 Ad. & El. 489). If the absence of qualification was pleaded, the burden of proof was on the plaintiff (*Waystaffe* v. *Sharpe* (1838), 3 M. & W. 521). A certificate was proved by showing that it came from the Apothecaries' Company, and that it bore the surname of the plaintiff (*Simpson* v. *Dismore* (1841), 9 M. & W. 47). Where an apothecary sued for his bill, which consisted of a number of items, and was successful, a new trial was refused merely because some of the items had not been proved (*Wheeler* v. *Sims* (1841), 5 Jur. 151). A chemist and druggist, acting as an apothecary, *i.e.*, supplying medicines etc., "according to his judgment" could not recover for them (*Richmond* v. *Coles* (1842), 11 L. J. (Q. B.) 155); nor could a surgeon recover the price of medicines supplied in a purely medical case (*Proud* v. *Mayall* (1846), 3 Dow. & L. 531), unless the medical treatment was ancillary to surgical treatment (*Allison* v. *Haydon* (1828), 4 Bing. 619); as to the business of a surgeon, see p. 311, *ante*; see also *Simpson* v. *Ralfe* (1834), 4 Tyr. 325; *Apothecaries' Co.* v. *Lotinga* (1843), 2 Mood. & R. 495. Cases emphasising the distinction between medicine and surgery are not now of much interest, in view of the fact that registered medical practitioners must have the double qualification; see p. 325, *ante*. In *Kannen* v. *M'Mullen* (1791), Peake, 83 [59], it was held to be a good defence to an action on an apothecary's bill that he acted negligently or improperly. As to recovery of charges, see p. 335, *ante*; see also p. 308, *ante*.

(*h*) Medical Act (21 & 22 Vict. c. 90), s. 27.

(*i*) *Leman* v. *Houseley* (1874), L. R. 10 Q. B. 66, 69.

(*j*) *Apothecaries' Co.* v. *Lotinga* (1843), 2 Mood. & R. 495, *per* CRESSWELL, J., at p. 500. A chemist may prepare and vend, but not prescribe nor administer medicine (*Allison* v. *Haydon* (1826), 4 Bing. 619, *per* BEST, C.J., at p. 621).

(*k*) 15 & 16 Vict. c. 56; see p. 353, *post*.

(*l*) 31 & 32 Vict. c. 121, s. 3; see p. 354, *post*. Certain other persons, who

SECT. 2. The Pharmaceutical Society.

SECT. 2.—*The Pharmaceutical Society.*

SUB-SECT. 1.—*Constitution.*

Origin of the Society.

873. In order that the practice of pharmaceutical chemistry may be entrusted to competent persons, the legislature has given extensive powers to the Pharmaceutical Society of Great Britain, which was established in 1841 for the purpose of advancing chemistry and pharmacy; for promoting a uniform system of educating those who practise the same; and for the protection of those who carry on the business of chemists and druggists. The Pharmaceutical Society obtained a royal charter in 1843, since confirmed by statute (*m*), under which it has power to make bye-laws.

Members of Society. Student-associates.

874. The Pharmaceutical Society consists of two classes (*n*), namely, members (*o*) and student-associates (*p*). In addition to registered pharmaceutical chemists, all persons who are registered as chemists and druggists (*q*) are eligible as members according to the bye-laws (*r*). There are also a limited number of honorary members and of corresponding members who are elected by the council (*s*).

SUB-SECT. 2.—*Government.*

The council.

875. The government of the Pharmaceutical Society is vested in a council consisting of twenty-one members elected by the general body of members. Seven members of the council go out of office each year, but are elegible for re-election (*t*).

Powers of council as to bye-laws.

The council may alter and amend the bye-laws made under or in pursuance of the charter, and may make new bye-laws (*u*). In making such bye-laws they may require that persons presenting themselves for examination shall prove that they have received a sufficient preliminary practical training (*v*). They may also prescribe the periods of time of, and courses of study in connection with, the qualifying examination, and may provide for the registration of persons having colonial diplomas (*a*).

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could show that they had been assistants to pharmaceutical chemists or chemists and druggists for a certain period prior to the Act, were also entitled to be registered as chemists and druggists (Pharmacy Act, 1868 (31 & 32 Vict. c. 121), s. 4). Analytical chemists are not as a rule required by the Pharmaceutical Society to register unless they keep open shop for the sale of poisons. As to the use of titles "photographic chemist" and "technical chemist," see note (*p*), p. 356, *post*.

(*m*) By the Pharmacy Act, 1852 (15 & 16 Vict. c. 56), s. 1; see also Pharmacy Act, 1868 (31 & 32 Vict. c. 121). The offices of the Pharmaceutical Society are at Nos. 16 and 17, Bloomsbury Square, London.

(*n*) There were formerly three classes, namely, members, associates, and students, but this was altered by the Pharmacy Acts Amendment Act, 1898 (61 & 62 Vict. c. 25), s. 2.

(*o*) *Ibid.*, s. 3.

(*p*) *Ibid.*, s. 2.

(*q*) Under the Pharmacy Act, 1868 (31 & 32 Vict. c. 121), s. 5; see p. 354, *post*.

(*r*) Pharmacy Acts Amendment Act, 1898 (61 & 62 Vict. c. 25), s. 3.

(*s*) *Ibid.*

(*t*) *Ibid.*, s. 4.

(*u*) Pharmacy Act, 1852 (15 & 16 Vict. c. 56), s. 2. The bye-laws at present in force are dated 7th August, 1907. As to the charter, see the text, *supra*.

(*v*) Poisons and Pharmacy Act, 1908 (8 Edw. 7, c. 55), s. 4.

(*a*) *Ibid.*

SUB-SECT. 3.—*Functions.*

SECT. 2. The Pharmaceutical Society.

876. The duties of the Pharmaceutical Society are to examine persons desirous of carrying on the business of chemists and druggists; to register such of these as possess competent skill and knowledge; and to institute proceedings against persons contravening the law (*b*). Duties of the Society.

SECT. 3.—*Examinations.*

877. Persons are appointed pursuant to the charter and bye-laws, or under statute (*c*), to examine in Latin, botany, *materia medica*, pharmaceutical and general chemistry; but they may not examine in the theory and practice of medicine, surgery, or midwifery. The examiners may grant certificates of competent skill and knowledge, and qualification to exercise the business of pharmaceutical chemists, or, as the case may require, to be engaged or employed as students, apprentices, or assistants (*d*). Examinations of pharmaceutical chemists.

878. The examiners appointed under statute (*e*) act as examiners of chemists and druggists (*f*). The examination is the same as that which has to be passed by an assistant pharmaceutical chemist, or as may be modified by any bye-law. An officer appointed by the Privy Council is entitled to be present at the examinations. The appointment of examiners is only in force for five years, and must be approved by the Privy Council. (*f*). Examinations of chemists and druggists.

879. The fees payable on examination and registration are fixed by bye-law, and are paid to the treasurer of the Pharmaceutical Society (*g*). Examination fees.

SECT. 4.—*Registration.*

SUB-SECT. 1.—*Registration of Pharmaceutical Chemists.*

880. The registrar, who is appointed by the Pharmaceutical Society (*h*), must keep a register of all members (*i*). The registrar

881. All persons who in 1852 were members, associates, students, or apprentices were entitled to be registered as such (*k*); and all persons who have been examined and who have obtained a certificate of qualification are entitled to be registered on payment of the fees fixed by the bye-laws (*l*). Every person registered as a Who may be registered.

(*b*) Pharmacy Act, 1852 (15 & 16 Vict. c. 56), preamble.
(*c*) Pharmacy Act, 1868 (31 & 32 Vict. c. 121).
(*d*) Pharmacy Act, 1852 (15 & 16 Vict. c. 56), s. 8; Pharmacy Act, 1868 (31 & 32 Vict. c. 121), s. 6.
(*e*) Pharmacy Act, 1868 (31 & 32 Vict. c. 121).
(*f*) *Ibid.*, s. 6. For the definitions of "chemist" and "chemist and druggist," see p. 351, *ante*. As to registration of chemists and druggists and the persons entitled to be registered, see p. 354, *post*.
(*g*) Pharmacy Act, 1868 (31 & 32 Vict. c. 121), s. 7.
(*h*) Pharmacy Act, 1852 (15 & 16 Vict. c. 56), s. 4.
(*i*) *Ibid.*, s. 5. As to publication of the register, see p. 354, *post*. As to the application of registration fees, see the text, *supra*.
(*k*) Pharmacy Act, 1852 (15 & 16 Vict. c. 56), s. 6; see *R.* v. *Pharmaceutical Society (Registrar)* (1855), 5 E. & B. 138.
(*l*) Pharmacy Act, 1852 (15 & 16 Vict. c. 56), s. 10.

SECT. 4. Registration.

pharmaceutical chemist is eligible to be elected as a member of the Pharmaceutical Society (*m*), but no registered medical practitioner is entitled to be registered (*n*), and, if a chemist obtains a medical degree, his name cannot be retained on the register (*o*).

Certificate of membership.

882. On payment of a fee, the registrar must give to anyone requiring it a certificate stating whether any particular person whose name and address is furnished to him is a member of the society or not. Such certificate, signed by the registrar or two members of the council, is *primâ facie* evidence of the facts therein stated (*p*).

Offences and penalties.

883. The registrar is guilty of a misdemeanour if he falsifies any register (*q*); and any other person falsely procuring or exhibiting a certificate is also guilty of a misdemeanour (*r*).

SUB-SECT. 2.—*Registration of Chemists and Druggists.*

The registrar.

884. The registrar of pharmaceutical chemists also acts as registrar of chemists and druggists (*s*). A name may not be

The register.

entered in the register unless the registrar is satisfied by proper evidence that the person claiming is entitled to be registered, and an appeal from the decision of the registrar may be decided by the council of the Pharmaceutical Society (*t*). The fees payable on registration are paid to the treasurer of the Pharmaceutical Society (*a*). The registrar is entitled to notice from the registrars of deaths of the death of any registered chemist (*b*).

Publication.

885. The register of pharmaceutical chemists and chemists and druggists is printed and published every year, and a printed copy purporting to be printed and published by authority is received in evidence in all courts (*c*).

False entry.

886. If a registrar makes a false entry in the register, or if any person improperly procures or attempts to procure himself to be registered, he is guilty of a misdemeanour (*d*).

Who may be registered as chemists and druggists.

887. All persons who were pharmaceutical chemists on the 31st July, 1868, were entitled to be registered as chemists and druggists without fee (*e*), and persons who were then practising as chemists and druggists were also entitled to be registered under certain

(*m*) Pharmacy Act, 1852 (15 & 16 Vict. c. 56), s. 10.
(*n*) *Ibid.*, s. 11.
(*o*) *Ibid.*
(*p*) *Ibid.*, s. 7.
(*q*) *Ibid.*, s. 15.
(*r*) *Ibid.*, s. 16; amended by Perjury Act, 1911 (1 & 2 Geo. 5, c. 6), s. 17, and Schedule, which will come into operation on the 1st January, 1912.
(*s*) Pharmacy Act, 1868 (31 & 32 Vict. c. 121), ss. 8, 9, 10.
(*t*) *Ibid.*, s. 12.
(*a*) *Ibid.*, s. 7.
(*b*) *Ibid.*, s. 11.
(*c*) *Ibid.*, s. 13.
(*d*) *Ibid.*, s. 14; amended by Perjury Act, 1911 (1 & 2 Geo. 5, c. 6), s. 17 and Schedule, which will come into operation on the 1st January, 1912.
(*e*) Pharmacy Act, 1868 (31 & 32 Vict. c. 121), s. 5. As to the persons who are chemists and druggists, see p. 351, *ante*.

conditions (*f*). Persons who are examined, and who upon examination obtain a certificate of competent skill, knowledge, and qualification, are entitled to be registered (*g*). SECT. 4. Registration.

SUB-SECT. 3.—*Erasure of Names from the Register.*

888. The Privy Council may direct the name of any pharmaceutical chemist or chemist and druggist, who is convicted of an offence which in their view renders him unfit to be on the register (*h*), to be erased, and the registrar must erase his name (*i*). By direction of Privy Council.

SECT. 5.—*Duties, Privileges, and Exemptions.*

889. Any person who carries on business as a pharmaceutical chemist or chemist and druggist must have his name and certification of qualification conspicuously exposed on the premises, subject to a penalty of £5 (*k*). If such a business is owned by someone who is not registered, it must be *bonâ fide* conducted by a registered pharmaceutical chemist, or chemist and druggist, subject to the like penalty (*l*). Name and qualification to be published.

890. As it is unlawful for any person to sell or keep open shop for retailing, dispensing, or compounding poisons, or to assume or use the title "chemist and druggist" or "chemist," or "druggist," or "pharmacist," or "dispensing chemist" or "dispensing druggist," unless he is a pharmaceutical chemist or a chemist or druggist, and is duly registered (*m*), it follows that in order to exercise the right of selling poisons a person must be registered as a chemist and druggist unless he is a registered medical practitioner (*n*). Right to sell poisons.

SECT. 6.—*Practice of Pharmacy by Bodies Corporate, Firms, and Partnerships.*

891. A body corporate, firm, or partnership may carry on the business of a pharmaceutical chemist, or chemist and druggist, if, in every premises where the business is carried on but not personally conducted by the superintendent, such business is *bonâ fide* conducted, under the direction of the superintendent, by a duly registered manager or assistant, whose certificate of qualification Conditions on which business may be conducted.

(*f*) Pharmacy Act, 1868 (31 & 32 Vict. c. 121), s. 5.
(*g*) *Ibid.*, s. 6. As to the examination, see p. 353, *ante*. As to the special register of managers, see note (*o*), p. 356, *post*.
(*h*) See p. 353, *ante*.
(*i*) Pharmacy Act, 1868 (31 & 32 Vict. c. 121), s. 26.
(*k*) Poisons and Pharmacy Act, 1908 (8 Edw. 7, c. 55), s. 3 (1).
(*l*) *Ibid.* On the decease of a pharmaceutical chemist, or a chemist or druggist, his executors may continue to carry on the business if, in every premises where it is carried on, the business is conducted by a duly registered person, and the name of such person is conspicuously exhibited on the premises (Pharmacy Act, 1868 (31 & 32 Vict. c. 121), s. 16, as amended by the Poisons and Pharmacy Act, 1908 (8 Edw. 7, c. 55), s. 3 (2)).
(*m*) Pharmacy Act, 1868 (31 & 32 Vict. c. 121), s. 15.
(*n*) See pp. 355, 356, *post*; and see, further, p. 384, *post*.

SECT. 6. **Practice of Pharmacy by Bodies Corporate, Firms, and Partnerships.**

is conspicuously exhibited on the premises (*o*). If these conditions are observed, the body corporate, firm, or partnership may take the description of "chemist and druggist," or "chemist" or "druggist," provided the superintendent is a member of the board of directors or other governing body of the body corporate (*p*).

SECT. 7.—*Offences by Unregistered Persons.*

Wrongful assumption of title etc.

892. A person (which term includes a body corporate) (*q*) who takes, uses, or exhibits the name or title of "chemist and druggist," or "chemist" or "druggist," and is not a registered pharmaceutical chemist, or chemist and druggist; or who takes, uses, or exhibits the name or title of "pharmaceutical chemist," "pharmaceutist," or "pharmacist" (*r*), and is not a pharmaceutical chemist; or who fails to conform to the regulations as to selling or compounding poisons; or who compounds medicines except according to the British Pharmacopœia (*s*), is liable to a penalty of £5 (*a*). This provision does not preclude any liability to which any such person would otherwise have been exposed (*b*), but it does not apply to apothecaries, veterinary surgeons (*c*), persons dealing in patent

(*o*) Poisons and Pharmacy Act, 1908 (8 Edw. 7, c. 55), s. 3 (4) (b). The name of such manager must be entered in a special register by the registrar of the Pharmaceutical Society (*ibid*). As to the sale of poisons by bodies corporate, see p. 382, *post*.

(*p*) Poisons and Pharmacy Act, 1908 (8 Edw. 7, c. 55), s. 3, *ad fin*.

(*q*) *Ibid.*, s. 3 (4). It had been held that a corporation could not be a pharmaceutical chemist (*Pharmaceutical Society* v. *London and Provincial Supply Association* (1880), 5 App. Cas. 857, *per* Lord SELBORNE, L.C., at p. 863).

(*r*) Poisons and Pharmacy Act, 1908 (8 Edw. 7, c. 55), s. 3 (3). The assumption of the titles "photographic chemist" (*Bremridge* v. *Turnbull* (1895), 23 Rettie (Justiciary Cases), 12) and "technical chemist" (*Bemridge* v. *Hume* (1895), 23 Rettie (Justiciary Cases), 9) as held (in Scotland) to constitute breaches of this provision. As to sale of drugs compounded otherwise than in accordance with the British Pharmacopœia, see title FOOD AND DRUGS, Vol. XV., p. 21, and p. 377, *post*.

(*s*) See *White* v. *Bywater* (1887), 19 Q. B. D. 582.

(*a*) Pharmacy Act, 1868 (31 & 32 Vict. c. 121), s. 15. The wrongful assumption of titles by persons pretending to be pharmaceutical chemists was also aimed at by the Pharmacy Act, 1852 (15 & 16 Vict. c. 56), s. 12), which is superseded by this provision Where a man, who was unregistered, sold medicines in a shop over which was placed his name, followed by the words "The Pharmacy," and the same words appeared on the medicines supplied by him, it was held that he was not guilty of an offence under the Pharmacy Act, 1852 (15 & 16 Vict. c. 56), s. 12 (*Pharmaceutical Society* v. *Mercer*, [1910] 1 K. B. 74). In *Gray* v. *Bremridge* (1887), 24 Sc. L. R. 747, it was held that where a company carried on the business of a chemist and druggist, individual shareholders could not be prosecuted for unlawfully taking and using the title of "chemist and druggist." By the Poisons and Pharmacy Act, 1908 (8 Edw. 7, c. 55), s. 2 (see p. 385, *post*), certain sellers of poisonous substances are exempted from the operation of the Pharmacy Act, 1868 (31 & 32 Vict. c. 121), s. 15, provided they are duly licensed, and conform to regulations made under the former statute. As to the effect of a breach of these regulations on proceedings under the Pharmacy Act, 1868 (31 & 32 Vict. c. 121), s. 15, see *Pharmaceutical Society* v. *Jacks*, [1911] 2 K. B. 115, and note (*d*), p. 385, *post*.

(*b*) Pharmacy Act, 1868 (31 & 32 Vict. c. 121), s. 15.

(*c*) See p. 370, *post*.

medicines (*d*), wholesale dealers in poisons (*e*), or any registered medical practitioner who has passed an examination in pharmacy (*f*).

SECT. 7. Offences by Unregistered Persons.

893. Penalties are recovered in England and Wales by plaint in the county court (*g*). An action or other proceeding for an offence must be brought within six months from the commission of the offence (*h*). Sums recovered by way of penalty and otherwise are paid as the Treasury direct (*i*).

Recovery of penalties.

Part VI.—Dentists.

SECT. 1.—*Registration.*

SUB-SECT. 1.—*Registration and Proceedings against Unqualified Persons.*

894. While the practice of dentistry by unregistered persons is not illegal, the public are protected from the irregular practitioner by the fact that he must not pretend to be registered or legally qualified.

Prevention of irregular practice.

895. Subject to the exceptions hereinafter mentioned (*j*), no person is entitled to take or use the title of "dentist" (either alone or in combination with any other word or words), or of "dental practitioner," or any name, title or addition (*k*), implying that he is registered under the Dentists Act, 1878 (*l*), or that he is a person specially qualified (*m*) to practise dentistry, unless he is registered (*l*). Infringement of this provision (which does not apply to registered medical practitioners (*n*), may involve, on summary conviction, a fine not exceeding £20 (*o*). But an unregistered person taking or using any name, title, or addition is not guilty of an offence under the above provision (1) if he shows that he is not ordinarily resident in the United Kingdom, that he is qualified to practise dentistry or dental surgery in a British possession or in a foreign country, and that he did not represent himself to be registered; (2) if he shows that his name

Prohibition of use of titles unless registered.

Exception to the rules.

(*d*) See p. 377, *post*.

(*e*) Pharmacy Act, 1868 (31 & 32 Vict. c. 121), s. 16. As to wholesale dealers in poisons, see p. 381, *post*.

(*f*) Pharmacy Act, 1869 (32 & 33 Vict. c. 117), s. 1.

(*g*) Pharmacy Act, 1852 (15 & 16 Vict. c. 56), s. 12. As to procedure in the county court, see title COUNTY COURTS, Vol. VIII., pp. 448 *et seq.*

(*h*) Pharmacy Act, 1852 (15 & 16 Vict. c. 56), s. 13.

(*i*) *Ibid.*, s. 14.

(*j*) See p. 358, *post*.

(*k*) These words "name, title, or addition" include any title, addition to a name, designation or description, whether expressed in words or by letters, or partly in one way and partly in the other (Medical Act, 1886 (49 & 50 Vict. c. 48), s. 26).

(*l*) Dentists Act, 1878 (41 & 42 Vict. c. 33), s. 3.

(*m*) The words "specially qualified" refer to a qualification in the nature of a diploma, and do not include a description implying mere personal skill (*Byrne* v. *Rogers*, [1910] 2 I. R. 220).

(*n*) *Ibid.*

(*o*) *Ibid.* The fine is recoverable under the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43) (Dentists Act, 1878 (41 & 42 Vict. c. 33), s. 40). As to enforcement of orders of courts of summary jurisdiction, see title MAGISTRATES, Vol. XIX., pp. 602 *et seq.*

SECT. 1. Registration.

has merely been erased from the register on the ground that he has ceased to practise (*p*).

Who may prosecute.

A prosecution may be instituted by the General Medical Council, by a branch council, or by a medical authority, if such council or authority think fit (*q*), or by a private person (*r*).

What amounts to taking a title.

896. A man does not take nor use a name, title, or addition merely by allowing the name of a former registered practitioner to remain on a brass plate on his premises (*s*). But the use of such words as "German Dental Institute, West Central Dental Institute, Ltd." on a brass plate may imply that the manager of the company who practises on the premises was "specially qualified" (*t*). It is not the irregular practice of dentistry but the fraudulent use of titles which is aimed at; a man may extract teeth and put in artificial teeth, and there is no objection to his announcing that he does so (*u*).

Practice by companies.

897. A limited company assuming a name which includes the words "surgeon dentists" is not liable to prosecution under the foregoing provision (*a*), but it may be restrained from carrying on business in such a way, and under such a name, as to deceive the public and lead them to believe that the business is carried on by registered persons (*b*).

False assumption of qualification.

898. A person falsely taking a qualification or certificate in relation to dentistry or dental surgery is liable on summary conviction to a fine not exceeding £20 (*c*).

(*p*) Dentists Act, 1878 (41 & 42 Vict. c. 33), s. 4.

(*q*) *Ibid.* As to the General Medical Council, branch council, and medical authorities, see pp. 315 *et seq.*, *ante*.

(*r*) Medical Act, 1886 (49 & 50 Vict. c. 48), s. 26.

(*s*) *Brown* v. *Whitlock* (1903), 67 J. P. 451.

(*t*) *Panhaus* v. *Brown* (1904), 68 J. P. 435; and see note (*m*), p. 357, *ante*.

(*u*) *Emslie* v. *Paterson* (1897), 24 Rettie (Justiciary Cases), 77, 81. In that case unregistered persons who put up a signboard bearing the inscription "American Dentistry, A. Emslie" and "Dental Office" were held not guilty of an offence in Scotland, while in *Bellerby* v. *Heyworth*, [1909] 2 Ch. 23, C. A., overruling *Barnes* v. *Brown*, [1909] 1 K. B. 38, the use of the following inscription by unregistered persons was held to be lawful:—"Bellerby, Heyworth and Brown. Finest Artificial Teeth. Painless extraction. Advice Free." Mr. Heyworth attends here." It is still doubtful whether the words "specially qualified" (see the text, *supra*) mean "qualified" in dentistry in the popular sense, or whether they merely refer to the qualifications which are named in the Act as entitling a person to be registered (*Bellerby* v. *Heyworth*, *supra*, *per* KENNEDY, L.J., at p. 33).

(*a*) *I.e.*, the Dentists Act, 1878 (41 & 42 Vict. c. 33), s. 3; see *O'Duffy* v. *Jaffe*, [1904] 2 I. R. 27.

(*b*) *A.-G.* v. *Appleton*, [1907] 1 I. R. 252; *A.-G.* v. *Myddletons, Ltd.*, [1907] 1 I. R. 471; *A.-G.* v. *Smith* (*George C.*), *Ltd.*, [1909] 2 Ch. 524. In the last case a company was formed to take over as a going concern the business of dentists and makers of artificial teeth which was formerly carried on by a person whose name was erased from the register. This man was employed by the company, and by circulars or otherwise the company took and used the style or title of "surgeon dentist." An injunction was granted to restrain it from so doing. In *R.* (*Rowell*) v. *Joint Stock Companies* (*Registrar*), [1904] 2 I. R. 634, registration of a dental company was refused on the ground that its proposed name involved a false representation.

(*c*) Dentists Act, 1878 (41 & 42 Vict. c. 33), s. 4. As to enforcement of

SUB-SECT. 2.—*Qualifications.*

SECT. 1. Registration.

Who may be registered as a dentist.

899. Any person who (1) is a licentiate in dental surgery or dentistry of any of the bodies or universities who choose members of the General Medical Council (*d*); (2) is entitled to be registered as a colonial or foreign dentist (*e*); or (3) was, on the 22nd July, 1878, *bonâ fide* engaged in the practice of dentistry or dental surgery, either separately or in conjunction with the practice of medicine (*f*), surgery, or pharmacy, is entitled to be registered (*g*).

SUB-SECT. 3.—*Colonial and Foreign Dentists.*

Colonial dentists.

900. A person who either (1) is not domiciled in the United Kingdom; or (2) has practised for more than ten years elsewhere, may be registered as a colonial dentist without examination if he shows that he is of good character, and that he holds some recognised certificate (*h*) granted in a British possession (*i*).

Foreign dentists.

901. A foreigner, or any person who has practised for more than ten years elsewhere than in the United Kingdom, may be registered as a foreign dentist, without examination, if he shows that he is of good character, and that he has obtained a recognised certificate (*k*) granted in a foreign country, which he continues to hold, or of which he has not been deprived for any cause which disqualifies him from being registered (*l*).

Appeals to Privy Council.

902. A person who is refused registration as a colonial or foreign dentist may appeal to the Privy Council if the reason for refusal is that the certificate is not recognised (*m*). The Privy Council may then, after hearing the General Medical Council, dismiss the appeal or order it to recognise the certificate (*n*).

SUB-SECT. 4.—*Entries in the Register.*

Contents and form of register.

903. The dentists register, which is kept by the general registrar (*o*), contains (1) a list of all United Kingdom dentists, that

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orders of courts of summary jurisdiction, see title MAGISTRATES, Vol. XIX., pp. 602 *et seq.*

(*d*) As to these bodies, see pp. 325, 326, *ante.*

(*e*) See the text, *infra.*

(*f*) Such persons must comply with the Dentists Act, 1878 (41 & 42 Vict. c. 33), s. 7 (2), which, as it is now practically obsolete, is not further considered.

(*g*) Dentists Act, 1878 (41 & 42 Vict. c. 33), s. 6. As to students who were serving as apprentices in 1878, see *ibid.*, s. 37, and *R.* v. *Medical Council*, [1897] 2 Q. B. 203, C. A.

(*h*) *I.e.*, "such certificate, diploma, membership, degree, licence, letters, testimonial, or other title, status, or document as may be recognised for the time being by the General Medical Council as entitling the holder thereof to practise dentistry or dental surgery in such possession or country, and as furnishing sufficient guarantees of the possession of the requisite knowledge and skill for the practice of dentistry or dental surgery" (Dentists Act, 1878 (41 & 42 Vict. c. 33), s. 10).

(*i*) *Ibid.*, s. 8.

(*k*) As to the meaning of "recognised" see note (*h*), *supra.*

(*l*) Dentists Act, 1878 (41 & 42 Vict. c. 33), s. 9.

(*m*) See note (*h*), *supra.*

(*n*) Dentists Act, 1878 (41 & 42 Vict. c. 33), s. 10.

(*o*) As to the general registrar, see p. 317, *ante.*

SECT. 1. Registration.

is, of all persons who are registered as having been engaged in the practice of dentistry or dental surgery on the 22nd July, 1878 (*p*), and all persons who are registered as licentiates in dentistry or dental surgery of any of the medical authorities (*q*) of the United Kingdom; and (2) separate lists of all colonial and foreign dentists (*r*). The lists are made out alphabetically, giving the names, addresses, qualifications, and dates of qualifications of the persons registered, and such other particulars as the General Medical Council directs (*s*).

Admissibility as evidence.

904. A copy of the register is printed at least once a year, and printed copies are admissible in evidence (*t*), and the register, when in the custody of the registrar, is deemed to be in proper custody (*u*).

Absence of name from register.

The absence of a name from the register is *primâ facie* evidence that the person in question is unregistered; but he may prove that he is registered by a certificate from the registrar (*v*).

Local register.

905. The local registrars must keep a register and perform such duties in relation thereto as the General Medical Council from time to time directs (*a*).

Powers of General Medical Council.

906. The General Medical Council may make and revoke general orders and regulations as to general and local registers, the practice of registration, and the fees to be paid therefor (*b*).

Amendment of register with regard to diplomas.

The General Medical Council may also, from time to time, make and vary orders for additions to and removals from the general register of any additional diplomas, memberships etc. which appear to it to be granted, after examination, by any of the medical authorities in respect of a higher degree of knowledge than is required to obtain a mere certificate of fitness (*c*). The mere fact that a medical authority has struck a person's name off its register of members does not authorise the erasure of his name from the medical register in the absence of any exercise by the Council of the judicial powers given to it by the Dentists Act, 1878 (*d*).

Application for registration.

908. A person entitled to be registered may have his name entered in the register on producing or sending to the general registrar (*e*) the document conferring or evidencing his licence or

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(*p*) See p. 359, *ante*.
(*q*) *E.g.*, the bodies and universities who choose members of the General Medical Council (Dentists Act, 1878 (41 & 42 Vict. c. 33), s. 2); see pp. 325, 326, *ante*.
(*r*) Dentists Act, 1878 (41 & 42 Vict. c. 33), s. 11 (1).
(*s*) *Ibid.*, s. 11 (2).
(*t*) *Ibid.*, s. 11 (3).
(*u*) *Ibid.*, s. 11 (4).
(*v*) *Ibid.*, s. 29.
(*a*) *Ibid.*, s. 11 (5).
(*b*) *Ibid.*, s. 17. As to the power of the General Medical Council to make bye-laws generally, see *ibid.*, s. 38.
(*c*) *Ibid.*, s. 11 (6).
(*d*) *Ibid.*, s. 13; see *Ex parte Partridge* (1887), 19 Q. B. D. 467, C. A.; see p. 361, *post*.
(*e*) *I.e.*, of the General Medical Council (Dentists Act, 1878 (41 & 42 Vict. c. 33), s. 2).

qualification, and other particulars required for registration, and on paying the registration fee (*f*), which must not exceed £5 (*g*). An alien resident in the United Kingdom may be registered, and a British subject may be registered although he resides or is engaged in practice beyond the limits of the United Kingdom (*h*).

SECT. 1. Registration.

Keeping the register.

909. The general registrar must register alterations in the names and addresses of registered persons (*i*), and erase the name of every deceased person (*k*), and of any person who has ceased to practise, but, in the latter case, not without such person's consent. He may send by post (*l*) a notice inquiring whether or not a person has ceased to practise, and, if he receives no answer to his letter within three months, he may, within fourteen days, send another notice by registered post. If he receives the first letter back from the dead letter office, or receives the second notice from that office, or does not, within three months after sending the second notice, receive any answer thereto, the person addressed is deemed to have ceased to practise and his name may be erased (*m*).

Frauds in relation to the register.

910. Fraud or falsification, committed either by applicants for registration or the registrar, is punishable by imprisonment not exceeding twelve months (*n*).

Application of registration fees.

911. The fees on registration, and the moneys derived from the sale of registers etc., are applied in defraying the expenses of registration and the other statutory expenses. Subject to this, they are applied towards the support of museums, libraries, or lectureships, or other public purposes connected with the promotion of learning in connection with dentistry and dental surgery (*o*).

SECT. 2.—*Control by General Medical Council.*

SUB-SECT. 1.—*Erasure of Name from the Register.*

Liability to have name removed.

912. A registered dentist, who, either before or after registration (*p*), is convicted, either in His Majesty's dominions or elsewhere, of an offence which, if committed in England, would be a felony or a misdemeanour, or is guilty of any infamous or disgraceful conduct

(*f*) Dentists Act, 1878 (41 & 42 Vict. c. 33), s. 7. As to persons who were articled to dentists prior to January, 1880, see *R.* v. *Medical Council*, [1897] 2 Q. B. 203, C. A.

(*g*) Dentists Act, 1878 (41 & 42 Vict. c. 33), s. 16.

(*h*) *Ibid.*, s. 7.

(*i*) *Ibid.*, s. 12 (1).

(*k*) *Ibid.*, s. 12 (2). He is entitled to notice of the death of every deceased dentist from the various registrars of deaths (*ibid.*, s. 36).

(*l*) As to posting of notices, see *ibid.*, s. 39.

(*m*) *Ibid.*, s. 12 (3).

(*n*) *Ibid.*, ss. 34, 35, the latter provision being repealed by the Perjury Act, 1911 (1 & 2 Geo. 5, c. 6), s. 17, and Sched.; see also *ibid.*, s. 6. The Perjury Act, 1911 (1 & 2 Geo. 5, c. 6), will come into operation on the 1st January, 1912.

(*o*) Dentists Act, 1878 (41 & 42 Vict. c. 33), s. 32. Accounts of all sums received and paid each year are kept by the treasurers of the General Medical Council and branch councils, and are laid before Parliament (*ibid.*, s. 33).

(*p*) *R.* v. *General Council of Medical Education* (1861), 3 E. & E. 525.

SECT. 2. Control by General Medical Council.

in a professional respect (*q*), is liable to have his name erased from the register (*r*).

Incorrect or fraudulent entries.

913. Any entry proved to have been incorrectly or fraudulently made may also be erased by the General Medical Council. Such erasure is discretionary, and cannot be made the subject of an action against the Council in the absence of malice (*s*).

Effect of erasures.

914. A name erased from the register under the penal clause must also be erased from the list of licentiates of the medical authority of which the person is a licentiate (*t*).

When a name cannot be erased.

915. The name of a person cannot be erased (1) by reason of his adopting or refraining from adopting any particular theory of dentistry or dental surgery; or (2) on account of a conviction for a political offence outside His Majesty's dominions; or (3) on account of a conviction for an offence which, though within the above provision (*u*), does not, either from its trivial nature, or the circumstances in which it was committed, disqualify a person from practising dentistry (*v*).

SUB-SECT. 2.—*Inquiry into Conduct.*

Infamous or disgraceful conduct.

916. The General Medical Council may, and upon the application of any body or university which chooses a member of that Council must, make inquiry into the case of a person alleged to be liable to have his name erased under the foregoing provision (*u*), and on proof of a conviction, or of infamous or disgraceful conduct, it must cause the name of such person to be erased (*a*).

Power to act by committee.

917. For the purpose of erasing a name or entry from, or restoring it to, the register, the General Medical Council may act by a committee not exceeding five in number, of whom the quorum must not be less than three. A report of the committee is conclusive as to the facts for the purpose of the exercise of these powers (*b*).

Appointment of dental committee.

918. The General Medical Council must appoint such a dental committee, and may determine the number and tenure of office of the members thereof. The committee must meet from time to time, and may regulate the summoning, notice, place of their meetings, and the mode of deciding questions. If there is a vacancy, the committee may act notwithstanding the vacancy, but they may appoint a member of the Council to fill the vacancy until the next

(*q*) The cases already cited with reference to "infamous conduct" on the part of a registered medical practitioner may be referred to in this connection; see p. 321, *ante*. A dentist who causes circulars and pamphlets to be published which are damaging to and derogatory of the profession of dentistry is guilty of infamous conduct (*Clifford* v. *Timms*, [1908] A. C. 12).

(*r*) Dentists Act, 1878 (41 & 42 Vict. c. 33), s. 13.

(*s*) *Ibid.*; see *Partridge* v. *General Council of Medical Education and Registration of the United Kingdom* (1890), 25 Q. B. D. 90, C. A.; and see p. 321, *ante*.

(*t*) Dentists Act, 1878 (41 & 42 Vict. c. 33), s. 13.

(*u*) See p. 361, *ante*, and the text, *supra*.

(*v*) Dentists Act, 1878 (41 & 42 Vict. c. 33), s. 13.

(*a*) *Ibid.*, ss. 2, 13.

(*b*) *Ibid.*, s. 15

meeting of the Council, and they may also, at the expense of the Council, appoint such legal or other assessor as they think necessary or proper (*c*).

SECT. 2. Control by General Medical Council.

919. Complaints as to the conduct of a dentist are received by the general registrar, who submits an abstract of the complaint and other documents to the president or to the chairman of the dental committee (*d*).

Procedure on an inquiry. Complaint.

If the complaint is made by a medical authority (*e*), the president or chairman of the dental committee forthwith appoints a time for an inquiry (*f*). If the complaint is made by any other person, or in any other case in which information has been received by the General Medical Council which, if proved, would render the person complained of liable to have his name removed, further inquiries may be made and such evidence obtained as will enable the matter to be brought before the dental committee in a convenient form (*g*). Should the president or the chairman of the dental committee take the view that no sufficient grounds are shown rendering further inquiry necessary, and the dental committee so resolve, the inquiry may be adjourned or abandoned altogether (*h*).

The hearing.

The dental committee and the president or the chairman may have the assistance of the solicitor to the General Medical Council, and of counsel (*i*). The report of the committee upon a penal case is put down for consideration by the General Medical Council in its programme of business (*k*), and, on hearing it read, the General Medical Council may decide whether the parties shall be heard upon the report, or it may send it back to the committee (*l*). The procedure on a hearing then followed is similar to that which is adopted in the case of medical practitioners who are found guilty of penal offences (*m*).

SUB-SECT. 3.—*Restoration of Name to the Register.*

Restoration of name to register.

920. A name or qualification once erased cannot be restored to the register except by order of the General Medical Council or of a court of competent jurisdiction. The General Medical Council may make an order to the effect that a name shall be restored on payment of such fee, not exceeding the registration fee, as it shall determine (*n*). If the name is restored to the general

(*c*) Dentists Act, 1878 (41 & 42 Vict. c 33), s. 15. The dental committee consist of the president (who, when present, occupies the chair), two members of the English, one member of the Scottish, and one member of the Irish branch councils (Standing Orders, 1908, ch. x.). As to these branch councils, see p. 318, *ante*.

(*d*) Standing Orders of the General Medical Council, 1908, ch. xv. (1).

(*e*) As to this term, see Dentists Act, 1878 (41 & 42 Vict. c. 33), s. 2, and pp. 325, 326, 360, *ante*.

(*f*) Standing Orders, 1908, ch. xv. (2).

(*g*) *Ibid.*, ch. xv. (3).

(*h*) *Ibid.*, ch. xv. (4), (5).

(*i*) *Ibid.*, ch. xv. (6).

(*k*) *Ibid.*, ch. xv. (8).

(*l*) *Ibid.*, ch. xv. (10).

(*m*) See p. 323, *ante*.

(*n*) Dentists Act, 1878 (41 & 42 Vict. c. 33), s. 14.

SECT. 2. Control by General Medical Council.

register it must also be restored to the list of licentiates of the medical authority of which the person is a licentiate (*o*).

SECT. 3.—*Examinations in Dentistry and Dental Surgery.*

SUB-SECT. 1.—*Examining Bodies.*

Who may hold examinations.

921. Any medical authority which has power to grant surgical degrees may hold examinations in dentistry and dental surgery, and grant certificates of fitness (*p*) on payment of reasonable fees (*q*), and such college or body must admit to the examinations held by it any person who has attained the age of twenty-one, and who has complied with the regulations as to education (*r*). Any person obtaining a certificate of fitness becomes a licentiate of such college or body, and his name is then entered on the list of licentiates.

Examination by Royal College of Surgeons.

922. The Royal College of Surgeons of England has power to hold examinations in dentistry and dental surgery, and may grant certificates. Any person obtaining a certificate becomes a licentiate in dental surgery of the Royal College of Surgeons (*s*).

Imposition of restrictions as to theory of dentistry.

923. No medical authority may attempt to impose on any candidate an obligation to adopt, or refrain from adopting, the practice of any particular theory of dentistry or dental surgery as a test or condition of admitting him to examination or granting a certificate. If the General Medical Council finds that anything of this kind is being done, it may represent the matter to the Privy Council, whereupon the Privy Council may order the authority to desist from such practice. Disobedience to the order involves loss of the right to grant certificates (*a*).

SUB-SECT. 2.—*Control by General Medical Council and Privy Council.*

Information as to examinations.

924. Every medical authority must furnish the General Medical Council with information as to the course of study and examinations to be gone through in order to obtain dental certificates. Persons deputed by the General Medical Council or by the branch councils may attend or be present at any such examinations (*b*).

Control exercised by Privy Council.

925. If the General Medical Council is of opinion that the course of study and examinations for dental certificates are not such as to secure the possession of requisite knowledge and skill, it may represent the fact to the Privy Council (*c*). The Privy Council, or two members of that body exercising its functions (*d*),

(*o*) Dentists Act, 1878 (41 & 42 Vict. c. 33), s. 14.
(*p*) *Ibid.*, s. 18.
(*q*) *Ibid.*, s. 20.
(*r*) *Ibid.*, s. 18.
(*s*) *Ibid.*, s. 21. As to the powers of the Royal College of Surgeons under its charter, see p. 312, *ante*.
(*a*) Dentists Act, 1878 (41 & 42 Vict. c. 33), s. 26.
(*b*) *Ibid.*, s. 22.
(*c*) *Ibid.*, s. 23.
(*d*) *Ibid.*, s. 31.

may then order that the certificate granted by such college or body shall not confer any right to be registered, and may revoke such order after further representation by the General Medical Council to the effect that the course of study or examination has met with its approval (*e*).

SUB-SECT. 3.—*Conduct of Examinations.*

Boards of examiners.

926. Subject to certain provisions as to a medical board (*f*), the councils of each of the following bodies—the Royal College of Surgeons of Edinburgh, the Faculty of Physicians and Surgeons of Glasgow, the Royal College of Surgeons of Ireland, and the governing body of any university in the United Kingdom—may appoint a board of examiners for the purpose of conducting examinations and granting dental certificates (*g*).

Constitution of board.

927. Each board is called the Board of Examiners in Dental Surgery or Dentistry. It consists of not less than six persons of whom at least one half are registered dentists. The members of each board continue in office for such period, and conduct the examinations in such manner, as the council or other governing body may from time to time direct. A casual vacancy in the board may be filled by the governing body; but the person so appointed only holds office for the period for which his predecessor would have acted (*h*).

SECT. 4.—*Privileges and Exemptions of Registered Persons.*

The right to practise.

928. A registered person (*i*) may practise dentistry and dental surgery in any part of the King's dominions, subject to any local law in force in that part (*k*), and only a person, who is registered as a dentist or is a registered medical practitioner, may recover a fee or charge in any court for the performance of any dental operation, or for any dental attendance or advice (*l*). An unregistered person may, however, maintain an action for the price of material, such as gold and artificial teeth, supplied by him to a patient (*m*). Such work as making and fitting artificial teeth is not a dental operation nor giving dental advice, as the term "dental operation" in this connection means an operation in the surgical sense upon a living patient (*n*).

To recover fees.

(*e*) Dentists Act, 1878 (41 & 42 Vict. c. 33), s. 24.

(*f*) These are to be found in the Dentists Act, 1878 (41 & 42 Vict. c. 33), s. 28, which, by the Medical Act, 1886 (49 & 50 Vict. c. 48), s. 26, was suspended until brought into force by an Order in Council, and no such order has been made.

(*g*) Dentists Act, 1878 (41 & 42 Vict. c. 33), s. 19.

(*h*) *Ibid.*

(*i*) As to the prohibition of the use of names, titles, or additions, except by registered dental practitioners, see pp. 357, 358, *ante*.

(*k*) Medical Act, 1886 (49 & 50 Vict. c. 48), s. 26

(*l*) Medical Act (21 & 22 Vict. c. 90), s. 34; Dentists Act, 1878 (41 & 42 Vict. c. 33), s. 5.

(*m*) *Seymour* v. *Pickett*, [1905] 1 K. B. 715, C. A., following *Hennan & Co.* v. *Duckworth* (1904), 90 L. T. 546; see also *Lee* v. *Griffin* (1861), 1 B. & S. 272.

(*n*) *Hennan & Co.* v. *Duckworth*, *supra*, *per* WILLS, J., at p. 437.

SECT. 4. Privileges and Exemptions of Registered Persons.

Jury and other service.

929. A registered dentist, if he so desires, is exempt from service on juries, in any parochial or other office, or in the militia (*o*).

Effect of dental certificate.

930. A dental certificate confers no right to be registered as a medical practitioner, nor to assume any name, title, or addition (*p*) implying that the person therein mentioned is by law recognised as a licentiate or practitioner in medicine or general surgery (*q*).

Part VII.—Midwives.

SECT. 1.—*The Central Midwives Board.*

SUB-SECT. 1.—*Constitution.*

Constitution.

931. The Central Midwives Board (hereafter in this part of the title referred to as "the Board") (*r*) consists of (1) four registered medical practitioners, one of whom is appointed by the Royal College of Physicians, one by the Royal College of Surgeons, one by the Society of Apothecaries, and one by the Incorporated Midwives Institute; (2) two persons (one of whom is a woman) appointed for three years by the Lord President of the Council; and (3) three persons appointed for terms of three years respectively by the County Councils Association, the Queen Victoria's Jubilee Institute for Nurses, and the Royal British Nurses Association (*s*).

SUB-SECT 2.—*Powers and Duties.*

Powers as to rules.

932. The powers and duties of the Board are to frame rules as to (1) its own proceedings; (2) the issue of certificates and the conditions of admission to the roll of midwives; (3) the admission to the roll of midwives practising at the 31st July, 1902; (4) the course of training of midwives, examinations, and the remuneration of examiners; (5) regulating, supervising, and restricting within due limits the practice of midwives; (6) defining what notice must be given by a midwife before she begins to practise; (7) deciding the conditions under which midwives may be suspended from practice.

Other powers and duties.

933. The Board also appoints examiners; decides upon the places where, and the times when, the examinations shall be

(*o*) Dentists Act, 1878 (41 & 42 Vict. c. 33), s. 30; see title JURIES, Vol. XVIII., p. 232.

(*p*) As to the meaning of the words "name, title, or addition," see note (*u*), p. 358, *ante*.

(*q*) Dentists Act, 1878 (41 & 42 Vict. c. 33), s. 27.

(*r*) Prior to 1902 any woman could practise as a midwife without let or hindrance. In 1878 a Midwives Bill was introduced in the House of Commons, but was not proceeded with. In 1893 a select committee of the House of Lords issued a report to the effect that no woman should be allowed to call herself, or practise as, a midwife except under suitable regulations. A further Bill was brought forward in 1900. The Midwives Act, 1902 (2 Edw. 7, c. 17), brought all the midwives in the United Kingdom under the control of a Central Board.

(*s*) Midwives Act, 1902 (2 Edw. 7, c. 17), s. 3.

held; publishes annually a roll of midwives who have been duly certified; decides upon the removal from the roll of the name of a midwife for misconduct, and upon the restoration to the roll of the name of any midwife so removed; and issues and cancels certificates. It also has general power to do any other act or perform any duty which may be necessary for carrying the Midwives Act, 1902 (*t*), into effect.

SECT. 1. The Central Midwives Board.

934. Rules framed by the Board must be approved by the Privy Council, and, before expressing approval, the Privy Council must take into consideration any representation which the General Medical Council may make with regard thereto (*u*).

Approval of rules.

935. Each woman presenting herself for examination must pay a fee of not more than one guinea. Examination fees are paid to the Board, and are applied to defray the expenses connected with examinations and certificates (*v*). The accounts of the Board are published annually; and if they show an excess of expenditure the Board may apportion the deficit between the local supervising authorities (*w*).

Fees and expenses.

SECT. 2.—*Local Supervising Authorities.*

SUB-SECT. 1.—*Constitution.*

936. Every county and every borough council acts as local supervising authority over the midwives within its area (*x*).

Local supervising authorities.

SUB-SECT. 2.—*Powers and Duties.*

937. A local supervising authority has the following powers and duties:—

Powers and duties.

(1) To exercise general supervision over all midwives practising within its area in accordance with the rules laid down under the Act (*y*);

(2) To investigate charges of malpractice, negligence, or misconduct, and report the same to the Board if a *primâ facie* case is made out;

(*t*) Midwives Act, 1902 (2 Edw. 7, c. 17), in this part of the title referred to as "the Act."

(*u*) *Ibid.*, s. 3. Rules made pursuant to this provision were approved by the Privy Council on the 12th August, 1903, and were reaffirmed on the 24th April, 1907. They include rules (a) regulating the proceedings of the Board; (b) regulating the issue of certificates and the conditions of admission to the roll of midwives; (c) regulating the course of training, and the conduct of examinations, and the remuneration of examiners; (d) of procedure on the removal of a name from the roll, and on the restoration of a name to the roll; (e) regulating, supervising, and restricting within due limits the practice of midwives; (f) deciding the conditions under which midwives may be suspended from practice. For forms of notices by midwife of intention to practise, see Encyclopædia of Forms and Precedents, Vol. X., p. 379.

(*v*) Midwives Act, 1902 (2 Edw. 7, c. 17), s. 5.

(*w*) *Ibid.*

(*x*) *Ibid.*, s. 8.

(*y*) *Ibid.* For form of notice of the Act by a local authority, see Encyclopædia of Forms and Precedents, Vol. IX., p. 377. As to borough councils and county councils, see title LOCAL GOVERNMENT, Vol. XIX., pp. 302 340.

SECT. 2. Local Supervising Authorities.

(3) To suspend a midwife from practice if such suspension appears necessary in order to prevent the spread of infection;

(4) To report to the Board the name of any midwife convicted of an offence;

(5) To supply the Board with the names of midwives who have notified their intention to practise, and to keep a current copy of the roll of midwives;

(6) To report changes of address and give due notice of the effect of the Act (*a*);

(7) To give due notice to persons using the title of "midwife" of the effect of the Act (*a*), so far as practicable.

SUB-SECT. 3.—*Delegation of Powers and Duties.*

Delegation of powers to committees.

938. The local supervising authority may delegate its powers, or any of them, to a committee consisting either wholly or partly of members of the council. Women may serve on such committee (*b*).

Delegation of powers to district councils.

939. A county council may delegate any powers or duties conferred or imposed upon it to any district council within the county (*c*). The powers and duties so delegated may be exercised by a committee appointed by the district council. Such committee may consist either wholly or partly of members of the district council. Expenses incurred must be repaid to the district council as a debt by the county council. In London the County Council may delegate its duties to the London borough councils (*d*).

SECT. 3.—*Certification of Midwives.*

SUB-SECT. 1.—*Necessity for Certificate.*

Restriction of practice to certified persons.

940. No woman may habitually and for gain (*e*) attend women in childbirth otherwise than under the direction of a qualified medical practitioner, unless she holds a certificate under the Act (*f*). Any woman so acting without being certified is liable on summary conviction to a fine not exceeding £10. This provision, however, does not apply to legally qualified medical practitioners, nor to anyone rendering assistance in a case of emergency (*g*).

Exceptions.

Effect of certificate.

941. A certificate under the Act (*f*) confers upon the person holding it no right nor title to be registered under the Medical Acts (*h*) or to assume any name or title implying that she is recognised as

(*a*) Midwives Act, 1902 (2 Edw. 7, c. 17).

(*b*) The provisions of the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 82 (1), (2), apply to such committees (Midwives Act, 1902 (2 Edw. 7, c. 17), s. 8).

(*c*) Midwives Act, 1902 (2 Edw. 7, c. 17), s. 9; see title LOCAL GOVERNMENT Vol. XIX., p. 331.

(*d*) Midwives Act, 1902 (2 Edw. 7, c. 17), s. 9.

(*e*) *Ibid.*, s. 1 (2). Certain transitory provisions are also contained in *ibid.*, s. 1 (1)). Provision was also made by *ibid.*, s. 2, for certain women who held certificates within a certain time of the Act coming into operation.

(*f*) Midwives Act, 1902 (2 Edw. 7, c. 17).

(*g*) The words "habitually and for gain" being conjunctive, not disjunctive, it is possible for a woman to practise as a midwife for charity, or to do so occasionally for gain. This limitation was placed upon the rigour of the Act for the benefit of the poor in outlying districts, who may find it difficult to secure the services of a certified midwife.

(*h*) For a list of the Medical Acts, see note (*b*), p. 308, *ante*.

a medical practitioner (*i*); nor does it imply that the person holding it is authorised to grant any medical certificate, or any certificate of death or still-birth, or to undertake the charge of cases of abnormality or disease in connection with parturition (*k*). A midwife holding a certificate may not employ an unqualified person as her substitute (*l*), and the word "employ" in this connection is not confined to employment for payment, but includes any employment by the midwife of an uncertified person as her substitute (*m*).

SUB-SECT. 2.—*The Roll of Midwives.*

Publication. Contents.

942. The roll of midwives, which is published annually by the Board (*n*), contains (1) the names of midwives certified as having passed an examination; and (2) the name of every midwife who has been certified either (i.) because at the passing of the Act (*o*) she held a midwifery certificate granted by a recognised institution (*p*); or (ii.) because at the passing of the Act (*o*) she had been in *bonâ fide* practice as a midwife for at least one year and was of good character (*q*).

Copies of the roll.

943. An authorised printed copy of the roll is evidence in all courts that the women therein specified are certified under the Act (*r*), and the absence of the name of any woman from such copy is evidence that she is not certified. In case, however, the name of a certified woman does not appear on the printed copy, a certificate, under the hand of the secretary of the Board, of the entry of the name of such midwife on the roll is evidence that she is so certified (*r*).

Offence.

944. Any person making or causing to be made any falsification in connection with the roll is guilty of a misdemeanour (*s*).

Decision of the Board as to removal.

945. In arriving at a decision to remove the name of a midwife from the roll, the Board need not act on the strict rules of evidence (*t*).

Appeal.

A woman who is aggrieved by a decision of the Board in removing her name from the roll may appeal to the High Court within three months after the notification of the decision to her (*a*), but no further appeal is allowed (*b*).

(*i*) Midwives Act, 1902 (2 Edw. 7, c. 17), s. 1 (5).
(*k*) *Ibid.*, s. 1 (5).
(*l*) *Ibid.*, s. 1 (4).
(*m*) *Re Feldmann* (1907), 97 L. T. 548.
(*n*) Midwives Act, 1902 (2 Edw. 7, c. 17), s. 3 (IV.).
(*o*) Midwives Act, 1902 (2 Edw. 7, c. 17) (date of passing, 31st July, 1902).
(*p*) These are—the Royal College of Physicians of Ireland; the Obstetrical Society of London; the Coombe Lying-in Hospital and Guinness's Dispensary; the Rotunda Hospital for the Relief of the Poor Lying-in Women of Dublin; or such other certificate as may be approved by the Board (*ibid.*, s. 2).
(*q*) *Ibid.*, s. 6.
(*r*) *Ibid.*, s. 7.
(*s*) *Ibid.*, s. 12; see also the Perjury Act, 1911 (1 & 2 Geo. 5, c. 6), s. 17, and Sched.; and see *ibid.*, s. 6. The Perjury Act, 1911 (1 & 2 Geo. 5, c. 6), will come into operation on the 1st January, 1912.
(*t*) *Re Feldmann, supra.*
(*a*) Midwives Act, 1902 (2 Edw. 7, c. 17), s. 4.
(*b*) *Ibid.*

SECT. 3. Certification of Midwives.

Appellate tribunal.

An appeal from any decision of the Board lies to the Divisional Court by an eight-day notice of motion, supported by affidavit, or, if the court (*c*) so directs on the hearing of the motion, by oral evidence.

Part VIII.—Veterinary Surgeons.

SECT. 1.—*The Royal College of Veterinary Surgeons.*

SUB-SECT. 1.—*Constitution.*

Origin of the College.

946. The Royal College of Veterinary Surgeons (hereafter in this part of the title frequently referred to as "the College") was incorporated as such by royal charter in 1844 (*d*) which recited that the Royal Veterinary College of London and the Veterinary College of Edinburgh had long been established for the education of students of the veterinary art; that the object of the Royal Veterinary College was to improve the veterinary art, which had been practised by ignorant persons; that this College had appointed professors and had formed schools of veterinary art, and had granted certificates or diplomas to such as were considered qualified to practise the veterinary art. It was also recited that the veterinary art was not recognised by law as a profession (*e*), and that it would be advantageous to the public to constitute a body of veterinary surgeons with privileges from which they had theretofore been excluded. The charter was therefore granted making the "Royal College of Veterinary Surgeons" a body corporate with a common seal, and declaring the veterinary art (*f*), as practised by the College, to be a recognised profession, and, further, that members of the College should be members of that profession to the exclusion of all others, and should be known and distinguished by the name or title of "veterinary surgeon."

Origin of the title "veterinary surgeon."

SUB-SECT. 2.—*The Council and Officers.*

Governing body.

947. The College consists of fellows, members, and foreign and colonial associates, and is governed by a council consisting of a president and six vice-presidents (all of whom are *ex-officio* members of the council), the secretary and the treasurer, and ordinary members. The council comprises in all thirty-two members, eight of whom retire annually at the annual general meeting (*g*), but

(*c*) R. S. C., Ord. 59, rr. 19, 20. As to Divisional Courts, see title COURTS, Vol. IX., p. 59.

(*d*) Now confirmed by statute (Veterinary Surgeons Act, 1881 (44 & 45 Vict. c. 62), s. 14). The charter of 1844 was amended by three subsequent charters issued respectively in 1879, 1883, and 1892. The description in the text, *supra*, of the constitution of the Royal College of Veterinary Surgeons has been compiled from these charters. The offices of the College are at 10, Red Lion Square, Holborn, London.

(*e*) A passage to this effect occurs in the judgment in *Sewell* v. *Corp* (1824), 1 C. & P. 392.

(*f*) "Veterinary surgery" means the art and science of veterinary surgery and medicine (Veterinary Surgeons Act, 1881 (44 & 45 Vict. c. 62), s. 2).

(*g*) The annual meeting of members of the College is held in London every

are eligible for re-election (*h*). No member of the council may be an examiner of the College (*i*).

Election.

948. The council is elected at the annual general meeting of the College. Votes of members entitled to vote are given by voting papers (*k*).

Who may be elected.

949. Any member of the College may be elected to be a member of the council, provided he (a) has attained the age of twenty-six years; or (b) has *bonâ fide* practised his profession of veterinary surgeon for not less than five years; or (c) has been a professor in a veterinary school (*l*). A certificate under the hands of two or more members of the council that, to their own personal knowledge, a candidate for election is eligible is sufficient evidence that he is eligible (*m*).

Vacancies or removals.

950. Vacancies may be filled up from time to time as they occur. A president, vice-president, or member of the council may resign at any time, or may be removed by a special general meeting for misconduct or other reasonable cause (*n*).

President and vice-presidents.

951. The president and vice-presidents are elected from the elected members of the council only (*o*). They are appointed each year at a meeting of the council held within a month of the general meeting. The president or, in his absence, a vice-president takes the chair at the annual general meeting and at meetings of the council. The person in the chair at the annual general meeting has a casting vote for the election of councillors.

Treasurer. Secretary.

The treasurer and secretary are appointed by, and may be removed from office at any time at the pleasure of, the council (*p*).

Minutes.

952. Minutes of the annual general meeting and of the meetings of the council are kept, and are binding on the College (*q*).

SUB-SECT. 3.—*Powers and Duties.*

Powers and duties of the College vested in the council.

953. The powers and duties of the College relate to the examination and registration of veterinary surgeons. These powers are vested in the council. This body has also entire management of the College; allows salaries to, appoints, and removes servants; makes bye-laws; fixes the times for examining students, and the nature and extent of, and the fees for, examinations (*r*).

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year. This meeting is convened by notices in the *London Gazette* and in the newspapers, the objects of the meeting being declared in the notices, but no business can be transacted at the general meeting unless there are at least ten members present (Charter, 1844, as amended by Charter, 1892, s. 3).

(*h*) Charter, 1892, s. 2.
(*i*) *Ibid.*, s. 5.
(*k*) Charter, 1879, s. 3.
(*l*) This proviso does not apply to anyone who was a member of the council on the 19th September, 1892; see Charter, 1892, s. 1.
(*m*) Charter, 1892, s. 1.
(*n*) *Ibid.*
(*o*) *Ibid.*, s. 2.
(*p*) Charter, 1844; Charter, 1876, s. 16.
(*q*) Charter, 1892, s. 2.
(*r*) Charter, 1876, s. 9.

SECT. 1. **The Royal College of Veterinary Surgeons.**

Bye-laws.

954. No order, rule, nor bye-law of the College can be made, altered, or repealed without notice being given at a previous council meeting. Notice of the proposed bye-law or alteration must be published for three months previous to the special meeting held to propose it, and it must be confirmed by another special meeting within fourteen days (*s*).

Committees.

955. The council elects from amongst its members a finance committee, a registration committee, an examination committee, and such other standing committees as are considered necessary (*t*).

Examiners.

956. The council also appoints examiners; but no professor of the Royal Veterinary College of London or the Veterinary College of Edinburgh can be appointed an examiner. Examiners must be fellows of the College (*a*), but they must not be members of the council. Each examiner is appointed for such period, not exceeding three years, as the council may think fit, but he may be re-elected.

SUB-SECT. 4.—*Members, Fellows, and Associates.*

Qualifications for membership.

957. All qualified students who have passed an examination to the satisfaction of the examiners and have attained the age of twenty-one are entitled to be admitted as members of the College on payment of a fee of not more than twenty guineas (*b*). Before submitting himself for the above examination, however, a student must produce a certificate to show that he has passed an examination in general education (*c*), and must have been a student for at least one session at one of the affiliated colleges (*d*).

The council may also admit as members, without examination, persons holding a certificate of qualification to practise the veterinary art granted by the Highland and Agricultural Society of Scotland (*e*). Students of that society may also be admitted.

Fellows of the College.

958. The College might (*f*), within six months of the date of the charter, appoint not more than 5 per cent. of its members "fellows." Subsequent admissions to fellowship were, and are, by examination. A register of fellows is kept by the council (*g*).

Foreign associates.

959. The council may appoint honorary and foreign associates, who may receive diplomas on payment of a sum not exceeding five guineas (*h*).

(*s*) Charter, 1844.
(*t*) Bye-laws 17—20.
(*a*) Charter, 1876, s. 9. As to the appointment of registrar, see note (*l*), p. 373, *post*.
(*b*) Charter, 1892.
(*c*) *Ibid.*
(*d*) *Ibid.*
(*e*) Charter, 1879, s. 1.
(*f*) By the supplemental Charter, 1876, ss. 1—9.
(*g*) To become a fellow a member must (1) have attained the age of twenty-six; (2) have practised his profession for at least five years, or have been a professor in a veterinary school; (3) have complied with bye-laws and passed a special examination for fellowship. Each fellow obtains a diploma under the seal of the College, and has to pay a fee not exceeding fifteen guineas (*ibid.*, ss. 3, 5).
(*h*) Charter, 1876, s. 7.

SECT. 2.—*Registration.*

SUB-SECT. 1.—*Qualification.*

Statutory qualification

960. While the provisions already referred to with regard to examination (*i*) and admission to membership are only to be found in the charters of the College, these charters are now confirmed by statute, and the council is bound to admit and register such students as have passed the examination of the College (*k*).

The register.

961. The register of the College, which was directed by the charter of 1876 to be made and maintained, is now styled "the Register of Veterinary Surgeons," and must be kept accurately by the registrar (*l*). It is printed by the council at least once a year, and authentic copies are admissible in evidence (*m*).

The registrar must, when so required, and on payment of a fee of 1*s.*, certify whether or not any person, whose name and address is furnished to him, appears on the register or is a member of the College (*n*).

Correction of register.

962. The registrar must insert in the register any alteration in the name or address of any person registered which may come to his knowledge (*o*). He must remove the names of deceased persons (*p*), and for that purpose is entitled to have notices of deaths from the registrars of deaths (*q*). He may also remove the name of any person who has ceased to practise, but not, in general, without the consent of that person (*r*). Where, however, he has taken the necessary steps (*a*) to ascertain whether a registered person is actually living or has changed his address, and he receives no reply, the name of such person may be removed from the register (*b*).

SUB-SECT. 2.—*Removal and Restoration of Names.*

Removal of name from register.

963. The council of the College at a meeting at which two-thirds of its number are present, and with the consent of three-fourths of the members so present, may remove names from the register in the following cases:—(1) at the request of the person whose name is to be removed; or (2) where a name has been incorrectly entered; or (3) where a name has been fraudulently entered or procured to be entered; or (4) where a person registered has, either before or after registration, been convicted either in His Majesty's dominions or elsewhere of an offence which, if committed in England, would

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(*i*) See p. 372, *ante*.
(*k*) Veterinary Surgeons Act, 1881 (44 & 45 Vict. c. 62), s. 4.
(*l*) *Ibid.*, ss. 2, 3; Charter, 1876, s. 14. The registrar is appointed by the council. He need not be a member of the College (*ibid.*, s. 13).
(*m*) Veterinary Surgeons Act, 1881 (44 & 45 Vict. c. 62), ss. 3 (2), 9.
(*n*) *Ibid*, s. 15.
(*o*) *Ibid.*, s. 5 (1).
(*p*) *Ibid.*, s. 5 (2).
(*q*) *Ibid.*, s. 10.
(*r*) *Ibid.*, s. 5 (3).
(*a*) As prescribed by *ibid.*, s. 5 (4).
(*b*) *Ibid.*, s. 5 (4).

SECT. 2. Registration.

be a misdemeanour or a higher offence; or (5) where a person registered is shown to have been guilty either before or after registration of any conduct disgraceful to him in a professional respect (*c*).

Restoration of name to register.

964. A name removed by the council cannot be restored to the register, except by resolution of the council or by order of court (*d*). The council may, with or without fee, restore a name by resolution passed by a like proportion of its number as is required for the removal of a name (*e*). If a person's name has been removed at his request, it must be restored on his application, and on payment of such fee, not exceeding the registration fee, as the council may fix (*f*).

Proceedings for removal or restoration of name.

965. For the purpose of exercising its power of removing or restoring a name to the register, the council ascertains the facts by means of the registration committee (*g*), of which the quorum must be not less than three. The report of that committee, after hearing the person implicated, is conclusive as to the facts; but the council forms its own judgment on the case independently of the committee (*h*).

Right of appeal.

966. If the council decides to remove or not to restore the name of any person, such person may appeal to the Privy Council. The Privy Council may either dismiss the appeal or issue the proper order to the council (*i*).

SUB-SECT. 3.—*Colonial and Foreign Practitioners.*

Colonial practitioners.

967. Where a person shows that he holds a recognised veterinary diploma (*j*) granted him in a British possession (*k*), and that such

(*c*) Veterinary Surgeons Act, 1881 (44 & 45 Vict. c. 62), s. 6, which also applies to any person who, on the 1st January, 1901, held the certificate of the Highland and Agricultural Society of Scotland (see p. 372, *ante*) granted prior to the 27th August, 1881 (Veterinary Surgeons Amendment Act, 1900 (63 & 64 Vict. c. 24), s. 2). The meaning of conduct "disgraceful in a professional respect" is thus set forth in the bye-laws of the College:—"108. Advertising by Veterinary Surgeons, or causing or permitting other persons to advertise for them, whether by paid advertisement or by editorial or other notice in the public press, or distributing or causing or permitting to be distributed circulars, books or cards relating to their professional attainments or abilities or charges, or in respect of medicines or appliances prepared or sold by them. 109. If any Veterinary Surgeon shall permit his name to be used by any unqualified or unregistered person, or do or permit any other act whereby an unqualified or unregistered person may pass himself off as, or practise as, a Veterinary Surgeon."

(*d*) Veterinary Surgeons Act, 1881 (44 & 45 Vict. c. 62), s. 7 (1).

(*e*) *Ibid.*, s. 7 (2).

(*f*) *Ibid.*, s. 7 (3).

(*g*) See p. 372, *ante*.

(*h*) Veterinary Surgeons Act, 1881 (44 & 45 Vict. c. 62), s. 8 (1).

(*i*) *Ibid.*, s. 8 (2).

(*j*) *I.e.*, a veterinary diploma recognised for the time being by the council of the College as furnishing a sufficient guarantee of the possession of the requisite knowledge and skill for the efficient practice of veterinary surgery, and as entitling the holder thereof to practise veterinary surgery in the British possession or foreign country where the diploma was granted (*ibid.*, s. 13 (3)).

(*k*) *I.e.*, any part of His Majesty's dominions out of the United Kingdom (*ibid.*, s. 13 (3)).

diploma was granted to him either when he was not domiciled in the United Kingdom, or in the course of a period of not less than five years during which he resided out of the United Kingdom, he is entitled to be registered, on payment of the proper fee, as a colonial practitioner, and to become a member of the College (*l*).

Foreign practitioners.

968. Where a person obtains a recognised veterinary diploma (*m*) in a foreign country, and is either an alien, or, being a British subject, has practised for more than ten years outside the United Kingdom, and continues to hold that diploma, or has not been deprived of it for any cause which would disentitle him to be registered, he is entitled, on payment of the registration fee and without examination, to be registered as a foreign practitioner, and to become a member of the College (*n*).

Appeals to Privy Council.

969. A person who is refused registration as a colonial or foreign practitioner is entitled to have the reason for refusal put into writing; and if it is because the diploma is not recognised, he may appeal to the Privy Council, and that body may either dismiss the appeal or direct the council to recognise the diploma (*o*).

SUB-SECT. 4.—*Privileges of Registered Persons.*

Recovery of fees.

970. No person can recover in any court any fee or charge for performing any veterinary operation, or for giving any veterinary attendance or advice, or for acting in any manner as a veterinary surgeon or veterinary practitioner, or for practising in any case veterinary surgery or any branch thereof(*p*), unless he is registered (*q*). Registered veterinary surgeons may dispense medicines for animals (*r*).

SUB-SECT. 5.—*Offences in respect of Registration.*

Obtaining registration by false representation.

971. A person who wilfully and falsely procures, or attempts to procure, himself to be registered, and any person aiding and abetting him, is liable to a fine not exceeding £50, or to be imprisoned for any term not exceeding twelve months (*s*). If the registrar makes.

(*l*) Veterinary Surgeons Act, 1881 (44 & 45 Vict. c. 62), s. 13 (1).

(*m*) *I.e.*, any diploma, licence, certificate, or other document granted by any university, college, corporation or other body in respect of veterinary surgery, including a licence or authority to a person to practise veterinary surgery, granted by any department of or persons acting under the authority of the Government of the country or place within or without the King's dominions wherein the licence or authority is granted (Veterinary Surgeons Act, 1881 (44 & 45 Vict. c. 62), s. 13 (3)).

(*n*) *Ibid.*, s. 13 (2).

(*o*) *Ibid.*, s. 13 (4). The jurisdiction of the Privy Council may be exercised by two members of that body (*ibid.*, s. 18 (1)).

(*p*) *Ibid.*, s. 17 (2).

(*q*) A duly qualified veterinary surgeon is exempt from jury service in Ireland (*R. (Westropp)* v. *Clare County Council*, [1904] 2 I. R. 569).

(*r*) Pharmacy Act, 1869 (32 & 33 Vict. c. 117), s. 1.

(*s*) Veterinary Surgeons Act, 1881 (44 & 45 Vict. c. 62), s. 11. This provision is repealed by the Perjury Act, 1911 (1 & 2 Geo. 5, c. 6), s. 17, Sched., and see *ibid.*, ss. 5, 6. The Perjury Act, 1911 (1 & 2 Geo. 5, c. 6), will come into operation on the 1st January, 1912.

SECT. 2. Registration.

or causes to be made, any false entry relating to the register, he is liable to similar penalties (*t*).

False use of title of fellow or member.

Any person, not being a fellow nor a member of the College, who takes or uses any name, title, addition, or description by means of initials or letters placed after his name, or otherwise stating or implying that he is a fellow or a member of the Royal College of Veterinary Surgeons, is liable to a fine not exceeding £20 (*a*).

SECT. 3.—*Offences by Unqualified Persons.*

Statutory offence.

972. The primary object of the legislature being to enable persons to distinguish between qualified and unqualified practitioners, it is illegal for any person who is unregistered to take or use the title of veterinary surgeon or veterinary practitioner, or any name, title, addition, or description stating that he is a veterinary surgeon or a practitioner of veterinary surgery, or of any branch thereof, or is specially qualified to practise the same. A person offending against this provision is liable to a fine not exceeding £20 (*b*). Thus a shoeing smith, who described his premises as a veterinary forge, was held to take a description stating that he was specially qualified to practise a branch of veterinary surgery (*c*). The use of the words "M. C., canine specialist. Dogs and cats treated for all diseases" was also held to be illegal (*d*); but a chemist who described himself as a "pharmaceutical and veterinary chemist" was held not to be guilty of an offence (*e*).

What amounts to an offence.

Offence by a company.

A limited company took the name "C.'s Veterinary Sanatorium, Ltd," and put this name over the fascia of its premises, followed by "Dogs and Cats Boarded. J. C., M.D., U.S.A., Specialist, Managing Director." It was a one man company, and the managing director had no qualification. It was held that this amounted to a representation that veterinary surgery was practised on the premises, and that both the company and the managing director, who were both sued as defendants, might be restrained by injunction (*f*).

Recovery of penalties.

973. Fines and penalties may be recovered in England as provided by the Summary Jurisdiction Acts (*g*).

Prosecution.

A prosecution may be instituted by the council of the College, but not by a private person without the written consent of the council (*h*).

(*t*) Veterinary Surgeons Act, 1881 (44 & 45 Vict. c. 62), s. 12.
(*a*) *Ibid.*, s. 16.
(*b*) *Ibid.*, s. 17 (1).
(*c*) *Royal College of Veterinary Surgeons* v. *Robinson*, [1892] 1 Q. B. 557.
(*d*) *Royal College of Veterinary Surgeons* v. *Collinson*, [1908] 2 K. B. 248.
(*e*) *Veterinary College* v. *Groves* (1893), 57 J. P. 505.
(*f*) *A.-G.* v. *Churchill's Veterinary Sanatorium, Ltd., and Churchill*, [1910] 2 Ch. 401.
(*g*) See title MAGISTRATES, Vol. XIX., pp. 602 *et seq.*; Veterinary Surgeons Act, 1881 (44 & 45 Vict. c. 62), s. 19.
(*h*) *Ibid.*

Part IX.—Drugs.

SECT. 1.—*Qualifications for Dispensing and Selling Drugs.*

SECT. 1. Qualifications for Dispensing and Selling Drugs.

Who may sell drugs.

974. The right to sell drugs, other than poisons, is not expressly affected by the statutes dealing with pharmaceutical chemists and chemists and druggists (*i*). Nevertheless, the business of a pharmaceutical chemist or chemist and druggist (which presumably includes the sale of drugs) may not be carried on unless it is conducted by a registered pharmaceutical chemist or chemist and druggist whose name is exhibited on the premises (*k*).

SECT. 2.—*Restriction on Sale.*

Medicines of the Pharmacopœia.

975. None of the medicines of the British Pharmacopœia (*l*) may be compounded except according to the formularies of that Pharmacopœia (*m*). Any person compounding medicines except as aforesaid is liable to pay for every offence a penalty or sum of £5, which may be recovered by plaint in the county court (*n*).

SECT. 3.—*Proprietary Articles.*

SUB-SECT. 1.—*In General.*

Subject to duty.

976. All pills, powders, waters, and other preparations and compositions to be used as medicine, which are by any public notice or advertisement held out or recommended to the public by the vendors thereof as beneficial to the relief of any complaint, are subject to special duties (*o*). Such medicines are usually termed "proprietary medicines" (*p*). The question whether a particular article is a proprietary medicine is a question of fact (*q*.) The duty is payable *ad valorem* (*r*).

SUB-SECT. 2.—*Definitions.*

"Proprietary medicine."

977. The term "proprietary medicine" includes (1) a series of specific drugs and preparations which are enumerated in the

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(*i*) See pp. 351, 355, *ante*.

(*k*) See p. 355, *ante*. As to practice by bodies corporate, firms, and partnerships, see pp. 355, 356, *ante*.

(*l*) See pp. 324, 356, *ante*.

(*m*) Pharmacy Act, 1868 (31 & 32 Vict. 121), s. 15. As to the standard of purity of drugs, see title FOOD AND DRUGS, Vol. XV., p. 21. As to the sale of drugs, see *ibid.*, pp. 16 *et seq.*

(*n*) Pharmacy Act, 1852 (15 & 16 Vict. c. 56), s. 12. As to recovery by plaint in the county court, see title COUNTY COURTS, Vol. VIII., pp. 460 *et seq.*

(*o*) *Smith* v. *Mason*, (1894) 58 J. P. 432, *per* CAVE, J., at p. 433, commenting on the effect of the Medicines Stamp Act, 1802 (42 Geo. 3, c. 56). The collection and management of the duties are conducted by the Commissioners of Customs and Excise; see Finance Act, 1908 (8 Edw. 7, c. 16), s. 4 (4); and see title REVENUE.

(*p*) See the text, *infra*. Proprietary medicines are excluded from the operation of the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), by s. 6 (2). For form of agreement for sale of secret compound and exclusive right to sell proprietary medicine, see Encyclopædia of Forms and Precedents, Vol. VIII., p. 4.

(*q*) *Fincher* v. *Duclercq* (1896), 60 J. P. 276.

(*r*) The rates of duty prescribed by the Stamp Act, 1804 (44 Geo. 3, c. 98), Sched. B., are—for every packet, box, bottle, pot, phial, or other inclosure containing any drugs, herbs, pills, waters, essences, tinctures, powders, or other

SECT. 3. Proprietary Articles.

schedule to the Medicines Stamp Act, 1812 (*a*); (2) all other pills, powders, lozenges, tinctures, potions, and waters (other than artificial mineral waters (*b*)) etc. to be used or applied externally or internally as medicines or medicaments for the prevention, cure, or relief of any disorder or complaint incident to or in anywise affecting the human body, wherein the person making or vending the same either (i.) claims to have any secret or occult art for the making or preparing of the same; or (ii.) claims to have any exclusive right or title to the making or preparing of the same; (3) all other pills, powders etc., which have been, are, or shall be prepared or sold under letters patent; (4) pills, powders etc. which are by any public notice or advertisement, or by any written or printed papers or handbills, or by any label, held out or recommended to the public (*c*) by the makers, vendors, or proprietors thereof as nostrums or proprietary medicines, or as specifics, or as beneficial to the prevention, cure, or relief of any ailment (*d*).

Special exemptions.

978. All drugs mentioned in the book of rates subscribed with the name of Sir Harbottle Grimstone, mentioned and referred to by the Act of tonnage and poundage (*e*), are exempt from duty (*f*).

Special drugs.

Unmixed drugs.

The following classes of drugs are also exempt: (1) drugs sold entire, without mixture or composition, by any recognised surgeon, apothecary, chemist, or druggist, who served a regular apprenticeship (*g*), or by any army or navy surgeon, or by any person licensed

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preparations or compositions to be used as medicine etc., where such packet etc., with its contents, does not exceed the price or value of:—

s.	*d.*	*s.*	*d.*
1	0	-	1½
2	6	-	3
4	0	-	6
10	0	- 1	0
20	0	- 2	0
30	0	- 3	0
50	0	- 10	0

And exceeding 50*s.*, £1.

(*a*) 52 Geo. 3, c. 150. It is not considered necessary to enumerate these, most of them being obsolete.

(*b*) *A.-G.* v. *Lamplough* (1878), 3 Ex. D. 214, C. A. In that case it appeared that the defendant sold a powder (Lamplough's Pyretic Saline), to be used for the purpose of making an effervescing draught, which he advertised as beneficial for a variety of disorders. The draught as made contained a salt of soda, chlorate of potash, and carbonic acid gas. It was held that the composition came under the head of "Waters" in the schedule to the Medicines Stamp Act, 1812 (52 Geo. 3, c. 150), the tax on which was repealed by stat. (1833) 3 & 4 Will. 4, c. 97, s. 20, and was not subject to duty; and see p. 379, *post*.

(*c*) A drug stated, in a price list issued gratis, to be a remedy for various diseases is "recommended to the public by public advertisement" (*Smith* v. *Mason & Co.*, [1894] 2 Q. B. 363).

(*d*) Medicines Stamp Act, 1812 (52 Geo. 3, c. 150), Schedule. The words "Pure Gum Pastilles: Influenza: Delightfully soothing to singers and public speakers," which were printed on an unstamped packet, were held to be capable of only one meaning, namely, that they amounted to a distinct statement that these pastilles were beneficial to a complaint affecting the human body (*Ransom* v. *Sanguinetti* (1903), 67 J. P. 219).

(*e*) Stat. (1660) 12 Car. 2, c. 4, s. 6.

(*f*) Medicines Stamp Act, 1812 (52 Geo. 3, c. 150), Sched.

(*g*) See *Kirby* v. *Taylor*, [1910] 1 K. B. 529, where it was decided that an oral

to sell any medicines chargeable with stamp duty; (2) mixtures or compositions compounded from medicinal drugs having different properties, and sold by any surgeon, apothecary, chemist, or druggist, the different denomination and properties of which are known, admitted, and approved of, in the preservation, cure, or relief of any disorder (*h*).

Mixtures from drugs having different properties.

979. Ginger and peppermint lozenges and other articles of confectionery are not chargeable with duty, unless they are sold as medicines or as beneficial for the prevention, cure, or relief of any distemper, malady, ailment, or disorder incident to or affecting the human body (*i*).

Confectionery.

All artificial mineral waters, or waters impregnated with soda or mineral alkali or carbonic acid gas, are also exempt (*j*).

Mineral waters.

SUB-SECT. 3.—*Licences.*

980. No person may take any advantage as the owner or proprietor of, or make, compound, or utter, sell, or expose for sale any drugs which are subject to duty, unless he obtains a licence (*k*). Before obtaining a licence he must give written notice to the Commissioners of Customs and Excise (*l*), specifying the shop or other premises at which he proposes to make or sell such drugs (*m*). He must also give notice of any change of address (*n*). The licence duty payable by an owner, proprietor, maker, and compounder of drugs subject to duty is 5*s*. by the year (*o*).

When required.

981. No victualler, confectioner, pastry cook, fruiterer, or other shopkeeper who sells the waters mentioned in the schedule to the Medicines Stamp Act, 1812 (*p*), for consumption on the premises need take out a licence for the purpose, provided such waters are sold in bottles with paper covers duly stamped (*q*). This requirement only refers to the waters mentioned in the schedule (*p*), and, accordingly, does not extend to waters such as ginger beer, lemonade etc., which have come into use since 1812, for the sale of which no licence is necessary. A licence need not be taken out for the sale of ginger or peppermint lozenges, or other articles of confectionery, unless the same are recommended as medicines (*r*).

When not required.

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agreement, together with actual service, does not constitute a "regular apprenticeship"; writing is necessary.

(*h*) Medicines Stamp Act, 1812 (52 Geo. 3, c. 150), Sched. No such mixture or compound is, however, exempt if the person selling it claims (1) that it is the result of some occult art; (2) that he has an exclusive right to sell it; (3) if it is the subject-matter of letters patent; (4) if it has been held out to the public as a nostrum, in which case the mixture or compound would come within the definition clause; see p. 378, *ante*.

(*i*) Stamp Act, 1815 (55 Geo. 3, c. 184), s. 54.

(*j*) Stat. (1833) 3 & 4 Will. 4, c. 97, s. 20; see *A.-G.* v. *Lamplough* (1878), 3 Ex. D. 214, C. A., and note (*b*), p. 378, *ante*.

(*k*) Medicines Stamp Act, 1802 (42 Geo. 3, c. 56), s. 9.

(*l*) Finance Act, 1908 (8 Edw. 7, c. 16), s. 4 (4); Excise Transfer Order, 15th February, 1909, *London Gazette*, 16th February, 1909, p. 1212.

(*m*) *Ibid.*, s. 17.

(*n*) *Ibid.*

(*o*) Customs and Inland Revenue Act, 1875 (38 & 39 Vict. c. 23), s. 8.

(*p*) 52 Geo. 3, c. 150; see note (*b*), p. 378, *ante*.

(*q*) Medicines Stamp Act, 1812 (52 Geo. 3, c. 150), s. 4.

(*r*) Stamp Act, 1815 (55 Geo. 3, c. 184), s. 54.

SECT. 3. SUB-SECT. 4.—*Duty on Sale.*

Proprietary Articles.

When payable.

982. The duty is payable and must be paid by the owner and proprietor, or maker and compounder of the drug before the drug is delivered out of the custody of the owner or maker, whether it is for home or foreign consumption (*s*). The duty is not payable by a chemist who buys to sell by retail (*t*).

Provision of wrappers, labels etc.

983. A person who makes or vends dutiable drugs or compounds must obtain from the Commissioners of Customs and Excise (*u*) stamps for paper covers, wrappers, or labels, which are to be placed on each packet sold (*v*). Some mark or word is printed on the wrappers to denote the duties payable. All packets with dutiable contents, when ready for sale or exposed for sale, must have such wrappers or labels pasted on them. The authorities may direct the manner in which such covers or wrappers are to be pasted and affixed, and may make such regulations as they think necessary to prevent any such covers being made use of a second time (*w*). Where stamped covers or wrappers are inadvertently damaged or spoilt without having been used, new covers may be obtained in substitution therefor (*a*).

Duty of retailer.

984. A person who receives from any compounder a dutiable article, for the purpose of selling the same again, must see that it has upon it the proper label denoting the duty payable. If it has no such label, he must either return the article to the person who delivered it to him, or deposit it at the head office of the Commissioners or the nearest stamp office (*b*).

Parcels of drugs.

985. Parcels containing a dozen or more packets of articles subject to duty which are sent to a retail vendor, or are intended for export, must be marked with the word "Medicine" and the name and address of the vendor or compounder. Officers of customs have power to seize parcels which they have reason to suspect are not properly marked (*c*).

SUB-SECT. 5.—*Offences.*

Offences and penalties.

986. Penalties, which are recovered summarily in the same manner as any fine or penalty under any Act relating to the excise (*d*), may be imposed for the following offences:—compounding, selling, or exposing for sale, dutiable articles without a licence,

(*s*) Medicines Stamp Act, 1802 (42 Geo. 3, c. 56), s. 3.
(*t*) *Ibid.*, s. 3.
(*u*) See note (*l*), p. 379, *ante*; but see par. 20 of the order therein referred to.
(*v*) *Farmer* v. *Glyn-Jones*, [1903] 2 K. B. 6. In that case the respondent, a retail chemist, bought ammoniated quinine from a wholesale dealer and sold the same by retail in a bottle, to which he affixed a label on which was printed "Ammoniated Tincture of Quinine, B.P., a well-known and highly recommended remedy for influenza and colds." It was held that, as the respondent was not the "owner, proprietor . . . . or original or first vendor" etc., the duty was not payable by him.
(*w*) Medicines Stamp Act, 1802 (42 Geo. 3, c. 56), s. 11.
(*a*) *Ibid.*, s. 18.
(*b*) Medicines Stamp Act, 1803 (43 Geo. 3, c. 73), s. 2; Finance Act, 1908 (8 Edw. 7, c. 16, s. 4 (4)).
(*c*) Medicine Stamp Act, 1803 (43 Geo. 3, c. 73), s. 3.
(*d*) Medicines Stamp Act, 1802 (42 Geo. 3, c. 56), s. 25; Stamp Duties Management Act, 1891 (54 & 55 Vict. c. 38), s. 26; see title REVENUE.

£20 (*e*); fraudulently removing labels after the medicines are sold, or using such labels a second time, £20 (*f*); selling or buying labels for the purpose of using the same a second time, or selling any packet with a used label, £20 (*g*); failure to give notice of the place where dutiable drugs are made or sold, £10 (*h*); failure on the part of a retailer to return to the vendor, or deliver up to the authorities, a packet which is not properly stamped, £20 (*i*).

SECT. 3. **Proprietary Articles.**

987. Proceedings for penalties must be commenced within three months after the forfeiture of the penalty (*k*). The penalty maybe mitigated, but so as not to be reduced to less than its fourth part (*l*). No conviction can be removed into a superior court by *certiorari* (*m*), but an appeal lies to quarter sessions (*n*). The buyer or seller of a dutiable drug who informs against the other party in selling or buying a drug contrary to the statute is admitted to give evidence, and is indemnified from penalties (*o*).

Penal proceedings.

Part X.—Poisons.

SECT. 1.—*Sale.*

SUB-SECT. 1.—*Who may Sell* (*p*).

988. Any person other than a wholesale dealer in poison (*q*) who, whether by himself, or by an assistant who is under his personal superintendence (*r*), sells or keeps open shop for the retailing, dispensing, or compounding of poisons, not being a registered pharmaceutical chemist or chemist and druggist, is liable for each offence to a penalty of £5 (*s*). He is also, in that case, exposed to

Penalty for sale other than by registered chemist.

(*e*) Medicines Stamp Act, 1802 (42 Geo. 3, c. 56), s. 9.
(*f*) *Ibid.*, s. 13.
(*g*) *Ibid.*, s. 14.
(*h*) *Ibid.*, s. 17.
(*i*) Medicines Stamp Act, 1803 (43 Geo. 3, c. 73), s. 2.
(*k*) *Ibid.*, s. 5.
(*l*) *Ibid.*
(*m*) Medicines Stamp Act, 1802 (42 Geo. 3, c. 56), s. 28.
(*n*) Stamp Duties Management Act, 1891 (54 & 55 Vict. c. 38), s. 26.
(*o*) Medicines Stamp Act, 1802 (42 Geo. 3, c. 56), s. 15.
(*p*) As to placing poisoned flesh or grain which is calculated to destroy life, and as to selling poisoned grain, see title AGRICULTURE, Vol. I., pp. 284, 285, and note (*d*), p. 385, *post*; as to the administration of poisonous substances to horses, cattle etc., see title ANIMALS, Vol. I., pp. 413, 414; as to administering and attempting to administer poisons for the purpose of endangering human life, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 593, 594; and as to the administration of drugs and poisons with intent to commit an indictable offence, see *ibid.*, pp. 602—604. As to provisions affecting trades generally, see title TRADE AND TRADE UNIONS.
(*q*) Pharmacy Act, 1868 (31 & 32 Vict. c. 121), s. 16.
(*r*) *Pharmaceutical Society* v *Wheeldon* (1890), 24 Q. B. D. 683.
(*s*) Pharmacy Act, 1868 (31 & 32 Vict. c. 121), s. 15. As to persons who notwithstanding this provision may sell poison under the Poisons and Pharmacy Act, 1908 (8 Edw. 7, c. 55), s. 2, see p. 384, *post*, and for cases where, on a

SECT. 1. Sale.

any liability to which he might be liable in the absence of the foregoing provision (*t*).

A registered pharmaceutical chemist or chemist and druggist is liable to similar penalties if he fails to conform to the regulations as to selling or compounding of poisons (*a*).

Sale by apothecaries or veterinary surgeons.

989. The preceding provisions as to sale of poisons do not affect apothecaries nor veterinary surgeons, nor do they apply to dealings in patent medicines (*b*).

Sale of patent medicines.

The term "patent medicines" in this connection means a medicine which is the subject of existing (*c*) letters patent, and does not extend to other proprietary medicines (*d*).

Sale by manager of body corporate.

990. A body corporate carrying on the business of chemists may only keep, retail, and dispense poisons if this part of the business is managed by a registered pharmaceutical chemist or chemist and druggist whose name has been forwarded to the registrar of the Pharmaceutical Society (*e*) to be entered by him in a special register, and who does not act in a similar capacity for any other body corporate, firm, or partnership (*f*).

SUB-SECT. 2.—*What constitutes Sale.*

What is a sale.

991. It is the acts of selling, compounding etc. which are prohibited, whether the person who does these acts is a principal to whom the business belongs or anyone whom he employs to carry on the business (*g*). While the sale of a compound containing a scheduled poison is illegal (*h*), the sale of a substance which contains an infinitesimal quantity of poison does not constitute an offence (*i*).

breach of regulations under that Act, the offender was held to be liable to penalties under the Pharmacy Act, 1868 (31 & 32 Vict. c. 121), ss. 15, 17, see *Pharmaceutical Society* v. *Nash*, [1911] 1 K. B. 520; *Pharmaceutical Society* v. *Jacks*, [1911] 2 K. B. 115.

(*t*) A chemist would be liable to an action for damages if he were negligently to allow his assistant to dispense poison, and so cause injury to a customer (*Pharmaceutical Society* v. *Wheeldon* (1890), 24 Q. B. D. 683, *per* HAWKINS, J., at p. 690).

(*a*) Pharmacy Act, 1868 (31 & 32 Vict. c. 121), s. 15.

(*b*) *Ibid.*, s. 16.

Pharmaceutical Society v. *Hornsey* (1894), 10 T. L. R. 492.

(*d*) *Pharmaceutical Society* v. *Piper & Co.*, [1893] 1 Q. B. 686, followed in *Pharmaceutical Society* v. *Armson*, [1894] 2 Q. B. 720, C. A., where opium was sold in a preparation called "Powell's Balsam of Aniseed." As to proprietary medicines, see p. 377, *ante*.

(*e*) As to his powers and duties, see p. 354, *ante*.

(*f*) Poisons and Pharmacy Act, 1908 (8 Edw. 7, c. 55), s. 3 (4). As to the practice of pharmacy by corporate bodies, see, further, pp. 355, 356, *ante*.

(*g*) *Pharmaceutical Society* v. *London and Provincial Supply Association* (1880), 5 App. Cas. 857, *per* Lord SELBORNE, L.C., at p. 865; *Pharmaceutical Society* v. *Nash*, *supra*.

(*h*) *Pharmaceutical Society* v. *Piper & Co.*, *supra*. There the defendants, a firm of grocers, sold a bottle of proprietary medicine called chlorodyne in the ordinary course of their business. The bottle contained one grain of morphia, which is one of the scheduled poisons, and the active principle of opium. It was proved that the whole bottle taken at once might kill a man. It was held that the defendants were rightly convicted. As to scheduled poisons, see note (*l*), p. 383, *post*.

(*i*) *Pharmaceutical Society* v. *Delve* (1893), 63 L. J. (Q. B.) 360 where

Who is a seller.

The seller means the person on the spot, who keeps the shop, and has power to regulate the sale (*j*).

A person who, as agent for a company, takes orders for a substance containing poison, which substance, in consequence of these orders, is sent direct to the customer, is not a seller within the meaning of the statute (*k*).

SECT. 2.—*Regulations as to Sale.*

SUB-SECT. 1.—*Poisons in General.*

Regulations as to scheduled poisons.

992. Subject to the exceptions hereinafter mentioned, it is unlawful to sell any scheduled (*l*) poison (*m*) either wholesale or retail,

the defendant was charged with selling a preparation of morphine. The analyst did not estimate the actual quantity, but said "it was not a trace, but it was more; it might be that the quantity is one-fiftieth of a grain per ounce, three-fiftieths of a grain in a bottle." The court, in these circumstances, refused to say that an offence had been committed.

(*j*) *Templeman* v. *Trafford* (1881), 51 L. J. (M. C.) 4.

(*k*) *Pharmaceutical Society* v. *White*, [1901] 1 K. B. 601, C. A.

(*l*) *I.e.*, any poison included in the schedule to the Poisons and Pharmacy Act, 1908 (8 Edw. 7, c. 55). The following are termed "Scheduled Poisons."

PART I.

Arsenic, and its medicinal preparations; aconite, aconitine, and their preparations; alkaloids—all poisonous vegetable alkaloids not specifically named in this schedule, and their salts, and all poisonous derivatives of vegetable alkaloids; atropine, and its salts, and their preparations; belladonna, and all preparations or admixtures (except belladonna plasters) containing 0·1 or more per cent. of belladonna alkaloids; cantharides, and its poisonous derivatives; coca, any preparation or admixture of, containing 1 or more per cent. of coca alkaloids; corrosive sublimate; cyanide of potassium, and all poisonous cyanides and their preparations; emetic tartar, and all preparations or admixtures containing 1 or more per cent. of emetic tartar; ergot of rye, and preparations of ergots; nux vomica, and all preparations of admixtures containing 0·2 or more per cent. of strychnine; opium, and all preparations or admixtures containing 1 or more per cent. of morphine; picrotoxin; prussic acid, and all preparations or admixtures containing 0·1 or more per cent. of prussic acid; savin, and its oil, and all preparations or admixtures containing savin or its oil.

PART II.

Almonds, essential oil of (unless deprived of prussic acid); antimonial wine; cantharides, tincture and all vesicating liquid preparations or admixtures of; carbolic acid, and liquid preparations of carbolic acid, and its homologues containing more than 3 per cent. of those substances, except preparations for use as sheep wash or for any other purpose in connection with agriculture or horticulture, contained in a closed vessel distinctly labelled with the word "poisonous," the name and address of the seller, and a notice of the special purpose for which the preparations are intended; chloral hydrate; chloroform, and all preparations or admixtures containing more than 20 per cent. of chloroform; coca, any preparation or admixture of, containing more than 0·1 per cent. but less than 1 per cent. of coca alkaloids; digitalis; mercuric iodide; mercuric sulphocyanide; oxalic acid; poppies, all preparations of, except red poppy petals and syrup of red poppies (*Papaver rhœas*); precipitate, red, and all oxides of mercury; precipitate, white; strophanthus; sulphonal; all preparations and admixtures which are not included in Part I. of this schedule and contain a poison within the meaning of the Pharmacy Acts, except preparations or admixtures the exclusion of which from this schedule is indicated by the words therein relating to carbolic acid, chloroform, and coca, and except the particular acids hereafter referred to (see p. 385, *post*). For the distinction between the first and second parts of the schedule, see p. 384, *post*.

(*m*) The Pharmaceutical Society (see p. 352, *ante*) has power to declare by a

SECT. 2. **Regulations as to Sale.**

unless the box, bottle, or other cover is distinctly labelled with the name of the article, the word "poison," and the name and address of the seller (*n*). He must give his own name and address, not those of the person who supplied him (*o*). It is sufficient if he gives his trade name, even if it is not his personal name (*p*).

Procedure on sale.

993. No poison mentioned in the first part of the schedule (*q*) may be sold to any person unknown to the seller unless he is introduced by some person known to the seller. Further, on every sale of a poison mentioned in the schedule (*q*), the seller must enter the particulars of the purchaser's name and address, and of the purpose for which the poison is required, in a book to be kept for the purpose. To this entry must be affixed the signature of the purchaser or the person who introduces him. Any person selling poison in contravention of the above provisions (*r*) is liable to a fine not exceeding £5 for a first, and £10 for a second or any subsequent, offence. The person on whose behalf any sale is made by any servant or apprentice is deemed to be the seller (*s*).

Poison book.

Exceptions to general rule.

994. There are certain exceptions to the above provisions (*r*) in the case of scheduled poisons (*t*). Thus, the provisions as to the label containing the name and address of the seller do not apply:—

Exports.

Wholesales.

Apothecary's prescriptions.

Ingredients in dispensed medicines.

(1) To articles to be exported from Great Britain by wholesale dealers; nor (2) to sales to retail dealers in the ordinary course of wholesale dealing; nor (3) to any medicine supplied by an apothecary to his patient; nor (4) to an article forming an ingredient of a medicine dispensed (*u*) by a registered pharmaceutical chemist or chemist and druggist; provided, in the last two cases, that the apothecary or chemist keeps a record of the sale and poison in a book to be kept by him for the purpose (*v*). Nor

Doctors' and chemists' prescriptions.

do the above provisions (*r*) apply to any medicine (*w*) supplied by a legally qualified medical practitioner to his patient, or dispensed by any registered chemist and druggist. But such medicine must be distinctly labelled with the name and address of the seller, and the ingredients thereof, with the name and address of the person to

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resolution that any other article ought to be deemed to be a poison. If such resolution is approved by the Privy Council, the name of the new substance is published in the *London Gazette*, and after a month from the expiration of such advertisement the substance becomes a poison within the meaning of the Act (Pharmacy Act, 1868 (31 & 32 Vict. c. 121), s. 2); and see *Brown* v. *Leggett*, [1906] 1 K. B. 330.

(*n*) Pharmacy Act, 1868 (31 & 32 Vict. c. 121), s. 17. As to the meaning of "seller," see p. 383, *ante*.

(*o*) Pharmacy Act, 1868 (31 & 32 Vict. c. 121), s. 17.

(*p*) *Edwards* v. *Pharmaceutical Society of Great Britain*, [1910] 2 K. B. 766.

(*q*) See note (*l*), p. 383, *ante*.

(*r*) See the text, *supra*.

(*s*) Pharmacy Act, 1868 (31 & 32 Vict. c. 121), s. 17.

(*t*) See note (*l*), p. 383, *ante*.

(*u*) If a person *bonâ fide* believes that he is dispensing a prescription given by a medical practitioner, he cannot be convicted for selling poison to a person unknown to him (*Berry* v. *Henderson* (1870), 39 L. J. (M. C.) 77).

(*v*) Pharmacy Act, 1868 (31 & 32 Vict. c. 121), s. 17; see *Berry* v. *Henderson*, *supra*.

(*w*) "The word 'medicine' is comprehensive enough to embrace everything which is to be applied medicinally, whether externally or internally" (*Berry* v. *Henderson*, *supra*, *per* LUSH, J., at p. 82).

whom it is sold or delivered, must be entered in a book kept for that purpose (*a*).

SECT. 2. Regulations as to Sale.

SUB-SECT. 2.—*Particular Acids.*

995. The following substances must not be sold by retail unless the box, bottle, vessel, wrapper, or cover is labelled with the name of the substance and the word "poisonous":—Sulphuric acid, nitric acid, hydrochloric acid, and soluble salts of oxalic acid. The King in Council may by Order add to the list. An offence is punishable by a fine not exceeding £5 (*b*). Sale of certain acids.

SUB-SECT. 3.—*Poisons for Agricultural Purposes.*

996. The sale of certain poisons for agricultural purposes is the subject of special regulation. Thus, the poisonous substances containing arsenic, tobacco, or the alkaloids of tobacco which are to be used exclusively in agriculture or horticulture for the destruction of insects, fungi, or bacteria, or as sheep dips or weed killers, may (*c*) be sold by any person licensed by a local authority who conforms to the regulations as to the keeping, transporting, and selling of such poisons (*d*). Insecticides, sheep dips, and weed killers.

997. Licences are issued in accordance with rules and regulations made by the Privy Council (*e*). Before granting a licence, the local authority must consider whether the reasonable requirements of the public as to the sale of such poisons are satisfied (*f*). Licences. Regulations.

SUB-SECT. 4.—*Arsenic.*

998. In addition to the foregoing precautions, the following rules must be observed on the sale of arsenic:—(1) The poison, if colourless, must be mixed with soot or indigo, so as to colour it (*g*); Precautions on sale.

(*a*) Pharmacy Act, 1869 (32 & 33 Vict. c. 117), s. 3.

(*b*) Poisons and Pharmacy Act, 1908 (8 Edw. 7, c. 55), s. 5.

(*c*) Notwithstanding the Pharmacy Act, 1868 (31 & 32 Vict. c. 121), s. 15, which prohibits persons other than registered pharmaceutical chemists, or chemists and druggists, selling or keeping open shop for the sale of poison; see p. 355, *ante*.

(*d*) Poisons and Pharmacy Act, 1908 (8 Edw. 7, c. 55), s. 2 (1). A person licensed under the Poisons and Pharmacy Act, 1908 (8 Edw. 7, c 55), who sells poisonous substances in breach of regulations duly made—as, for example, by selling them in receptacles not duly labelled—may be sued in the county court for the penalty imposed by the Pharmacy Act, 1868 (31 & 32 Vict. c. 121), s. 15 (see pp. 357, 381, *ante*), in respect of the sale of poison by an unregistered person (*Pharmaceutical Society* v. *Jacks*, [1911] 2 K. B. 115). The unlicensed assistant of a person so licensed may not sell insecticide containing poison (*Pharmaceutical Society* v. *Nash*, [1911] 1 K. B 520). By the Protection of Animals Act, 1911 (1 & 2 Geo. 5, c. 27), s. 8 (a), it is an offence punishable by fine not exceeding £10 for any person to sell or give away, or cause to be sold or given away, any grain or seed which has been rendered poisonous, except for *bonâ fide* use in agriculture.

(*e*) Poisons and Pharmacy Act, 1908 (8 Edw. 7, c. 55), s. 2 (3). Regulations made under *ibid.*, s. 2, will be found in the calendar of the Pharmaceutical Society, 1910, at p. 59; and as to forms of licence, and regulations relating to the vessel in which the substance is to be sold, see Statutory Rules and Orders, 1911, No. 1080 (Poison, England and Scotland), dated 10th November, 1911.

(*f*) Poisons and Pharmacy Act, 1908 (8 Edw. 7, c. 55), s. 2 (2).

(*g*) Arsenic Act, 1851 (14 & 15 Vict. c. 13), s. 3.

SECT. 2. Regulations as to Sale.

(2) the person to whom the poison is sold or delivered must be of mature age (*h*); (3) the occupation as well as the name and address of the purchaser must be entered in the poison book (*i*); and (4) if the purchaser is not known to the seller, and is introduced by some person known to both, this person must be present as a witness to the transaction, and must enter his name and address in the poison book (*k*).

(*h*) Arsenic Act, 1851 (14 & 15 Vict. c. 13), s. 2.
(*i*) *Ibid.*, s. 1.
(*k*) *Ibid.*, s. 2. As to the poison book, see p. 384, *ante*.

MEETINGS.

See COMPANIES; CRIMINAL LAW AND PROCEDURE; LOCAL GOVERNMENT; MEDICINE AND PHARMACY; PARLIAMENT; PRESS AND PRINTING; TRESPASS.

MEMBER OF PARLIAMENT.

See PARLIAMENT.

MEMBERS' CLUBS.

See CLUBS.

MEMORANDUM OR NOTE.

See CONTRACT; GUARANTEE; SALE OF GOODS.

MERCANTILE AGENCY.

See AGENCY.

MERCANTILE GUARANTEE.

See GUARANTEE.

MERCANTILE TRANSFER.

See BILLS OF SALE; COMPANIES; STOCK EXCHANGE.

MERCHANDISE MARKS.

See TRADE MARKS, TRADE NAMES, AND DESIGNS.

MERCHANT SHIPPING.

See SHIPPING AND NAVIGATION.

MERGER.

See CONTRACT; LANDLORD AND TENANT; MORTGAGE; REAL PROPERTY AND CHATTELS REAL.

MESNE PROFITS.

See LANDLORD AND TENANT; MORTGAGE; REAL PROPERTY AND CHATTELS REAL.

METROPOLIS.

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PART I. Introductory.

Part I.—Introductory (a).

Meaning of "Metropolis."

999. Conventionally the term "Metropolis" is used to designate the chief or capital town of a country or state, but in law it has a more limited application. When the term is used in an Act of Parliament, or in any document having statutory authority, as a rule it is defined either expressly or by reference to the definition contained in the Metropolis Management Act, 1855 (*b*), as being deemed to include the City of London (*c*), and the parishes and places mentioned in certain schedules to that Act (*d*).

Meaning of "London."

1000. The term "Metropolis" must not be confounded with the term "London," which, in modern legislation, is generally expressed to mean the administrative County of London (*e*), and since the area of that county may be varied from time to time (*f*), the term "London" cannot be regarded as having a constant and defined application to, or as necessarily meaning the same thing as "Metropolis," though in fact it often does so (*g*).

(*a*) The following pages do not purport to contain an exhaustive account of all matters that may conceivably fall within the scope of a work relating to the governing and good order of the Metropolis. As shown by the lists of cross-references appended to the table of contents of this title (see p. 391, *ante*), and to that of title LOCAL GOVERNMENT, Vol. XIX., pp. 233—236, the majority of these matters are considered under other and more appropriate headings. Further, many of the powers etc. of the various metropolitan authorities depend upon the provisions of local Acts which do not fall within the scope of this work. The object of this title is to give a general survey of the system of metropolitan government, and to include a somewhat fuller reference to certain matters, *e.g.*, the regulation of buildings in London, which do not fall, or cannot conveniently be grouped, under other titles.

(*b*) 18 & 19 Vict. c. 120.

(*c*) See p. 400, *post*.

(*d*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 250. The designated schedules are those identified by the letters A, B, and C, and setting out by name the parishes, districts, precincts, liberties, and places, which together constitute "the Metropolis" within the meaning of the Act; see note (*h*), p. 393, *post*. As to elections in metropolitan areas, see title ELECTIONS, Vol. XII., pp. 393 *et seq.*

For the purposes of the Metropolitan Fire Brigade Act, 1865 (28 & 29 Vict. c. 90), the "Metropolis" means the City of London and all other parishes and places for the time being within the jurisdiction of the London County Council as successors of the defunct Metropolitan Board of Works (*ibid.*, s. 2). See p. 395, *post*. For the meaning of "Metropolis" as used in the Burial Acts, see title BURIAL AND CREMATION, Vol. III., p. 446. For "Metropolitan" as the title of an archbishop, see title ECCLESIASTICAL LAW, Vol. XI., p. 387. See, further, note (*g*), *infra*.

(*e*) *E.g.*, the London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 5 (40); the London (Equalisation of Rates) Act, 1894 (57 & 58 Vict. c. 53), s. 4 (1); the Telegraph Act, 1892 (55 & 56 Vict. c. 59), s. 9; the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 141. For the administrative County of London, see pp. 393 *et seq.*, *post*.

(*f*) For alteration of area, see title LOCAL GOVERNMENT, Vol. XIX., p. 377.

(*g*) The term "London" is so indefinite as to denote different areas according as it is used in connection with the jurisdiction of the Corporation of the City (see pp. 400, 422, *post*), the London County Council (see pp. 393 *et seq.*, *post*), the police (see pp. 416, 429, *post*), the magistracy (see title MAGISTRATES, Vol. XIX., pp. 548, 561—563, 621, note (*o*)), the poor law guardians (see p. 415, *post*), the Asylums

Part II.—Metropolitan Areas and Authorities.

SECT. 1.—*The Administrative County of London.*

SECT. 1. The Administrative County of London.

1001. The Metropolis (*h*) is an administrative county by the name of the Administrative County of London (*i*), and as such is within the jurisdiction of the County Council of the Administrative County of London, which is a body corporate and has perpetual succession

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The administrative county.

Board (see p. 411, *post*), the Central Criminal Court (see title COURTS, Vol. IX., p. 87), the Registrar-General (see title REGISTRATION OF BIRTHS, MARRIAGES, AND DEATHS), the Metropolitan Water Board (see p. 416, *post*), the gas companies (see title GAS, Vol. XV., p. 375), the Post Office (see title POST OFFICE), or the Port of London (see p. 410, *post*). For some general reference to these distinctions, see the Report of the Royal Commission on the City and County of London Amalgamation, Parliamentary Paper, 1894, Cd. 7493, p. 12. As to the London Bankruptcy District, see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 47, note (*y*). As to burial areas, see title BURIAL AND CREMATION, Vol. III., pp. 500, 501. As to metropolitan county courts, see title COUNTY COURTS, Vol. VIII., p. 411. As to coroners' districts, see title CORONERS, Vol. VIII., p. 213. For the jurisdiction of various local courts of London, see title COURTS, Vol. IX., pp. 176—178. For the jurisdiction of the Consistory Court of London, see title ECCLESIASTICAL LAW, Vol. XI., pp. 507, 508. The term "London" has also to be considered in connection with the right of medical practitioners, notaries and solicitors to practise therein; see, respectively, titles MEDICINE AND PHARMACY, p. 309, *ante*; NOTARIES; SOLICITORS.

When the word "London" is used in a statute, and is not thereby otherwise defined, it means, strictly, the City of London, and not "London" or "the Metropolis" in the popular application of those expressions; see *Hudson* v. *Tooth* (1877), 3 Q. B. D. 46, *per* COCKBURN, C.J., at p. 52; *Serjeant* v. *Dale* 1877), 2 Q. B. D. 558, *per* LUSH, J., at p. 568. A similar limitation would seem to be put upon the construction of the word "London" when used in a contract, unless the circumstances are such that the intention of the parties to use the larger meaning is clearly indicated; see *Mallan* v. *May* (1844), 13 M. & W. 511; compare *Taylor* v. *Neville* (1878), 47 L. J. (Q. B.) 254, C. A.; see title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 438, note (*p*). As to the construction of the word in a will, see *Wallace* v. *A.-G.* (1864), 33 Beav. 384; and as to stage coaches, *Ditcham* v. *Chvis* (1828), 4 Bing. 706; and carriers, *Beckford* v. *Crutwell* (1833), 5 C. & P. 242.

(*h*) Meaning the City of London and the parishes and places mentioned in Schedules A, B, and C to the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), as amended by subsequent Acts (Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 100). The amending Acts were the Metropolis Management Amendment Act, 1885 (48 & 49 Vict. c. 33), the Metropolis Management Battersea and Westminster) Act, 1887 (50 & 51 Vict. c. 17), and the Metropolis Management (Plumstead and Hackney) Act, 1893 (56 & 57 Vict. c. 55). Some slight alterations in the scheduled lists are required by reason of the operation of the London Government Act, 1899 (62 & 63 Vict. c. 14), s. 15—22, and the various Orders in Council made in pursuance thereof, under which every part of the administrative county of London, outside the City, is situated in some borough and some parish, and no parish is situated in more than one borough or partly in a borough and partly in the City; and certain detached parts of parishes were transferred to adjoining parishes and boroughs, certain areas from Surrey and Middlesex were brought into London, and certain areas originally in London were transferred to Middlesex, Surrey, or Kent. See the report, dated 15th July, 1907, of the Commissioners under the London Government Act, 1899. The registration county of London coincides with the administrative county.

(*i*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 40 (1).

SECT. 1. The Administrative County of London.

The London County Council.

Distinctions between the London County Council and other county councils.

and a common seal (*k*), and is usually referred to as the London County Council (*l*). To this Council has been entrusted the management of the administrative and financial business of the county (*m*), in the same manner as in the case of the other county councils, save in the following respects. The Council cannot levy a police rate within the Metropolitan Police District, and has no jurisdiction over the Metropolitan Police Force or the City of London Police Force (*n*), nor, as regards matters arising under the Riot (Damages) Act, 1886 (*o*), within the Metropolitan Police District or the City (*p*). If the Council exercise borrowing powers, it must do so in accordance with the provisions of the Acts relating to the Metropolitan Board of Works (*q*). The jurisdiction to license houses or places for the public performance of stage plays only extends to such part of the county as is outside the jurisdiction of the Lord Chamberlain, but includes the City (*r*). The Council may grant licences for racecourses within a radius of ten miles from Charing Cross (*s*). The general powers as to the appointment and payment of medical officers of health (*t*), and the jurisdiction over main roads (*u*), are subject to the powers of the Corporation of the City and of the metropolitan borough councils (*a*).

(*k*) Local Government Act, 1888 (51 & 52 Vict. c. 41), ss. 79, 100.

(*l*) See p. 418, *post*. The powers of the County Council are statutory (*London County Council* v. *A.-G.*, [1902] A. C. 165).

(*m*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 1. For the powers transferred to the councils of counties, see title LOCAL GOVERNMENT, Vol. XIX., pp. 367 *et seq.*

(*n*) See p. 429, *post*, and title POLICE.

(*o*) 49 & 50 Vict c. 38.

(*p*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 93.

(*q*) *Ibid.*, s. 40 (9): *ibid.*, ss. 69, 70, are inapplicable to London. For borrowing powers, see p. 444, *post*.

(*r*) See Theatres Act, 1843 (6 & 7 Vict. c. 68), s. 3; and title THEATRES AND OTHER PLACES OF ENTERTAINMENT. The jurisdiction of the Court of Aldermen as to music and dancing licences within the City was transferred to the County Council by the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 41 (1) (a). A swimming bath in London may be licensed by the County Council for music or dancing or both (see Baths and Washhouses Act, 1896 (59 & 60 Vict. c. 59), ss. 2, 3). The Council also licenses cinematograph entertainments (Cinematograph Act, 1909 (9 Edw. 7, c. 30); see *London County Council* v. *Bermondsey Bioscope Co.* (1910), 27 T. L. R. 141).

(*s*) Racecourses Licensing Act, 1879 (42 & 43 Vict. c. 18), s. 3; see title GAMING AND WAGERING, Vol. XV., pp. 286, 287.

(*t*) See Local Government Act, 1888 (51 & 52 Vict. c. 41), ss. 17—19, 24 (c); Housing, Town Planning etc. Act, 1909 (9 Edw. 7, c. 44), s. 70; and title LOCAL GOVERNMENT, Vol. XIX., p. 346.

(*u*) See Local Government Act, 1888 (51 & 52 Vict. c. 41), ss. 11, 41 (4), as affected by the London Government Act, 1899 (62 & 63 Vict. c. 14), s. 6. The provisions of Part I. of the Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), with respect to main roads, extend to the Metropolis (Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 41 (4)); but an Order of the Local Government Board, made on the application of the Council, under the Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), s. 16, that a road in the county, and outside the City, has ceased to be a main road, does not require confirmation by Parliament (London County Council (General Powers) Act, 1896 (59 & 60 Vict. c. clxxxviii.), s. 31). See also title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 200.

(*a*) See Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), ss. 106—109; title PUBLIC HEALTH AND LOCAL ADMINISTRATION; and pp. 402, 422, 430, *post*.

SECT. 1. The Administrative County of London.

The County Council has succeeded to the functions of the managers of the Metropolitan Asylums District (*b*) under the Valuation (Metropolis) Act, 1869 (*c*), and the powers and duties of the clerk to that body under that Act have been transferred to the clerk of the County Council (*d*).

In other respects, the provisions of the Local Government Act, 1888 (*e*), with respect to the powers, duties, and liabilities of county councils, and the transfer of property, debts, and liabilities of counties to county councils, apply to the administrative County of London in like manner, as nearly as circumstances admit, as if the quarter sessions, justices, and clerks of the peace of the counties of Middlesex, Surrey, and Kent had been, so far as regards the Metropolis, the quarter sessions, justices, and clerk of the peace for the administrative County of London (*f*).

Valuation.

Application of Local Government Act, 1888.

1002. The London County Council succeeded to the powers, duties, property, debts, and liabilities of the Metropolitan Board of Works, and the officers and servants of that Board became officers and servants of the Council (*g*). This transfer gave the Council jurisdiction with respect to main drainage (*h*); new streets, including formation, building line, naming and numbering of houses; street improvements; height of buildings; width of streets; the regulation and supervision of building operations; dangerous structures; temporary structures (*i*); Thames bridges, tunnels and embankments (*k*); unhealthy areas and houses; housing of the

Transfer of powers of Metropolitan Board of Works.

(*b*) See p. 411, *post*.

(*c*) 32 & 33 Vict. c. 67; see title RATES AND RATING.

(*d*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 44.

(*e*) 51 & 52 Vict. c. 41.

(*f*) *Ibid.*, s 40 (6); see *ibid.*, s. 40 (7), as to the apportionment of property, debts, and liabilities.

(*g*) *Ibid.*, ss. 40 (8), 118 (14); Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), ss. 135, 137, 138. The Metropolitan Board of Works has ceased to exist. The bye-laws, orders, and regulations of the Board in force at the date of transfer were continued in force (see Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 123). As to transferred officers and compensation for loss of office, see title PUBLIC AUTHORITIES AND PUBLIC OFFICERS.

(*h*) See title SEWERS AND DRAINS.

(*i*) See pp. 406, 463, 470 *et seq.*, *post*, and title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 198—211.

(*k*) The powers of the justices of the City of London with respect to county bridges were transferred to the London County Council by virtue of the Local Government Act, 1888 (51 & 52 Vict. c. 41), ss. 3 (viii.) 41 (1) (b). The Council took over from the Metropolitan Board of Works, under *ibid.*, s. 40 (8), the following bridges over the Thames:—Hammersmith, Putney, Wandsworth, Albert, Chelsea, Vauxhall, Lambeth, Westminster, and Waterloo, also Deptford Creek Bridge. These are now county bridges (London County Council (General Powers) Act, 1895 (58 & 59 Vict. c. cxxvii.), s. 46). The footbridge at Charing Cross belongs to the South-Eastern Railway Company, but the public have a right of footway thereover (Metropolis Toll Bridges Act, 1877 (40 & 41 Vict. c. xcix.) The Council also controls the Victoria Embankment, with Cleopatra's Needle (see Monuments (Metropolis) Act, 1878 (41 & 42 Vict. c. 29)), the Albert Embankment, and the Chelsea Embankment. Special powers as to lighting the Victoria Embankment and Westminster and Waterloo Bridges were conferred by the London County Council (General Powers) Act, 1893 (56 & 57 Vict. c. cxxi.), s. 20. The Council may provide and maintain sanitary conveniences on the Victoria Embankment (London

SECT. 1. The Administrative County of London.

working classes (*l*); parks, gardens, squares, commons, and open spaces (*m*); gas testing (*n*); tramways (*o*); explosives (*p*); protection from fire (*q*); public health and sanitation (*r*); and many other matters, together with powers as to borrowing, rating, and finance (*s*).

Conferred powers.

1003. Beyond the powers so transferred and those exercised in common with other county councils, many powers and duties have been specially conferred upon the County Council by both public and private Acts of Parliament (*t*). The Council is a highway authority for the purposes of Part II. (which deals with road improvement) of the Development and Road Improvement Funds Act, 1909 (*u*), as respects the administrative County of London (*a*); a local authority for the protection of dangerous places on canals (*b*), and for Part I. of the Children Act, 1908 (*c*) (which deals with infant life protection), and it may institute proceedings under Part II. of that Act (*c*) (which deals with the prevention of cruelty (*d*)); and it is the authority for making exemption orders as regards lights on vehicles (*e*).

Road improvement.

Canals.

Children.

Lights on vehicles.

County Council (General Powers) Act, 1911 (1 & 2 Geo. 5, c. lxiii.), s. 13). As to special powers with regard to subways etc., see pp. 398, 405, *post*. As to the City bridges, see p. 428, *post*. See also title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 200.

(*l*) See title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*m*) See Metropolitan Board of Works Act, 1877 (40 & 41 Vict. c. viii.); Metropolitan Board of Works (Various Powers) Act, 1887 (50 & 51 Vict. c. cvi.); London Council (General Powers) Act, 1890 (53 & 54 Vict c. ccxliii.), ss. 14—21; London County Council (General Powers) Act, 1898 (61 & 62 Vict. c. ccxxi.), s 61; London County Council (General Powers) Act, 1905 (5 Edw. 7, c ccvi.), ss. 30—32; Town Gardens Protection Act, 1863 (26 & 27 Vict. c. 13), Metropolitan Commons Act, 1866 (29 & 30 Vict. c. 122); Metropolitan Commons Amendment Act, 1869 (32 & 33 Vict. c. 107); Commons Act, 1876 (39 & 40 Vict. c. 56), ss. 20, 30, 31; Metropolitan Commons Act, 1878 (41 & 42 Vict c. 71); Open Spaces Act, 1906 (6 Edw. 7, c. 25), ss. 15 (2), 19; and titles COMMONS AND RIGHTS OF COMMON, Vol. IV., p. 610; OPEN SPACES AND RECREATION GROUNDS.

(*n*) See title GAS, Vol. XV., pp. 375—393, for gas supply in the Metropolis, and *ibid.*, p. 390, for gas examiners.

(*o*) See title TRAMWAYS AND LIGHT RAILWAYS

(*p*) See title EXPLOSIVES, Vol. XIV., pp. 355 *et seq.*

(*q*) See pp 417, 488, *post*; and titles CORONERS, Vol. VIII., p. 296; FACTORIES AND SHOPS, Vol. XIV., p. 467; PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*r*) See title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*s*) See p. 438, *post*, and title RATES AND RATING.

(*t*) A list of these statutes for the time being in force is appended to the annual report of the London County Council.

(*u*) 9 Edw. 7, c. 47.

(*a*) *Ibid*, s 15; see title HIGHWAYS, STREETS, AND BRIDGES, Vol., XVI., p. 201.

(*b*) Canals Protection (London) Act, 1898 (61 & 62 Vict. c. 16); see title RAILWAYS AND CANALS.

(*c*) 8 Edw 7, c. 67.

(*d*) Children Act, 1908 (8 Edw. 7, c. 67), ss. 10 (1), 34 (2); see title INFANTS AND CHILDREN, Vol. XVII., p. 162.

(*e*) Lights on Vehicles Act, 1907 (7 Edw. 7, c. 45), s. 3 (5); see title STREET AND AERIAL TRAFFIC. The Council may prescribe that vehicles shall carry a light of particular colour during the hours of darkness (*Adamson v. Miller* (1900), 16 T. L. R. 185).

1004. The County Council may conduct inquiries and negotiations relative to markets and market rights not the property of or under the control of the Corporation of the City, and the expediency of establishing new markets in or near the administrative county, and may pay the expenses of such inquiries, not exceeding £1,000, out of the county fund (*f*); and may expend money, not exceeding, unless under express powers, £1,000 in any one financial year, in investigating subjects of general importance to the inhabitants of the county as such (*g*).

Markets. Investigations.

1005. The County Council may purchase by agreement buildings or places of historical or architectural interest, or works of art, and may undertake, or contribute towards, the cost of preserving, maintaining, and managing any such buildings or places; and may erect and maintain, or contribute towards the provision, erection, and maintenance of works of art in London (*h*), and towards the exhibition and preservation of works of art and objects of historical, antiquarian, or other public interest (*i*).

Places of historical interest. Works of art etc.

1006. The County Council exercises in London the powers as to allotments, the expenses being defrayed and money being borrowed under and in accordance with the Local Government Act, 1888 (*k*).

Allotments.

1007. Both the County Council and metropolitan borough councils may erect lavatories and conveniences upon a disused burial ground under their control, subject to obtaining a faculty for the purpose in respect of a ground which has been consecrated (*l*).

Disused burial grounds.

1008. The County Council may maintain or subsidise bands to provide music in parks, gardens, open spaces, and in any place within the county (*m*), and may establish and maintain an ambulance service (*n*).

Music. Ambulances.

1009. The County Council has important powers in relation to the execution of works on the river Thames (*o*) for purification

Rivers Thames and Lea.

(*f*) London County Council (General Powers) Act, 1891 (54 & 55 Vict. c. ccvi.), s. 70. As to the rights of the City Corporation in respect of markets, see p. 428, *post*, as to markets generally, see title MARKETS AND FAIRS, pp. 1 *et seq.*, *ante*.

(*g*) London County Council (General Powers) Act, 1893 (56 & 57 Vict. c. ccxxi.), s. 12.

(*h*) London County Council (General Powers) Act, 1898 (61 & 62 Vict. c. ccxxi.), s. 60.

(*i*) London County Council (General Powers) Act, 1906 (6 Edw. 7, c. cl.), ss. 30—38.

(*k*) Small Holdings and Allotments Act, 1908 (8 Edw. 7, c. 36), s. 36. The Local Government Board may confer on any sanitary authority in the administrative County of London the powers of a parish council as to allotments (Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 33; and see title ALLOTMENTS, Vol. I., pp. 343, 360.

(*l*) London County Council (General Powers) Act, 1900 (63 & 64 Vict. c. cclxviii.), s. 29. As to such faculties, see titles BURIAL AND CREMATION, Vol. III., p. 423; ECCLESIASTICAL LAW, Vol. XI., p. 540.

(*m*) London Council (General Powers) Act, 1890 (53 & 54 Vict. c. ccxliii.), s. 21; London County Council (General Powers) Act, 1893 (56 & 57 Vict. c. ccxxi.), s. 18.

(*n*) Metropolitan Ambulances Act, 1909 (9 Edw. 7, c. 17). This power does not extend to the City.

(*o*) The Thames above Teddington is under the control of the Conservators

SECT. 1. The Administrative County of London.

purposes (*p*), and on the river and its tributaries, within the limits of the Metropolis, for the prevention of floods and the maintenance of the river banks, and may require such works to be executed by the Corporation of the City, or metropolitan borough councils, or the owners of particular premises, and in default may itself do the work (*q*).

Flood works to be constructed on the river Lea by or under the requirements of the Council must first be approved by the Lea Conservancy Board (*r*).

Woolwich ferry.

The Council controls and works the ferry across the Thames at Woolwich, and has made bye-laws for its regulation (*s*); it possesses special statutory powers to run a service of steamboats on the river (*t*), and maintains, repairs, and lights the subways under the Thames at Woolwich (*a*) and Rotherhithe (*b*).

Miscellaneous powers.

1010. Other special powers relate to the manufacture and sale of ice-cream (*c*), the licensing and control of common lodging-houses and their keepers (*d*), the provision of accommodation for retail street

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(see p. 413, *post*), and, below that point, of the Port of London Authority (see pp. 410, 414, *post*).

(*p*) Metropolis Management Amendment Act, 1858 (21 & 22 Vict. c. 104), s. 2. As to the consent of the Admiralty, see *ibid.*, s. 27; *Brownlow* v. *Metropolitan Board of Works* (1863), 13 C. B. (N. S.) 768.

(*q*) See Metropolis Management (Thames River Prevention of Floods) Amendment Act, 1879 (42 & 43 Vict. c. cxcviii.); Metropolitan Board of Works (Various Powers) Act, 1882 (45 & 46 Vict. c. lvi.), ss. 46—48; London County Council (General Powers) Act, 1907 (7 Edw. 7, c. clxxv.), ss. 41—44.

(*r*) Metropolis Management (Thames River Prevention of Floods) Amendment Act, 1879 (42 & 43 Vict. c. cxcviii.), s. 19. As to the regulation of works under or over the river Lea, see Metropolis Management Amendment Act, 1858 (21 & 22 Vict. c. 104), s. 30.

(*s*) Metropolitan Board of Works (Various Powers) Act, 1885 (48 & 49 Vict. c. clxvii.), ss. 14—23; London County Council (General Powers) Act, 1892 (55 & 56 Vict. c. ccxxxviii.), s. 39; London County Council (General Powers) Act, 1894 (57 & 58 Vict. c. ccxii.), ss. 5—7; Thames Tunnel (North and South Woolwich) Act, 1909 (9 Edw. 7, c. lxviii.).

(*t*) Thames River Steamboat Service Act, 1904 (4 Edw. 7, c. cciii.); Thames River Steamboat Service Act, 1904 (Amendment) Act, 1908 (8 Edw. 7, c. xcviii.). The service has been suspended. For the power to charge tolls in respect of piers and landing-places, see *ibid.*

(*a*) Thames Tunnel (North and South Woolwich) Act, 1909 (9 Edw. 7, c. lxviii.), s. 6.

(*b*) Thames Tunnel (Rotherhithe and Ratcliff) Act, 1900 (63 & 64 Vict. c. ccxix.); London County Council (General Powers) Act, 1909 (9 Edw. 7, c. cxxx.), s. 62.

(*c*) London County Council (General Powers) Act, 1902 (2 Edw. 7, c. clxxiii.), ss. 42—44. Proceedings under these provisions are instituted by the borough councils as sanitary authorities, and they receive the penalties (London County Council (General Powers) Act, 1904 (4 Edw. 7, c. ccxliv.), s. 48); and see title FOOD AND DRUGS, Vol. XV., p. 70.

(*d*) The former jurisdiction of the Commissioners of Police of the Metropolis as the local authority in the administrative county under the Common Lodging Houses Acts, 1851 and 1853 (14 & 15 Vict. c. 28; 16 & 17 Vict. c. 41), was transferred to the County Council by the Local Government Board's Provisional Orders Confirmation (No. 12) Act, 1894 (57 & 58 Vict. c. cxxiv.); London County Council (General Powers) Act, 1902 (2 Edw. 7, c. clxxiii.), ss. 46—57; London County Council (General Powers) Act, 1904 (4 Edw. 7, c. cclxiv.), s. 47; London County Council (General Powers) Act, 1907 (7 Edw. 7, c. clxxv.), s. 79; see also Public Health Acts Amendment Act,

vendors (*e*), the licensing of depôts for the reception of horses for slaughter or the carcases of dead horses (*f*), the registration of employment agencies (*g*), the maintenance of a golf course in Hainhault Forest (*h*), and the appointment of special constables (*i*). The duties of the Council under the London Building Acts (*k*), the sanitary powers of the Council (*l*), and its position as a local education authority (*m*), are dealt with elsewhere.

Bills in Parliament.

1011. In addition to the general powers of a county council to promote or oppose bills in Parliament (*n*), the County Council may promote bills when it appears that further powers are required for the purpose of any work for the improvement of the Metropolis or the public benefit of the inhabitants, including the provision of parks, pleasure grounds, places of recreation and open spaces (*o*), or relating to the supply of water in London (*p*).

Legal proceedings generally.

1012. The County Council has the same general power of expending public funds in prosecuting or defending any legal proceedings necessary for the promotion or protection of the interests of the inhabitants of the county as has the council of a municipal borough under the Borough Funds Acts (*q*); but in the case of the County Council no consent of the electors is necessary (*r*).

1907 (7 Edw. 7, c. 53), ss. 69—75, and title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*e*) London County Council (General Powers) Act, 1903 (3 Edw. 7, c. clxxxvii.), ss. 50—52. As to pedlars, see title MARKETS AND FAIRS, pp. 57 *et seq.*, *ante*.

(*f*) London County Council (General Powers) Act, 1903 (3 Edw. 7, c. clxxxvii.), ss. 53—56; see titles ANIMALS, Vol. I., p. 412; PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*g*) London County Council (General Powers) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. cxxix.), ss. 20—28. The County Council may make bye-laws as to the conduct of such agencies. As to compelling the Council to hear an application for a licence for an employment agency, see *R.* v. *London County Council, Ex parte Thornton* (1911), 27 T. L. R. 422. In the City these powers are exercised by the Corporation. See also title WORK AND LABOUR.

(*h*) London County Council (General Powers) Act, 1909 (9 Edw. 7, c. cxxx.), s. 56.

(*i*) London County Council (General Powers) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. cxxix.), s. 44; see title POLICE.

(*k*) See p. 470, *post*.

(*l*) See pp. 409, 463, *post*, and title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*m*) See title EDUCATION, Vol. XII., p. 52. Under the London County Council (General Powers) Act, 1911 (1 & 2 Geo. 5, c. lxiii.), s. 15, notices required to be given under the Children Act, 1908 (8 Edw. 7, c. 67), s. 122 (cleansing of verminous children), may be issued by the clerk to the County Council.

(*n*) See Local Government Act, 1888 (50 & 51 Vict. c. 41), s. 15; County Councils (Bills in Parliament) Act, 1903 (3 Edw. 7, c. 9). The provisions of the Borough Funds Act, 1872 (35 & 36 Vict. c. 91), were applied to the County Council by the Local Government Act, 1888 (51 & 52 Vict. c. 41); see, generally, title LOCAL GOVERNMENT, Vol. XIX., pp. 380 *et seq.* As to promotion of bills in Parliament, generally, see title PARLIAMENT.

(*o*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 144; Metropolis Management Amendment Act, 1856 (19 & 20 Vict. c. 112), s. 10.

(*p*) London Water Act, 1892 (55 & 56 Vict. c. cxxx.), s. 2; but see the Metropolis Water Act, 1902 (2 Edw. 7, c. 41), and title WATER SUPPLY.

(*q*) 1872 (35 & 36 Vict. c. 91); 1903 (3 Edw. 7, c. 14); see title LOCAL GOVERNMENT, Vol. XIX., pp. 380, 381.

(*r*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 15; County Councils (Bills in Parliament) Act, 1903 (3 Edw. 7, c. 9), s. 1 (1), (5); and see title LOCAL GOVERNMENT, Vol. XIX., p. 381.

SECT. 1. The Administrative County London.

The expenses incurred are general county expenses, unless the Council declares them to be special expenses: against such a declaration the overseers of a parish aggrieved may appeal to the Local Government Board (*s*).

The County Council is exempt from all provisions requiring recognisances to be entered into by parties to appeals or other legal proceedings (*t*).

SECT. 2.—*The City of London.*

Extent of the City.

1013. The expression "the City of London" includes all parts formerly within the jurisdiction of the Commissioners of Sewers for the City of London (*u*). The Commissioners have been abolished, and their powers, authorities, and duties have been transferred to the Common Council of the City of London (*v*), who would seem, therefore, to exercise jurisdiction over much the same geographical area, which is about a square mile in extent; comprising the area between the old City walls and certain liberties without the walls (*w*). For the purposes of the London Government Act, 1899 (*x*), the Inner and Middle Temples are deemed to be within the City of London (*a*). For certain very limited purposes the Corporation of the City has jurisdiction in the ancient borough of Southwark (*b*). The City is not a metropolitan borough (*c*), and comprises but one parish for all purposes other than ecclesiastical charitable, or those relating to taxation (*d*).

Wards.

1014. The City of London is divided for the purpose of its municipal government into twenty-five wards of unequal size, which

(*s*) County Councils (Bills in Parliament) Act, 1903 (3 Edw. 7, c. 9), s. 1 (2), (3).

(*t*) London County Council (General Powers) Act, 1893 (56 & 57 Vict. c. ccxxi.), s. 11.

(*u*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 250; London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 5 (43). For the extent of the jurisdiction of the Commissioners of Sewers, see City of London Sewers Act, 1848 (11 & 12 Vict. c. clxiii), s. 262.

(*v*) City of London Sewers Act, 1897 (60 & 61 Vict. c. cxxxiii.); see pp. 426, 428, *post*.

(*w*) By Orders in Council made pursuant to the London Government Act, 1899 (62 & 63 Vict. c. 14), s. 17, the area of the City was slightly lessened.

(*x*) 62 & 63 Vict. c. 14.

(*a*) *Ibid.*, s. 22.

(*b*) Certain parishes in Southwark and Newington are constituted as the metropolitan borough of Southwark, but the Mayor, Commonalty, and Citizens, and the Court of Aldermen of the City of London, appoint certain officers and may exercise certain powers within the borough (see London Government Act, 1899 (62 & 63 Vict. c. 14), s. 16 (3)). The Corporation appoints the steward and high bailiff of Southwark, the coroner for Southwark, and the judge of the Southwark Borough Court (see title COURTS, Vol. IX., p. 202), and is lord of three manors in the borough. The City justices hold courts of quarter sessions for Southwark (see titles COURTS, Vol. IX., p. 203; MAGISTRATES, Vol. XIX., p. 622).

(*c*) London Government Act, 1899 (62 & 63 Vict. c. 14), s. 1. But *ibid.*, s. 7, dealing with expenses incidental to the transfer of powers and duties, applies as if the Common Council were the council of a metropolitan borough (*ibid.*, s. 7 (3)); see p. 402, *post*. For educational purposes, too, the City is in the same position as a metropolitan borough (Education (London) Act, 1903 (3 Edw. 7, c. 24), s. 4 (2)); see title EDUCATION, Vol. XII., p. 53.

(*d*) City of London (Union of Parishes) Act, 1907 (7 Edw. 7, c. cxl.), s. 5.

between them return two hundred and six common councillors to the Court of Common Council (*e*).

The county of the City.

1015. The City is a distinct and separate county for non-administrative purposes, under the name of the County of the City of London, but if and when the Mayor, Commonalty, and Citizens of the City assent to jurisdiction being conferred therein on the justices and court of quarter sessions of the county of London, such jurisdiction may be conferred by commission under the Great Seal (*f*).

The City is also a separate county for the purposes of the Militia Act, 1882 (*g*), and the Commissioners of Lieutenancy of the City act as the lieutenant of the county (*h*).

Sheriffs.

1016. The City has two sheriffs who are elected in Common Hall (*i*) on Midsummer Day, and, after having been approved by the Sovereign, are sworn in at the Guildhall on the 28th September (*j*). Refusal to accept office entails a fine of £200, unless the person claiming exemption can show that he is not worth £30,000 (*k*). The sheriffs of the City have no authority except in the City (*l*).

SECT. 3.—*The County of London.*

County of London.

1017. For non-administrative purposes, such portion of the administrative county of London, excluding the City, as forms part of the geographical counties of Middlesex, Surrey and Kent, is severed from those counties and formed into a separate county by the name of the County of London, with a sheriff, a commission of the peace, and a court of quarter sessions. All enactments, laws, and usages with respect to counties in England and Wales, and to sheriffs, justices, and quarter sessions, apply, so far as circumstances admit, to the County of London (*m*).

(*e*) For a list of the wards and of the number of councillors returned to each, see Statement of the Corporation to the Royal Commission of 1893. The ward of Bridge Without does not return a common councilman, but has an alderman, who is, in practice, the senior alderman who has passed the chair; see note (*c*), p. 424, *post*.

(*f*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 40 (3). For the Great Seal, see title CONSTITUTIONAL LAW, Vol. VII., pp. 8—17, 60, 61. As to the court of quarter sessions for the City, see titles COURTS, Vol. IX., pp. 177, 178; MAGISTRATES, Vol. XIX., p. 622. The Tithe Commutation Acts do not apply to the City (Tithe Act, 1836 (6 & 7 Will. 4, c. 71), s. 90). For tithe in the City, see title ECCLESIASTICAL LAW, Vol. XI., p. 752.

(*g*) 45 & 46 Vict. c. 49, s. 50; Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 38; see title ROYAL FORCES.

(*h*) See Militia Act, 1882 (45 & 46 Vict. c. 49), s. 50; Local Government Act, 1888 (51 & 52 Vict. c. 41), ss. 59 (2), 91.

(*i*) See p. 429, *post*.

(*j*) Act of the Common Council, 1878.

(*k*) Half the penalty is paid to the Freemen's Orphan School and half to the persons who actually take up the office of sheriff. No one can be compelled to serve a second time.

(*l*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 41 (8). As to sheriffs generally, see title SHERIFFS AND BAILIFFS.

(*m*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 40 (2). The old Liberty of the Tower has been merged in the County of London; see *ibid.*, s. 48 (1), and Order in Council dated 30th April, 1894 (*London Gazette*, 11th May, 1894, p. 2669), by which it was provided that the former exclusive

SECT. 3. **The County of London.**

For purposes connected with legal proceedings the counties of London and Middlesex are deemed to be one county (*n*).

Clerk of the peace.

1018. The clerk of the peace for the County of London must be a separate officer from the clerk of the London County Council, and, subject to the directions of the quarter sessions, has charge of, and is responsible for, the records and documents of those sessions and of the justices out of session (*o*).

SECT. 4.—*The Metropolitan Boroughs.*

Metropolitan boroughs.

1019. The whole of the administrative County of London, exclusive of the City of London (*p*), is divided into twenty-eight metropolitan boroughs, for each of which a borough council has been established and incorporated (*q*). To such councils have been transferred the powers, duties, property, and liabilities (*r*) of the elective vestries and district boards (*a*) that formerly exercised jurisdiction over any

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jurisdiction of the Tower should cease, and that the Liberty should be united with and form part of the County of London for all purposes for which the justices of the Liberty had hitherto exercised separate jurisdiction. The lieutenant and the sheriff of the County of London are appointed by the Crown, and the sheriffs of the City have no authority therein (Local Government Act, 1888 (51 & 52 Vict. c. 41), ss. 40 (2), 41 (8), 91). The Militia Acts apply to the County of London as they apply to other counties (*ibid.*, s. 91). For the quarter sessions for the County of London, and the chairman and deputy-chairman thereof, see title MAGISTRATES, Vol. XIX., p. 621. The London County Council, not the Standing Joint Committee of Quarter Sessions and County Council, decides where the courts of quarter sessions shall be held in the county (*County of London Standing Joint Committee* v. *London County Council* (1911), 27 T. L. R. 473). It is for the County Council to determine whether any and what new site for a court-house should be acquired, but for a Standing Joint Committee to determine what accommodation shall be provided on the site, and when the committee has decided the County Council must provide the accommodation demanded (*ibid.*, at p. 567). For the application of enactments relating to juries, see title JURIES, Vol. XVIII., pp. 230, 238.

(*n*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 89.

(*o*) *Ibid.*, s. 83 (11). As to the appointment, duties, and office of the clerk of the peace and the appointment of a deputy, see titles LOCAL GOVERNMENT, Vol. XIX., p. 343; MAGISTRATES, Vol. XIX., p 624.

(*p*) The boundaries of the boroughs were fixed by Orders in Council made pursuant to the London Government Act, 1899 (62 & 63 Vict. c. 14), ss. 1, 15—22. For a list of these Orders, see Stat. R. & O., 1900, p. 988.

(*q*) London Government Act, 1899 (62 & 63 Vict. c. 14), ss. 1, 17, and Orders in Council made thereunder; see Stat. R. & O., 1900, Nos. 380—407 inclusive, and p. 430, *post*.

(*r*) The expressions "powers," "duties," "property," "liabilities," and "powers, duties, and liabilities," have respectively the same meanings as in the Local Government Act, 1888 (51 & 52 Vict. c. 41) (London Government Act, 1899 (62 & 63 Vict. c. 14), s 34). An action for damages will lie for neglect of duty (*Holborn Union Guardians* v. *St. Leonard, Shoreditch, Vestry* (1876), 2 Q. B. D. 145; *Meek* v. *Whitechanel Board of Works* (1860), 2 F. & F. 144).

(*a*) The expression "elective vestry" means any vestry elected under the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120) (London Government Act, 1899 (62 & 63 Vict. c. 14), s. 34). The Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), set up the Metropolitan Board of Works (now superseded by the London County Council (see p. 395, *ante*)) as the administrative centre for the local government of London, and twenty-three elective vestries and fifteen district boards of works, which were abolished by the

part of the area now comprised in the borough, including their powers and duties under any local Act (*b*). In case of doubts as to the extent of any such transfer the decision of the High Court may be obtained (*c*).

Woolwich.

1020. Woolwich, which formerly occupied a unique position in the scheme of metropolitan local government, has been brought into line with the rest of the Metropolis, and now constitutes a metropolitan borough, and is subject to the general law applying to metropolitan boroughs and to the various enactments applying to London. The borough council, however, still retains the old rights of the local board to make contributions for the purpose of technical education (*d*) and to carry on a market (*e*).

Highway powers.

1021. By virtue of this transfer, or under subsequent legislation, a borough council have the powers and duties of surveyors of

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London Government Act, 1899 (62 & 63 Vict. c. 14), and their functions taken over by the metropolitan borough councils, which were declared to be the successors of the old bodies (*ibid.*, s. 4 (1)). Acts of Parliament referring to the latter are to be construed with due regard to this substitution and transfer (*ibid.*, s. 31 (2)), but references in any Act passed before the 13th July, 1899, to a borough are not to be construed as referring to a metropolitan borough, unless applied thereto by or under the London Government Act, 1899 (62 & 63 Vict. c. 14), or some subsequent enactment (*ibid.*, s. 31 (1)). Generally speaking, the powers of a borough council extend to the whole of the borough, but where a power under an Act relates only to some part of a borough, the exercise of such power, and its extent, will depend upon the scheme settled for that particular borough (*ibid.*, s. 4 (3)).

(*b*) London Government Act, 1899 (62 & 63 Vict. c. 14), ss. 4, 17. A map showing the area comprised within, and the boundary lines of, each metropolitan borough is deposited at the office of the Privy Council, at the office of the clerk of the London County Council, and at the office of the town clerk of the borough, the two last mentioned maps being open to inspection. Copies of or extracts from any map so deposited with the clerk of the county council or the town clerk, and certified by him to be true, are received as evidence of the contents of that map (Orders in Council dated 15th May and 7th August, 1900).

(*c*) London Government Act, 1899 (62 & 63 Vict. c. 14), s. 29. It is not the practice for the court to order costs to be paid on a case stated under this provision (*Paddington Borough Council* v. *Kensington Royal Borough Council* (1911), 105 L. T. 35; and see *Re Salop County Council* (1891), 65 L. T. 416). The proceedings will be the same as in the case of doubts arising under the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 29. For cases under this section, see title LOCAL GOVERNMENT, Vol. XIX., p. 367, note (*n*); and see title MAGISTRATES, Vol. XIX., p. 635, note (*a*). The rights exercised by the council must not be inconsistent with the powers of the other party under a private Act of Parliament (*Surrey Commercial Dock Co.* v. *Bermondsey Corporation*, [1904] 1 K. B. 474).

(*d*) See title EDUCATION, Vol. XII., p. 53, note (*e*).

(*e*) London Government Act, 1899 (62 & 63 Vict. c. 14), s. 19, and Order in Council made thereunder, dated 7th August, 1900. With regard to the market carried on by the Woolwich Local Board, and now by the Corporation, the scheme under the Act provided that the profits of carrying on the market should be applied in defraying the costs thereof, that any balance should be credited to the parish of Woolwich, and that any costs which the borough council incurred in respect of the market and which were not defrayed out of the profits thereof, should be raised by a rate levied in the parish of Woolwich, together with, and as an additional item of, the general rate. The Woolwich borough council is not a market authority under the Public Health Act, 1875 (38 & 39 Vict. c. 55). As to such authorities, see title MARKETS AND FAIRS, pp. 11, 23, *ante*.

SECT. 4. The Metropolitan Boroughs.

highways within the borough (*f*). The borough council may be required by the County Council to undertake the maintenance and repair of any highway in the borough which is repairable by the County Council by reason of its being the roadway and footway of a bridge, embankment, or otherwise, on terms to be agreed or determined by the Local Government Board, in which case the borough council will have the same powers and be subject to the same duties and liabilities as if the highway was vested in it (*g*).

Sanitary powers.

1022. Subject to the control of the County Council, a borough council supervises the drainage and sewerage of the borough (*h*) and is the sanitary authority for the borough (*i*), and enforces the sanitary provisions of the Factory and Workshop Acts, 1901 and 1907 (*k*), with respect to bakehouses and workshops, and the Acts relating to adulteration and the sale of unwholesome food (*l*).

Powers as "local authority" etc.

1023. The borough council is the local authority under various Acts relating to electric lighting (*m*), gas (*n*), open spaces (*o*), tramways (*p*), water (*q*), the housing of the working classes (*r*), buildings (*s*), shop hours (*t*), the employment of children (*a*), and the

(*f*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), ss. 90, 96; Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 73 (for the powers of the council as to street improvement see *ibid.*, s. 72); and see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 200 *et seq.* A borough council may repair footways in streets not repairable by them (London County Council (General Powers) Act, 1911 (1 & 2 Geo. 5, c. lxiii.), s. 14).

(*g*) London Government Act, 1899 (62 & 63 Vict. c. 14), s. 6 (2).

(*h*) See title SEWERS AND DRAINS. Main sewers remain under the supervision of the County Council (see p. 395, *ante*). With the consent of the County Council, a metropolitan borough council may transfer its duties in relation to sewerage and drainage to the County Council (Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 89; Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 28). Plans for new drains must be submitted to the council (*Bethnal Green Vestry* v. *London School Board*, [1898] A. C. 190).

(*i*) See p. 408, *post*, and title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*k*) 1 Edw. 7, c. 22, s. 153 (4); 7 Edw. 7, c. 39; see title FACTORIES AND SHOPS, Vol. XIV., p. 527.

(*l*) See title FOOD AND DRUGS, Vol. XV., pp. 8, 42.

(*m*) See title ELECTRIC LIGHTING AND POWER, Vol. XII., pp. 541 *et seq.* The consent of the borough council is required to the obtaining by undertakers of electric lighting orders (*ibid.*, p. 616), and the council may itself undertake the electric lighting of the borough. Where a metropolitan borough council is authorised to supply and is supplying electrical energy, it may supply electric wiring and fittings, motors, and apparatus to its customers (London County Council (General Powers) Act, 1906 (6 Edw. 7, c. cl.), ss. 27—29; see title ELECTRIC LIGHTING AND POWER, Vol. XII., p. 624). As to the powers of a municipal corporation outside the London area, see *A.-G.* v. *Leicester Corporation*, [1910] 2 Ch. 359.

(*n*) See title GAS, Vol. XV., pp. 305 *et seq.*

(*o*) Open Spaces Act, 1906 (6 Edw. 7, c. 25), s. 1; see title OPEN SPACES AND RECREATION GROUNDS.

(*p*) See title TRAMWAYS AND LIGHT RAILWAYS.

(*q*) See title WATER SUPPLY.

(*r*) Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70); Housing of the Working Classes Act, 1903 (3 Edw. 7, c. 39); see title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*s*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.); London Building Acts Amendment Act, 1905 (5 Edw. 7, c. ccix.); see p. 470, *post*.

(*t*) Shop Hours Act, 1904 (4 Edw. 7, c. 31), s. 8; see title FACTORIES AND SHOPS, Vol. XIV., p. 528.

(*a*) Employment of Children Act, 1903 (3 Edw. 7, c. 45), s. 13; see title INFANTS AND CHILDREN, Vol. XVII., p. 150.

notification of births (*b*). It is its duty to enforce the law relating to barbed wire (*c*), overhead wires (*d*), canal boats (*e*), the protection of dangerous places on canals (*f*), and the use of steam whistles (*g*). It may make complaints to the Local Government Board of offences in connection with alkali works (*h*), and, to justices, of the default of railway companies in keeping bridges or other works in repair (*i*); and it may provide and maintain public clocks in the borough at the charge of the general rate (*k*).

Adoptive Acts.

1024. The Baths and Washhouses Acts (*l*), the Burial Acts (*m*), and the Public Libraries Acts (*n*) may be adopted in a metropolitan borough in like manner as in a borough outside London, and not otherwise (*o*), and where any such Act does not now extend to the whole borough it may be adopted in the rest of the borough, and the borough council will be the authority for administering the Act (*p*). A borough council is an "urban authority" within the meaning of the Museums and Gymnasiums Act, 1891 (*q*).

(*b*) Notification of Births Act, 1907 (7 Edw. 7, c. 40), s. 2 (4); see title MEDICINE AND PHARMACY, p. 339, *ante*.

(*c*) Under the Barbed Wire Act, 1893 (56 & 57 Vict. c. 32); see titles BOUNDARIES, FENCES, AND PARTY WALLS, Vol. III., p. 128; HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 169.

(*d*) See the London Overhead Wires Act, 1891 (54 & 55 Vict. c. lxxvii.); and titles ELECTRIC LIGHTING AND POWER, Vol. XII., p. 641; HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 206; TELEGRAPHS AND TELEPHONES; TRAMWAYS AND LIGHT RAILWAYS. The consent of the council should be obtained by the Postmaster-General before laying underground wires (Telegraph Act, 1863 (26 & 27 Vict. c. 112), s. 9; *Postmaster-General* v. *London Corporation* (1898), 14 T. L. R. 222).

(*e*) See title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*f*) Under the Canals Protection (London) Act, 1898 (61 & 62 Vict. c. 16), authority is conferred upon both the County Council and the borough councils; see title RAILWAYS AND CANALS.

(*g*) Steam Whistles Act, 1872 (35 & 36 Vict. c. 61). A whistle blown by compressed air is within the statute (*Herbert* v. *Leigh Mills Co.* (1889), 53 J. P. 679).

(*h*) See titles NUISANCE; PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*i*) See title RAILWAYS AND CANALS.

(*k*) London County Council (General Powers) Act, 1903 (3 Edw. 7, c. clxxxvii.), s. 65. As to the power of the borough council with regard to the planting of trees in highways, see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 204, 205.

(*l*) For these Acts, see titles LOCAL GOVERNMENT, Vol. XIX., p. 257, note (*m*); PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*m*) For these Acts, see titles BURIAL AND CREMATION, Vol. III., pp. 401 *et seq.*; LOCAL GOVERNMENT, Vol. XIX., p. 257, note (*n*), and *ibid.*, p. 500, for their operation in London. Many, if not all, of the metropolitan borough councils have the powers of a burial board.

(*n*) For these Acts, see titles LOCAL GOVERNMENT, Vol. XIX., p. 257; PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*o*) London Government Act, 1899 (62 & 63 Vict. c. 14), ss. 4 (4), 34; see titles BURIAL AND CREMATION, Vol. III., p. 450; LOCAL GOVERNMENT, Vol. XIX., pp. 257, 267, 311.

(*p*) London Government Act, 1899 (62 & 63 Vict. c. 14), s. 4 (2), (4). See also the Report of the Proceedings of the Commissioners under that Act, dated 15th July, 1907, as to the transfer of powers under the adoptive Acts in the various boroughs.

(*q*) 54 & 55 Vict. c. 22; Public Libraries Act, 1901 (1 Edw. 7. c. 19), s. 13.

SECT. 4. The Metropolitan Boroughs.

1025. Some minor powers of the London County Council connected with wooden structures, the removal of obstructions in streets, the removal of sky-signs (*r*), and the registration of dairymen (*s*) have been transferred to the borough council (*t*), and in certain cases other powers may be exercised by it within the borough concurrently with the general powers of the County Council (*u*).

Powers transferred from County Council.

A borough council may be invested by the County Council with any of the powers and duties of the latter body in connection with the local supervision and control of midwives (*a*).

Method of transfer.

On the application of the County Council and of the majority of the borough councils, the Local Government Board may make a provisional order for transferring to all the borough councils any power exercisable by the County Council, and for transferring to the County Council any power exercisable by the borough councils (*b*).

Enforcing bye-laws.

1026. Each borough council must enforce within its borough the bye-laws and regulations for the time being in force with respect to dairies and milk, slaughter-houses, knackers' yards, and offensive businesses (*c*), and any bye-laws made by the County Council for the regulation and control of hoardings and similar structures used for the purpose of advertising (*d*).

Miscellaneous powers.

Education.

1027. The borough councils appoint two-thirds of the managers of the provided schools in the borough, and the local education authority must consult with the council as to the site of any new public elementary school to be provided in the borough (*e*).

(*r*) See title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 207; and p. 494, *post*.

(*s*) See title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*t*) London Government Act, 1899 (62 & 63 Vict. c. 14), s. 5 (1), Sched. II., Part I.

(*u*) *Ibid.*, s. 5 (2), Sched. II., Part II. These are powers under the London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 170 (see pp. 470, 480, *post*), ss. 197, 200 (11) (h) (see pp. 473, 493, *post*); under the Metropolis Water Act, 1871 (34 & 35 Vict. c. 113), ss. 17—25 (see title WATER SUPPLY); under the Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 7 (see title RAILWAYS AND CANALS); under the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 65, which relates to the acquisition of land (see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 167); power to adopt the Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), Part III. (see title PUBLIC HEALTH AND LOCAL ADMINISTRATION); and power to make bye-laws under the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 23, as applied by the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 16 (see p. 460, *post*, and title LOCAL GOVERNMENT, Vol. XIX., p. 328).

(*a*) Midwives Act, 1902 (2 Edw. 7, c. 17), s. 9; see titles MEDICINE AND PHARMACY, pp. 366 *et seq.*, *ante*; PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*b*) London Government Act, 1899 (62 & 63 Vict. c. 14), s. 5 (3). As to the proceedings of the Local Government Board in such a case, see *ibid.*, s. 28.

(*c*) See titles ANIMALS, Vol. I., pp. 412, 413, 433, 434; FOOD AND DRUGS, Vol. XV., p. 64, note (*g*); PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*d*) See the Advertisements Regulation Act, 1907 (7 Edw. 7, c. 27), ss. 2, 8, and title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*e*) Education (London) Act, 1903 (3 Edw. 7, c. 24), s. 2; and see title EDUCATION, Vol. XII., p. 53, for the general powers of a metropolitan borough council as to education. As to the power of Woolwich to assist technical education, see title EDUCATION, Vol. XII., p. 53, note (*e*).

The council may establish and maintain a labour bureau, the expenses of which will be paid out of the general rate (*f*).

Borough councils are the overseers of every parish within their boroughs: they must appoint such officers as may be required to assist in the transaction of the business, and must defray the expenses of and incidental to the performance of the duties of overseers (*g*). They have the same powers as other borough councils in relation to the promotion and opposing of bills in Parliament and to legal proceedings (*h*).

Overseers.

SECT. 5.—*The Metropolitan Parishes.*

1028. As every parish in the administrative County of London outside the City is within the area of a metropolitan borough and under the jurisdiction of the borough council, who have succeeded to the powers and duties of the elective vestries (*i*), and are the overseers (*k*), the parish has practically ceased to exist as a municipal unit in the Metropolis, though it is still of importance as a unit for purposes of elections and taxation (*l*). For ecclesiastical purposes vestries may still be held in metropolitan parishes (*m*), but references in any Act to the churchwardens and overseers of a parish, except so far as those references relate to the affairs of the church, are construed as references to the council of the borough comprising the parish (*n*), and property vested in the overseers or churchwardens

Position of the parish.

(*f*) Labour Bureaux (London) Act, 1902 (2 Edw. 7, c. 13), ss. 1, 2. A labour bureau is an office or place used for supplying information, either by the keeping of registers or otherwise, respecting employers who desire to engage workpeople and workpeople who seek engagement or employment (*ibid.*, s. 3); see title WORK AND LABOUR. As to the general rate, see pp. 410, 440, *post*; and title RATES AND RATING.

(*g*) London Government Act, 1899 (62 & 63 Vict. c. 14), s. 11 (1). The town clerk (as to this officer, see p. 455, *post*) exercises the powers and duties and is subject to the liabilities of overseers with respect to the preparation of lists of voters (see title ELECTIONS, Vol. XII., pp. 193 *et seq.*) and of jury lists (see title JURIES, Vol. XVIII., p. 233) in the borough, and any document required to be signed by overseers may be signed by the town clerk (London Government Act, 1899 (62 & 63 Vict. c. 14), s. 11 (1)). Nominees of the borough council have been substituted for the overseers as trustees of a charity (*ibid.*, s. 23 (4), and Orders in Council made thereunder on 9th and 25th March, 1901). For the powers and duties of overseers generally, see titles *passim*, and Mackenzie, Overseers' Handbook, 1910, 7th ed.

(*h*) London Government Act, 1899 (62 & 63 Vict. c. 14), s. 6 (6). The council is a "governing body" within the meaning of the Borough Funds Act, 1872 (35 & 36 Vict. c. 91) (*ibid.*), and a "borough" within the operation of the Borough Funds Act, 1903 (3 Edw. 7, c. 14), s. 9. See title LOCAL GOVERNMENT, Vol. XIX., pp. 380 *et seq.*, and the cases cited in 2 Lumley, Public Health, 7th ed., 1520.

(*i*) See p. 402, *ante*.

(*k*) See the text, *supra*.

(*l*) See titles ELECTIONS, Vol. XII., pp. 131 *et seq.*; RATES AND RATING.

(*m*) For ecclesiastical parishes and vestries, see title ECCLESIASTICAL LAW, Vol. XI., pp. 442, 452.

(*n*) London Government Act, 1899 (62 & 63 Vict. c. 14), s. 23 (3). This Act specially provided for safeguarding the powers and duties of a vestry which related to the affairs of the church, or to any interest of a vestry in church property (*ibid.*, s. 23 (1), (2), (3)), and by schemes made thereunder and confirmed by Orders in Council such powers and duties were transferred to and vested in the inhabitants of the ecclesiastical district for the time being attached to the mother church of the parish, and rules were prescribed for the summoning of

SECT. 5. The Metropolitan Parishes.

and overseers, other than property connected with the affairs of the church or held for an ecclesiastical charity within the meaning of the Local Government Act, 1894 (*o*), is vested in the borough council (*p*).

City parishes.

1029. The parishes in the City of London have been united into one for civil purposes, and the administrative powers therein are exercised by the Common Council (*q*).

Apportionment of rate.

1030. If a metropolitan borough comprises more than one parish, the amount to be raised by rate to meet the expenses of the borough council, or other sums payable as part of those expenses, must be divided between the parishes in proportion to their rateable value (*a*).

Education expenses.

1031. The powers of a county council to charge expenses in connection with education on a parish specially benefited by a school or college (*b*), or to credit a parish with money arising from an endowment (*c*), cannot be exercised in respect of a metropolitan parish, but so far as endowments are concerned the Board of Education can settle a scheme for the application of the money (*d*).

Boundaries.

1032. Where the boundaries between any two parishes are irregular or inconvenient the borough councils may readjust them by agreement, and submit the agreement to the Local Government Board, who may confirm it by order under seal (*e*).

SECT. 6.—*The Metropolitan Sanitary Districts.*

Sanitary district.

1033. A sanitary district is the area within which the provisions of the Public Health (London) Act, 1891 (*f*), are executed by a particular sanitary authority (*g*). The metropolitan sanitary authorities within the meaning of that Act are, in the City, the Common Council (*h*), and in a metropolitan borough the borough council (*i*).

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meetings of the inhabitants for the purpose of dealing with church affairs. The Schemes also provided for the due performance of the powers of churchwardens and for many other incidental matters (see Report of the Proceedings of the Commissioners under the Act, and title ECCLESIASTICAL LAW, Vol. XI., p. 457).

(*o*) 56 & 57 Vict. c. 73; see title LOCAL GOVERNMENT, Vol. XIX., pp. 246, 247.

(*p*) London Government Act, 1899 (62 & 63 Vict. c. 14), s. 23 (3). This general vesting clause was subject to the provisions of the Schemes referred to in note (*n*), p. 407, *ante*.

(*q*) City of London (Union of Parishes) Act, 1907 (7 Edw. 7, c. cxl.), s. 5.

(*a*) See London Government Act, 1899 (62 & 63 Vict. c. 14), s. 10 (3).

(*b*) See Education Act, 1902 (2 Edw. 7, c. 42), s. 18 (1), and title EDUCATION, Vol. XII., p 47.

(*c*) Education Act, 1902 (2 Edw. 7, c. 42), s. 13 (2).

(*d*) Education (London) Act, 1903 (3 Edw. 7, c. 24), s. 4, Sched. I. (4).

(*e*) Metropolitan Poor Amendment Act, 1869 (32 & 33 Vict. c. 63), s. 22. See s. 4 of the same Act as to the power of the Board to adjust parts of divided parishes, a power which is probably obsolete since the rearrangement of boundaries under the London Government Act, 1899 (62 & 63 Vict. c. 14).

(*f*) 54 & 55 Vict. c. 76; see also p. 465, *post*.

(*g*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 99 (2).

(*h*) As successors of the Commissioners of Sewers; see *ibid.*, s. 99 (1) (a), p. 400, *ante*.

(*i*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 99 (1) (b), (c), (d);

Duties and powers of sanitary authorities.

1034. It is the duty of the sanitary authority to abate nuisances existing in its district, and to otherwise put in force the powers relating to public health and local government vested in it (*k*), so as to secure the proper sanitary condition of all premises within the district (*l*). The authority may appoint a committee for these purposes (*m*), and any such committee, subject to the terms of their appointment, may serve and receive notices, take proceedings, and empower any officer of the council to make complaints and to take proceedings and other necessary steps (*n*).

A sanitary authority may acquire and hold land for the purposes of its duties without any licence in mortmain (*o*).

Defaulting authority.

1035. If a metropolitan borough council (*p*) makes default in its duty as a sanitary authority, the London County Council may institute proceedings, and do any act which such authority might have done, and recover from it the expenses occasioned thereby (*q*). The London County Council may itself complain to the Local Government Board that a sanitary authority has failed in its duty, and the Board may make an order against the authority and enforce it by mandamus, or appoint the County Council to perform the duty at the cost of the defaulting authority (*r*).

London Government Act, 1899 (62 & 63 Vict. c. 14), s. 1 (1). As regards the extra-parochial places mentioned in the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), Sched. C, see the Holborn, Finsbury, and Westminster (Sanitary Authorities) Scheme, 1900, confirmed by Order in Council of 12th November, 1900; the Borough of Holborn (Gray's Inn) Scheme, confirmed by Order in Council of 15th June, 1901; the Borough of Holborn (Lincoln's Inn) Scheme, confirmed by Order in Council of 25th March, 1901; and the London Government Act, 1899 (62 & 63 Vict. c. 14), s. 22.

(*k*) For these powers, see titles BURIAL AND CREMATION, Vol. III., p. 566 (mortuaries); FOOD AND DRUGS, Vol. XV., p. 42 (unsound food); LOCAL GOVERNMENT, Vol. XIX., pp. 266 *et seq.*, NUISANCE; PUBLIC HEALTH AND LOCAL ADMINISTRATION; WATER SUPPLY. For powers as to dangerous structures, see p. 493, *post*.

(*l*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76). As to special sanitary powers of the authority and of the London County Council, see London County Council (General Powers) Act, 1904 (4 Edw. 7, c. ccxliv.), ss. 19—27 (various); London County Council (General Powers) Act, 1907 (7 Edw. 7, c. clxxv.), ss. 24—35 (samples of milk, and tuberculosis); ss. 36—40 (cleansing of verminous persons); London County Council (General Powers) Act, 1908 (8 Edw. 7, c. cvii.), ss. 5—14 (health visitors, sale of food etc.); London County Council (General Powers) Act, 1909 (9 Edw. 7, c. cxxx), ss. 16—19, 66 (sale of food etc.); and title PUBLIC HEALTH AND LOCAL ADMINISTRATION. For the special powers of the City Corporation, see City of London (Public Health) Act, 1902 (2 Edw. 7, c. cxvi.); London County Council (General Powers) Act, 1908 (8 Edw. 7, c. cvii.), s. 9. Bye-laws made by the County Council under the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), do not extend to the City (*ibid.*, s. 133 (b)).

(*m*) *Ibid.*, s. 99 (3).

(*n*) *Ibid.*, s. 99 (4). An officer must receive a particular direction in each case. It is not enough to empower him generally (*St. Leonard Vestry* v. *Holmes* (1885), 50 J. P. 132).

(*o*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 99 (5).

(*p*) This power does not extend to the case of a default by the corporation of the City (*ibid.*, s. 133 (d)), as to which see p. 422, *post*.

(*q*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 100. Expenses etc. may be recovered in a summary manner (*ibid.*, s. 117).

(*r*) *Ibid.*, s. 101, which see as to the procedure on complaints; also *ibid.*, ss. 117, 129, and the Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 293—296.

SECT 6. **The Metropolitan Sanitary Districts.**

Transfer of powers.

1036. The Local Government Board may assign to the London County Council any powers and duties under the Epidemic Regulations (*s*), which they may deem it desirable should be exercised and performed by the Council, and if the Local Government Board are of opinion that any sanitary authority in whose default the Council has power to proceed and act under the Public Health (London) Act, 1891 (*t*), is making or is likely to make default in the execution of the Regulations, they may by order assign to the Council, for such time as may be specified in the order, such powers and duties of the sanitary authority under the Regulations as they may think fit (*u*).

Expenses.

1037. The expenses incurred by the Corporation of the City or by a metropolitan borough council in acting as sanitary authority are paid out of the general rate (*a*).

SECT. 7.—*The Port of London.*

Meaning of "Port of London."

1038. The expression "Port of London" has varying meanings. For Customs purposes the limits of the port may be declared by Treasury warrant (*b*); for pilotage purposes it extends to Gravesend (*c*); and for conservancy purposes, and for the purposes of the Port of London Act, 1908 (*d*), it is set out by metes and bounds.

The Port of London Authority.

1039. The Port of London Authority was constituted for the general purposes of administrating, preserving, and improving the Port of London (*e*). It is a body corporate, with a common seal and power to acquire and hold land (*f*), and consists of a chairman, vice-chairman, and elected and appointed members (*g*). To it were transferred the undertakings of the London and India Docks Company, the Surrey Commercial Dock Company, and the Millwall Dock Company, with all their rights, powers and privileges, duties,

(*s*) Namely, those made in pursuance of the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 134; see title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*t*) 54 & 55 Vict. c. 76.

(*u*) London County Council (General Powers) Act, 1893 (56 & 57 Vict. c. ccxxi.), s. 13. Where any such order has been made, the expenses incurred by the council in pursuance of the order are recoverable from the sanitary authority in manner provided by the Public Health (London) Act, 1891 (54 & 55 Vict c. 76), s. 101 (3) (London County Council (General Powers) Act, 1893 (56 & 57 Vict. c. ccxxi.), s. 13).

(*a*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 103; City of London (Union of Parishes), Act, 1907 (7 Edw. 7, c. cxl.).

(*b*) Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36), s. 11; Treasury Warrant of 1st August, 1883 (*London Gazette*, 10th August, 1883, p. 3966); Port of London Act, 1908 (8 Edw. 7, c. 68), s. 41; see title REVENUE.

(*c*) See *General Steam Navigation Co.* v. *British and Colonial Steam Navigation Co.* (1869), L. R. 4 Exch. 238, Ex. Ch., *per* BYLES, J., at p. 245; and title SHIPPING AND NAVIGATION.

(*d*) See Port of London Act, 1908 (8 Edw. 7, c. 68), ss. 7 (2), 49, Sched. V.; and see title WATERS AND WATERCOURSES.

(*e*) Port of London Act, 1908 (8 Edw. 7, c. 68), s. 1 (1).

(*f*) *Ibid.*, s. 1 (2).

(*g*) For the prescribed method of election and appointment, see *ibid.*, s. 1 (3)—(11), Sched. I.; Port of London (First Election of Members) Provisional Order Act, 1911 (1 & 2 Geo. 5, c. clxv.).

obligations, and liabilities, other than those in respect of debenture stock (*h*); all the rights, powers and duties of the Conservators of the River Thames (*i*), in respect of the River Thames below the landward limit of the Port of London; certain specified funds, and all property and liabilities of the Conservators held, acquired, or incurred in respect of the Thames below that limit (*k*); and all powers and duties of the Watermen's Company with respect to the registration and licensing of craft and boats, and the licensing, government, regulation, and control of lightermen and watermen (*l*). In addition to the transferred powers, the Port of London Authority is invested with many other powers necessary for or incidental to the proper carrying out of the objects for which it was constituted (*m*).

SECT. 7. The Port of London.

1040. The Mayor, Commonalty, and Citizens of the City of London are the exclusive port sanitary authority of the Port of London (*n*), and as such may exercise such of the powers, rights, duties, capacities, and liabilities of a sanitary authority as may be assigned to them by Order of the Local Government Board (*o*). They may, with the sanction of that Board, delegate to any metropolitan borough council whose district, or part of whose district, forms part of, or abuts over, any part of the port (*p*), or to any conservators, commissioners, or other persons having authority in or over any part of the port (*q*), the exercise of any powers conferred on the port sanitary authority by the Order of the Local Government Board (*r*). The expenses of the port sanitary authority are paid out of the corporate funds (*s*).

The Port Sanitary Authority.

SECT. 8.—*The Metropolitan Asylums District.*

1041. The Metropolitan Asylums District was constituted for the better organisation of the arrangements for dealing with cases of

The Metropolitan Asylums Board.

(*h*) See Port of London Act, 1908 (8 Edw. 7, c. 68), s. 3, for the terms of transfer.

(*i*) See pp. 413, 414, *post*

(*k*) Port of London Act, 1908 (8 Edw. 7, c. 68), s. 7.

(*l*) See *ibid*, ss. 11, 12. For the transferred powers, see also the Watermen's and Lightermen's Amendment Act, 1859 (22 & 23 Vict. c. cxxxiii.), the Thames Watermen's and Lightermen's Act, 1893 (56 & 57 Vict. c. lxxxi.), as amended by and so far as left unrepealed by the Port of London Act, 1908(8 Edw. 7, c. 68). See as to the conduct of the port, river etc., the Port of London River Bye-laws, 1911; the Thames Fishery Bye-laws, 1893; the Thames Motor Launch Bye-laws, 1906; the Thames Watermen's and Lightermen's Bye-laws 1860, 1867, 1893, 1894, and 1895; and the Port of London (Registration of River Craft) Bye-laws, 1910.

(*m*) See the Act, *passim*. For the power to acquire land compulsorily, see Port of London Act, 1911 (1 & 2 Geo. 5, c. xxvii.).

(*n*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), ss. 111, 112 (3).

(*o*) *Ibid.*, s. 112 (1). See Order of the Local Government Board dated 25th March, 1892 (No. 27,939). The provisions of the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 23, as to the consumption of smoke by steam engines and furnaces, extend to the Port of London and are to be enforced therein by the port sanitary authority (*ibid.*, s. 23 (7)).

(*p*) *Ibid.*, ss. 99, 112 (3), (4); London Government Act, 1899 (62 & 63 Vict. c. 14), s. 4.

(*q*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 112 (4).

(*r*) *Ibid.*, s. 112 (3).

(*s*) *Ibid.*, s. 111.

SECT. 8. **The Metropolitan Asylums District.**

infectious disease and insanity among the poor (*t*). The District includes the whole of the administrative County of London, and the management is entrusted to a board of seventy-three members, known variously as the Metropolitan Asylums Board and the Metropolitan Asylums Managers, fifty-five of whom are elected every three years by the various boards of guardians in the Metropolis, while eighteen are nominated by the Local Government Board (*u*).

The Metropolitan Asylums Managers within their district have, for the purpose of the Epidemic Regulations (*a*), such powers and duties of a sanitary authority (*b*) as may be assigned to them by the regulations made by the Local Government Board (*c*), and have also important powers and duties in connection with infectious diseases and hospitals (*d*). The whole of the casual wards in the metropolis are under their control (*e*).

Expenses.

1042. The expenses incurred by the Metropolitan Asylums Managers in executing the provisions of the Public Health (London) Act, 1891 (*f*), may, so far as the maintenance in hospital of non-pauper patients is concerned, be recovered from the guardians of the union from which the patient is received, who are entitled to be repaid out of the Metropolitan Common Poor Fund (*g*); so far as concerns the maintenance and use of conveyances for infectious cases, the expenses may be defrayed out of that Fund, with the sanction of the Local Government Board (*h*); while the other expenses are defrayed by contribution from the unions and parishes comprised in the Metropolitan Asylums District, which are assessed in proportion to their annual rateable value, on a precept sent to the guardians by the Managers (*i*).

(*t*) Poor Law Board Order, 15th May, 1867, as amended by subsequent Orders. These Orders were made under powers conferred by the Metropolitan Poor Act, 1867 (30 & 31 Vict. c. 6), which has been amended by several later Acts.

(*u*) For the various duties and powers of the Metropolitan Asylums Board, see titles LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., p. 513; POOR LAW; PUBLIC HEALTH AND LOCAL ADMINISTRATION. By virtue of the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 44, the functions of the Managers and their clerks under the Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67), were transferred to the London County Council and their clerk; see p. 395, *ante*, and title RATES AND RATING.

(*a*) See p. 410, *ante*.

(*b*) See p. 408, *ante*.

(*c*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 85.

(*d*) See *ibid.*, ss. 79, 80, and title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

Metropolitan Casual Paupers Order, 1911; see title POOR LAW.

(*e*) 54 & 55 Vict. c. 76.

(*f*) *Ibid.*, s. 80. As to this fund, see p. 415, *post*.

(*g*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 104 (1).

(*h*) Metropolitan Poor Act, 1867 (30 & 31 Vict. c. 6), ss. 31, 55; Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 104 (2). For the borrowing powers of the managers, see these Acts and the Metropolitan Board of Works (Loans) Act, 1869 (32 & 33 Vict. c. 102), s. 37.

SECT. 9.—*The Central (Unemployed) Body for London.*

SECT 9. The Central (Unemployed) Body for London.

1043. The Central Body was constituted by Order of the Local Government Board (*k*), under authority conferred by the Unemployed Workmen Act, 1905 (*l*), for the purpose of superintending and co-ordinating the action of the various local distress committees established in London under the Act (*l*), and to aid the efforts of those committees by means of labour exchanges, employment registers, emigration, the provision of temporary work, and other means (*m*). Its jurisdiction extends over the whole of the administrative County of London, including the City.

Central (Unemployed) Body.

It is a corporate body with perpetual succession and a common seal, and has power to sue and be sued in its corporate name, and to hold lands without any licence in mortmain. It is composed of four members selected from and by the London County Council, four members selected from and by the Distress Committee of the Common Council, four members so selected by the Distress Committee of the Westminster City Council, two members so selected by each of the other metropolitan borough councils, together with members, not exceeding eight, nominated by the Local Government Board, and eight persons (of whom one at least must be a woman) co-opted by the above members (*n*). Twenty form a quorum (*o*).

Nature and composition.

The expenses of the Central Body are defrayed out of a fund derived partly from voluntary contributions and partly from contributions made, on the demand of the Central Body, by the councils of each metropolitan borough and the Common Council, in proportion to the rateable value of the borough and the City, paid as part of the expenses of the council and raised out of the general rate (*p*).

Expenses.

The procedure of the Central Body and of the various local distress committees is regulated by orders and regulations of the Local Government Board (*q*).

Procedure

SECT. 10.—*The Conservators of the River Thames.*

1044. The Conservators of the River Thames were constituted for the protection and improvement of the navigation and waters

Thames Conservancy.

(*k*) The Organisation (Unemployed Workmen) Establishment Order, 1905 (Stat. R. & O., 1905, Part II., p. 1347).

(*l*) 5 Edw. 7, c. 18, s. 1 (1). The Act was originally limited to a duration of three years (*ibid.*, s. 8), but has been continued in successive years, and by the Expiring Laws Continuance Act, 1911 (1 & 2 Geo. 5, c. 22), is continued to 31st December, 1912.

(*m*) Unemployed Workmen Act, 1905 (5 Edw. 7, c. 18), s. 1 (4), (5).

(*n*) *Ibid.*, s. 1; the Organisation (Unemployed Workmen) Establishment Order, 1905, art. vi.; see title WORK AND LABOUR.

(*o*) Order of 31st August, 1910 (8 Local Government Orders etc., 294).

(*p*) Unemployed Workmen Act, 1905 (5 Edw. 7, c. 18), s. 1 (6).

(*q*) These are the Organisation (Unemployed Workmen) Establishment Order, 1905 (Stat. R. & O., 1905, Part II., 1347); Amending Order of 21st October, 1905 (*ibid.*, 1357); the Regulations (Organisation for Unemployed), 1905 (*ibid.*, 1378); the Regulations (Organisation for Unemployed) Second Series, 1908 (Stat. R. & O., 1908, 1000); Order of 31st August, 1910 (8 Local Government Orders etc., 294).

SECT. 10. **The Conservators of the River Thames.**

of the Thames (*r*), but as all their rights, powers, and duties, and all property and liabilities held, acquired, or incurred in respect of the Thames below a line drawn across the river at the boundary between the Middlesex parishes of Teddington and Twickenham have been transferred to the Port of London Authority (*s*), the Conservators have practically ceased to be a metropolitan authority, save in so far as regards their powers and duties as to house-boats and pleasure boats (*t*).

The Conservators.

1045. The Port of London Authority appoints a conservator, the Metropolitan Water Board two, the London County Council three, and the Corporation of the City two, conservators (*a*). The Conservators appoint one member to the Metropolitan Water Board (*b*).

Failure to act.

1046. If the Conservators fail to perform the duties imposed upon them with respect to the preservation and maintenance of the flow and purity of the Thames and its tributaries, or to exercise any powers conferred upon them for that purpose, or for the purpose of preserving the rights and interests of the public in respect of the Thames and its towpaths, complaint may be made to the Local Government Board by any of certain interested authorities, and that Board may make an order which will be binding on the conservators (*c*).

River traffic.

1047. The Port of London Authority and the Conservators may arrange for the exercise by the Conservators, in the Port of London, of the powers of the Authority for regulating the passage of vessels on the Thames on the occasion of a regatta, boat race, or other similar occasion (*d*).

SECT. 11.—*The Parliamentary Areas.*

Parliamentary boroughs.

1048. The creation of metropolitan boroughs did not alter the limits of any parliamentary borough or parliamentary county (*e*), so that the parliamentary representation of the Metropolis remains as before. The City of London is a distinct area and returns two

(*r*) See Thames Conservancy Act, 1894 (57 & 58 Vict. c. clxxxvii); Thames Conservancy Act, 1905 (5 Edw. 7, c. cxcviii.); Thames Conservancy Act, 1911 (1 & 2 Geo. 5, c. lvii.), and the Thames Conservancy (Registration and Tolls) Bye-laws, 1911; see also the bye-laws referred to in note (*l*), p. 411, *ante*.

(*s*) Port of London Act, 1908 (8 Edw. 7, c. 68), s. 7; see p. 410, *ante*, and title WATERS AND WATERCOURSES.

(*t*) Port of London Act, 1908 (8 Edw. 7, c. 68), s. 7 (2) (g).

(*a*) *Ibid.*, s. 8, Sched. III. The other conservators are appointed by the Board of Trade, and by various riparian county, borough, and district councils.

(*b*) Metropolis Water Act, 1902 (2 Edw. 7, c. 41), s. 1 (3); Port of London Act, 1908 (8 Edw. 7, c. 68), s. 8 (6)

(*c*) Port of London Act, 1908 (8 Edw. 7, c. 68), s. 8 (7). The Board of Trade also have certain powers over the Conservators (see *ibid.*, s. 8 (8)).

(*d*) *Ibid.*, s. 10 (1). As to registration of steam launches, see *ibid.*, s. 10 (2) The river Lea is also under the control of a Board of Conservators appointed under the Lea Conservancy Act, 1868 (31 & 32 Vict. c. cliv.); see also Lea Conservancy Act, 1874 (37 & 38 Vict. c. xcvi.).

(*e*) London Government Act, 1899 (62 & 63 Vict. c. 14), s. 31 (3).

members to the House of Commons (*f*). There are also twenty-eight parliamentary boroughs, each comprising a specified parish or parishes and returning a fixed, though varying, number of members, totalling fifty-nine (*g*). In pursuance of the theory of single-member constituencies, each borough with more than one member is split up into as many divisions as there are members allotted to it, and each of these divisions returns one member (*h*). SECT. 11. **The Parliamentary Areas.**

SECT. 12.—*The Poor Law Areas.*

1049. The City of London is a separate poor law area; the remainder of the administrative County of London is divided into twenty-nine poor law unions, in which boards of guardians are elected annually by the parochial electors (*i*). The functions of the guardians are practically the same as in the rest of the country (*k*). Unions.

1050. The Metropolitan Common Poor Fund is raised by contributions from the several poor law areas in the Metropolis, which are periodically assessed on the basis of their rateable value by the Local Government Board. The Board issue to the guardians a precept requiring them to pay the amount of their contribution as and when directed. The guardians raise the amount out of the poor rate and pay it to the credit of the account of the Receiver of the Fund at the Bank of England. In the case of places where there is no poor rate, the controlling authority pays the assessment on a similar precept and may levy it on the occupiers of property in such a place (*l*). Common Poor Fund. How raised.

1051. Out of the Fund so raised are paid, to a prescribed extent, the expenses incurred in the maintenance of paupers in workhouses, of lunatics in asylums etc. (except such as are chargeable on the county rate), and of fever and small-pox patients; in respect of medical relief; the salaries of and compensation to (*l*) certain poor law officers; vaccination charges; the maintenance of pauper children in schools (*m*); the expenses of administering the Fund and certain other charges (*n*). Expenses chargeable on Fund.

After the audit of the union accounts the auditors certify to the How repaid

(*f*) Redistribution of Seats Act, 1885 (48 & 49 Vict. c. 23), s. 4.

(*g*) *Ibid.*, Sched. IV.; Representation of the People Act, 1867 (30 & 31 Vict. c. 102), Sched. C.

(*h*) Redistribution of Seats Act, 1885 (48 & 49 Vict. c. 23), s. 8, Sched. VI.; Representation of the People Act, 1867 (30 & 31 Vict. c. 102), Sched. C. The administrative county does not include the whole of certain of the parliamentary divisions, but, on the other hand, takes in portions of certain extra-metropolitan parliamentary divisions.

(*i*) Local Government Act, 1894 (56 & 57 Vict. c. 73), ss. 20, 30, 44; see title ELECTIONS, Vol. XII., p. 397.

(*k*) See title POOR LAW.

(*l*) Metropolitan Poor Amendment Act, 1869 (32 & 33 Vict. c. 63), s. 18.

(*m*) See also title EDUCATION, Vol. XII., p. 89; Elementary Education Act, 1876 (39 & 40 Vict. c. 79), s. 40; Metropolitan Poor Act, 1898 (61 & 62 Vict. c. 45), s. 1.

(*n*) See also Poor Law Act, 1879 (42 & 43 Vict. c. 54), s. 16; Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 104; and p. 412, *ante*.

SECT. 12. **The Poor Law Areas.**

Local Government Board the amount actually expended by each union in respect of expenses which are to be repaid out of the Fund, and the Board thereupon direct the Receiver to repay to the guardians the sums so expended. Guardians are entitled to have credit, in part payment of their contribution, for the amount which may be repayable to them, in respect of expenditure during the preceding half-year (*o*).

SECT. 13.—*The Metropolitan Police District.*

Police District.

1052. The Metropolitan Police District is the area in which the metropolitan police force has jurisdiction. It comprises the county of London, exclusive of the City and its liberties, the county of Middlesex, the county boroughs of Croydon and West Ham, and such places in the counties of Surrey, Herts, Essex, and Kent, within a radius of not more than fifteen miles from Charing Cross, as the King by Order in Council may include (*p*). The metropolitan police force is under the command of a Commissioner, who is appointed by the Crown and is under the immediate authority of the Home Secretary (*q*).

SECT. 14.—*The Metropolitan Water Board.*

Water Board.

1053. The Metropolitan Water Board was established for the purpose of acquiring by purchase, and of managing and carrying on, the undertakings of nine metropolitan water companies and of the urban district councils of Tottenham and Enfield, and for the purpose of supplying water within the parishes and places in which any of the said companies or councils were authorised to supply water and in the parishes of Sunbury and Chessington, but excluding the boroughs of Croydon and Richmond and the urban districts of Cheshunt and Ware, and with saving clauses in respect of part of the parish of Hendon, the urban districts of Enfield, Barnet, and Hoddesdon, the rural district of Romford, and of places in Hertfordshire (*r*).

(*o*) Metropolitan Poor Act, 1867 (30 & 31 Vict. c. 6), ss 61—72, Metropolitan Poor Amendment Act, 1870 (33 & 34 Vict. c. 18), ss. 1, 2; Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), s. 43; see also Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), ss. 80, 87. For equalisation of rates, see p. 442, *post*.

(*p*) For places included by Order in Council, see Stat. R. & O. Rev., 1904, Vol. VIII., tit. Metropolitan and City Police Districts, p. 1. Trafalgar Square is within the district (Trafalgar Square Act, 1844 (7 & 8 Vict. c. 60)). There is no right of the public to hold meetings in Trafalgar Square (*Ex parte Lewis* (1888), 21 Q. B. D. 191). As to Metropolitan Police Magistrates, see title MAGISTRATES, Vol. XIX., pp. 518 *et seq.*

(*q*) See Metropolitan Police Acts, 1829 and 1839 (10 Geo. 4, c. 44, and 2 & 3 Vict. c. 47), and titles CONSTITUTIONAL LAW, Vol. VII., p. 85; POLICE. For the City police, see p. 429, *post*, City of London Police Act, 1839 (2 & 3 Vict. c. xciv.); and title POLICE.

(*r*) See Metropolis Water Act, 1902 (2 Edw. 7, c. 41), and title WATER SUPPLY. As to admission of reporters to meetings, see title PRESS AND PRINTING.

SECT. 15.—*The London Fire Brigade.*

SECT. 15. The London Fire Brigade.

1054. The London Fire Brigade (*s*) is maintained by and under the control of the London County Council (*t*). The Council has a general power to acquire land and build fire stations, to sell superfluous property, and to establish telegraphic or telephonic communication between one station and another, and between stations and other points (*a*).

Control.

1055. The chief officer and men are appointed by and are removable at the pleasure of the Council (*b*). The Council pays them such salaries as it thinks fit, and may make regulations as to the compensation payable to them in case of accident, or to their dependants in case of death; as to their pensions or allowances on retirement; as to gratuities to persons giving notice of fires; as to gratuities to members of the brigade and other persons in return for meritorious services, and as to gratuities to turncocks (*c*). The Council may by bye-laws make regulations for the training, discipline, and good conduct of the brigade, and generally for its maintenance in a state of efficiency (*d*).

Regulations as to staff and employment.

The Council may permit part of the brigade to be employed for remuneration on special services, and may also allow the brigade to attend fires outside the Metropolis: in such cases the owner and occupier of the property involved are jointly liable to pay all expenses incurred by the brigade and a reasonable remuneration (*e*).

1056. The Council has power to require the provision of fire plugs, and to mark their situation by notices on any house or building (*f*).

Fire plugs.

1057. On the occasion of a fire the officer in charge may take command of volunteers, may remove persons whose presence impedes the brigade, and generally may take any measures that appear expedient for the protection of life and property: in particular he may break into, take possession of, and pull down

Powers of officer in charge.

(*s*) The London County Council (General Powers) Act, 1904 (4 Edw. 7, c. ccxliv.), s. 46, gave this name to the force originally formed as the Metropolitan Fire Brigade under the Metropolitan Fire Brigade Act, 1865 (28 & 29 Vict. c. 90). In that year (see *ibid.*, s. 6) the Metropolitan Board of Works took over the fire engines etc. maintained by various insurance companies, and was empowered (*ibid.*, s. 11) to purchase or subscribe towards the provision of fire escapes. As to the area served by the brigade, see note (*d*), p. 392, *ante*. As to the provision of means of escape from buildings in case of fire, see pp. 488 *et seq.*, *post*. As to inquests on fires in London, see title CORONERS, Vol. VIII., p. 296.

(*t*) Metropolitan Fire Brigade Act, 1865 (28 & 29 Vict. c. 90), ss. 4, 11. The Council may act through a committee (*ibid.*, s. 28).

(*a*) *Ibid.*, s. 5.

(*b*) *Ibid.*, s. 7; see *ibid.*, s. 22, as to ejecting discharged members from official residences.

(*c*) *Ibid.*, s. 8.

(*d*) *Ibid.*, s. 9.

(*e*) *Ibid.*, s. 30. For definition of "owner," see *ibid.*, s. 33.

(*f*) *Ibid.*, s. 32. As to the use of hydrants, see also London County Council (General Powers) Act, 1894 (57 & 58 Vict. c. ccxii.), s. 4.

Sect. 15. The London Fire Brigade.

premises to stay a fire, doing as little damage as possible, and may shut off the supply of water to other localities in order to increase the pressure (*g*). Damage done by the brigade in the due execution of their duties is deemed damage by fire for insurance purposes (*g*).

Powers of police.

1058. The police may close any street in or near which a fire is burning, and may remove persons whose presence impedes the brigade (*g*).

Expenses.

1059. The expenses (*h*) of the brigade are partly met by contributions from the Government (*i*) and from the various offices insuring property in the Metropolis (*k*), who are entitled to receive a daily report of fires (*l*).

Penalties.

1060. A person giving a false alarm of fire to the brigade or any officer thereof by means of a street fire alarm or otherwise is liable to a penalty not exceeding £20 (*m*).

In the case of chimney fires a penalty not exceeding 20*s.* is payable by the occupier or person responsible (*n*).

Provision for recovery of penalties and audit.

1061. Provision is made (*o*) for the summary recovery of penalties and expenses (*p*), and for the summary determination of disputes (*q*)

Salvage.

1062. It is the duty of the brigade to render gratuitous assistance to the salvage corps maintained by fire insurance offices and to hand over to their custody property saved from fire (*r*).

Part III.—The London County Council.

Sect. 1.—*Constitution.*

Composition of the Council.

1063. The London County Council consists of a chairman, nineteen aldermen, and one hundred and eighteen councillors. The chairman may be selected from outside the Council; the aldermen must not exceed in number one-sixth of the whole number of county councillors; the councillors are elected, four

(*g*) Metropolitan Fire Brigade Act, 1865 (28 & 29 Vict. c. 90), s. 12. As to taking possession of property, see *Joyce* v. *Metropolitan Board of Works* (1881), 44 L. T. 811.

(*h*) As to fire brigade expenses generally, see Metropolitan Board of Works (Loans) Act, 1869 (32 & 33 Vict. c. 102), s. 22.

(*i*) Metropolitan Fire Brigade Act, 1865 (28 & 29 Vict. c. 90), s. 18.

(*k*) *Ibid.*, s. 13. As to calculating and enforcing contributions, see *ibid.*, ss. 14—17.

(*l*) *Ibid*, s. 31.

(*m*) London County Council (General Powers) Act, 1893 (56 & 57 Vict. c ccxxi.), s. 16.

(*n*) London County Council (General Powers) Act, 1900 (63 & 64 Vict. c cclxviii.), s. 30.

(*o*) By the Metropolitan Fire Brigade Act, 1865 (28 & 29 Vict. c. 90).

(*p*) *Ibid.*, s. 24.

(*q*) *Ibid.*, s 25.

(*r*) *Ibid.*, s 29.

for the City, and two each for the other parliamentary boroughs or electoral divisions into which such boroughs are divided (*s*). A parochial elector may vote at the election of a councillor in the same manner as a county elector (*a*).

Position of the City members.

Councillors elected for the City may not act or vote in respect of any question arising before the Council as regards matters involving expenditure on account of which the parishes in the City are not for the time being liable to be assessed, equally with the rest of the administrative county, to county contributions (*b*). This restriction, however, does not prevent any such councillor, when in the chair and performing the duties of chairman, regulating the procedure at a meeting, but is effective to prevent him giving a vote or doing any act, such as signing cheques, which is not purely ministerial (*c*).

SECT. 2.—*Proceedings.*

Meetings.

1064. The meetings and proceedings of the London County Council are, in some respects, differently regulated to those of other county councils, inasmuch as that Council has obtained some special authorisations, and, especially, may from time to time make standing orders for the regulation of its proceedings and business and vary and revoke the same (*d*). No judicial duties are exercised by the Council (*e*), and neither the meetings of the Council nor of the committees constitute a court (*f*).

Convening.

The chairman may, at any time, call a meeting of the Council. Twenty members may require him to call a meeting by signing a requisition for that purpose, and if he refuses, or within seven days does not do so, the signatories may call a meeting (*g*).

Notice and summons.

Notice of a meeting, signed by the chairman or the conveners, in the latter case specifying the business, must be fixed on the offices of the Council forty-eight hours at least before the meeting, and a summons to attend, specifying the business, and signed by the clerk, must be left at or sent by post to the address of every member, but

(*s*) Local Government Act, 1888 (51 & 52 Vict. c. 41), ss. 1, 40 (4), (5); Redistribution of Seats Act, 1885 (48 & 49 Vict. c. 23). For the election of councillors, aldermen, and chairman, see title ELECTIONS, Vol. XII., pp. 356—361, 397; for the franchise, see *ibid.*, p. 191; for the power to appoint a deputy-chairman, see *ibid.*, p. 397; for the term of office, see *ibid.*, pp. 356 *et seq.*, and for the qualifications and disqualifications of candidates and members, see title LOCAL GOVERNMENT, Vol. XIX., pp. 302 *et seq.*, 340, 341.

(*a*) London County Council Electors Qualification Act, 1900 (63 & 64 Vict. c. 29), s. 2.

(*b*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 41 (6).

(*c*) See London County Council (General Powers) Act, 1890 (53 & 54 Vict. c. ccxlii.), s. 23. As to the clerk, deputy-clerk, and other officers of the Council, see p. 453, *post*.

(*d*) London County Council (General Powers) Act, 1893 (56 & 57 Vict. c. ccxxi.), s. 10.

(*e*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 78 (2).

(*f*) See *Royal Aquarium and Summer and Winter Garden Society* v. *Parkinson*, [1892] 1 Q. B. 431, C. A., and title COURTS, Vol. IX., pp. 9 *et seq.* As to the consequences of a defamatory statement made by a county councillor at a meeting, see title LIBEL AND SLANDER, Vol. XVIII., pp. 681, 682.

(*g*) London County Council (General Powers) Act, 1893 (56 & 57 Vict. c. ccxxi.), s. 10, Sched., 1, 2.

SECT 2. Proceedings.

want of service of the summons on a member does not affect the validity of a meeting (*h*).

No business other than that specified in the summons can be transacted at a meeting, except any urgent matter brought up in accordance with the standing orders (*i*).

Chairman.

1065. The chairman of the Council presides if present, or, in his absence, the vice-chairman or the deputy-chairman. If all these are absent, the meeting chooses a member to preside (*k*). In the case of equality of votes, the acting chairman has a second or casting vote (*l*).

Quorum.

1066. Unless in any case otherwise provided by statute, all acts of the Council, and all questions coming or arising before it, may be done and decided by the majority of such members as are present and vote at a meeting duly held, the whole number present, whether voting or not, not being less than one-fourth of the number of the whole Council (*m*).

Minutes.

1067. Minutes of the proceedings at a meeting must be drawn up and printed, and signed either by the chairman at the meeting, or at the next ensuing meeting by the chairman thereof (*n*).

Resolution for expenditure.

1068. A resolution authorising expenditure upon, or the construction of, works, the estimated cost of which amounts to or exceeds £20,000, must be confirmed at a subsequent meeting of the Council (*o*).

Contracts.

1069. A contract entered into by the Council for work or materials, whereof the value or amount exceeds £10, must be made under its seal (*p*).

Service of notices etc.

1070. Any document required to be served on the Council may be served by delivering it personally to the clerk, or by leaving it at the principal office of the Council (*q*); and any notice required to be given to another person may be served personally or be left with some inmate of the place of abode of such person, or, if required to be given to an owner or occupier of any land or premises, and there is no occupier, by affixing it to some

(*h*) London County Council (General Powers) Act, 1893 (56 & 57 Vict. c. ccxxi.), s. 10, Sched., 3, 4, 5.

(*i*) *Ibid.*, Sched., 6.

(*k*) *Ibid.*, Sched., 7. As to the admission of reporters, see title PRESS AND PRINTING. As to the admission of ratepayers, see title LOCAL GOVERNMENT, Vol. XIX., p. 348.

(*l*) London County Council (General Powers) Act, 1893 (56 & 57 Vict. c. ccxxi.), Sched., 9.

(*m*) *Ibid.*, Sched., 8.

(*n*) *Ibid.*, Sched., 10.

(*o*) Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 23.

(*p*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 149. This applies also to the contracts of a metropolitan borough council. As to contracts with corporations generally, see titles CORPORATIONS, Vol. VIII., pp. 380—386; LOCAL GOVERNMENT, Vol. XIX., pp. 268, 313; PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*q*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 220.

conspicuous part of the land or premises. If, however, the name and address of the owner or that of his agent is known, the notice is to be served on him personally, or left with some inmate at his place of abode or sent by post to him, or served on his agent (*r*). Any notice given by the Council is sufficiently authenticated if signed by the clerk or the officer by whom it is given (*s*).

SECT. 3.—*Committees.*

In general.

1071. The London County Council possesses the same rights as other county councils to appoint committees and to delegate powers to such committees (*a*). These rights have been largely exercised, and the executive work of the Council is entrusted to a number of committees, of which the principal are appointed for dealing with finance, asylums, housing of the working classes, improvements, fire brigade, parks and open spaces, main drainage, highways, including tramways, education (*b*), theatres and music-halls (*c*), and pensions (*d*).

Appeal committee.

1072. The Council must appoint a committee for the purpose of hearing appeals by persons aggrieved by any order of a borough council in relation to the construction of works or to the expenses thereof, or as to the removal of subsoil under a street, or as a sanitary authority, and must refer all such appeals to that committee (*e*). The chairman of the Council is an *ex-officio* member of the committee, and presides at all meetings at which he is present: in his absence, or if his office is vacant, the committee choose one of their number to preside. Three form a quorum (*f*). The proceedings on appeals are regulated by the standing orders of the Council (*g*). The committee must hear, and may allow or

(*r*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 221.

(*s*) *Ibid.*, s. 222. *Ibid.*, ss. 220—222 apply also to metropolitan borough councils, substituting the town clerk for the clerk; see p. 455, *post*.

(*a*) See title LOCAL GOVERNMENT, Vol. XIX., pp. 348 *et seq.* The Council may pay the reasonable travelling expenses incurred by any committee or sub-committee (London County Council (General Powers) Act, 1911 (1 & 2 Geo. 5, c. lxiii.), s. 17).

(*b*) For the constitution of the Education Committee, see title EDUCATION, Vol XII., p. 19.

(*c*) Special orders have been made by the Council for regulating the procedure of the Theatres and Music Halls Committee, sitting as the Licensing Committee, and at the annual licensing meeting of the Council; see title THEATRES AND OTHER PLACES OF ENTERTAINMENT.

(*d*) Appointed under the Old Age Pensions Act, 1908 (8 Edw. 7, c. 40), s. 8; see title POOR LAW.

(*e*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 211; Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 57; Metropolis Management Amendment Act, 1890 (53 & 54 Vict. c. 66), s. 6 (appeals, however, may be referred by the Council to any committee it may select); Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 126. Under the standing orders of the Council the committee must hear and determine appeals made to the Council under any other Act of Parliament. As to the matters in respect of which such orders may be made, see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 204 *et seq.*

(*f*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 212.

(*g*) Under *ibid*, s. 202, the Council may make bye-laws for regulating appeals. An appeal must be entered within seven days after notice of the order objected

SECT. 3. Committees.

dismiss the appeal, or may quash, confirm, or vary the order appealed from, may make orders as to the payment of costs, and may award compensation (*h*).

Part IV.—The City Corporation.

SECT. 1.—*In General.*

Incorporation.

1073. The citizens and freemen of the City of London are a body politic and corporate by the name of "The Mayor and Commonalty and Citizens of the City of London" (*i*).

Seal.

1074. They have a common seal, known as the Common Seal of the City of London, which proves itself without any further evidence of the assent of the Corporation or the identity of the seal (*j*).

Discharge of functions.

1075. The Corporation (*k*) discharges its functions through three assemblies—the Court of Aldermen (*l*), the Court of Common Council (*m*), and the Court of Common Hall (*n*). It is not affected by the Borough Funds Acts (*o*) or the Municipal Corporations Act, 1882 (*p*), and is not restricted by external control in the

to has been served on the occupier of the premises affected thereby, or after the act complained of (Metropolis Management Act, 1855 (18 & 19 Vict c. 120), s. 211). The day on which the notice was served or the act done is excluded (*Robinson* v. *Waddington* (1849), 13 Q. B. 753; *Radcliffe* v. *Bartholomew*, [1892] 1 Q. B. 161; and see title TIME).

(*h*) Metropolis Management Act, 1855 (18 & 19 Vict c. 120), ss. 21, 212; Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 29. As to the power of the appeals committee to levy improvement rates upon defaulters, see s. 30 of the latter Act. The right of appeal conferred as above does not prevent the courts from exercising their jurisdiction to restrain a borough council from exceeding its authority (*Tinkler* v. *Wandsworth District Board of Works* (1858), 2 De G. & J. 261, C. A.), nor does it prevent a court of summary jurisdiction inquiring into the validity of a notice (*Fulham Vestry* v. *Solomon*, [1896] 1 Q. B. 198; but compare *St. James and St. John, Clerkenwell Vestry* v. *Feary* (1890) 24 Q. B. D. 703).

(*i*) Stat. (1690) 2 Will. & M. c. 8, s. 3.

(*j*) See title EVIDENCE, Vol. XIII., p. 496. This seal was granted by Henry III. The special regulations of the Court of Common Council require that the seal shall only be affixed in open court, after a formal resolution. The seal is affixed only to such documents which have been examined and signed by one of the law officers of the Corporation.

(*k*) The account here given of the Corporation is mainly derived from the Statement of the Corporation appended to the Report of the Royal Commission, 1894, and where no other authority is given for a statement in the text it should be regarded as being collected from that Report and the evidence taken by the Commission (Parliamentary Paper, 1894, Cd. 7493).

(*l*) See p. 424, *post*.

(*m*) See p. 426, *post*.

(*n*) See p. 429, *post*.

(*o*) Borough Funds Act, 1872 (35 & 36 Vict. c. 91), s. 11; see title LOCAL GOVERNMENT, Vol. XIX., pp. 380 *et seq.*

(*p*) 45 & 46 Vict. c. 50.

application of such property and funds as are not subject to specific trusts or special enactment (*q*).

SECT. 2.—*The Lord Mayor.*

Election.

1076. The Lord Mayor is selected on the 29th September in each year by the liverymen of the City in Common Hall assembled, from among the aldermen who have filled the office of sheriff (*r*). The livery nominate two candidates, and of these the Court of Aldermen appoint one to the office of Lord Mayor for the year next ensuing. The Lord Mayor Elect is presented to the Lord Chancellor for the Sovereign's approval, to be signified, generally on the first day of Michaelmas Term, and is afterwards, on the 8th and 9th November respectively, sworn in at the Guildhall, and before the judges of the High Court, for the due execution of his office (*s*).

Privileges.

1077. The title of Mayor as chief officer of the City is of very ancient date, and the right to be styled Lord Mayor was conferred by an early charter (*t*). The Lord Mayor is also entitled to the prefix of "Right Honourable," and, on the demise of the Sovereign, is summoned to attend the meeting of the Privy Council, and signs the proclamation of the successor to the Throne. He has also certain rights in connection with the Coronation (*u*).

In the City the Lord Mayor takes precedence of every subject of the Crown. He is the head of the City Lieutenancy, and has the privilege of recommending to the Sovereign the names of persons to fill vacancies occurring therein. He is, by custom, perpetual Escheator and Coroner for the City and Southwark; he is Clerk of the Markets; Admiral of the Port of London; Chief Magistrate of the City (*v*); and is named first in the Commission of Oyer and Terminer and General Gaol Delivery of the Central Criminal Court (*x*). No troops may pass through the City without his permission, and he receives quarterly, under the Sovereign's Sign Manual, the password of the Tower. He is entitled, as spokesman for the citizens, to the right of special access to the Sovereign, and to present petitions at the Bar of the House of Commons. He receives, out of the City's cash, an annual salary of £10,000.

The Lord Mayor is *ex-officio* President of the Association of the City of London under the Territorial and Reserve Forces Act, 1907 (*a*).

(*q*) See *Parr* v. *A.-G.* (1842), 8 Cl & Fin. 409, 431, H. L.

(*r*) The practice is to nominate the two senior aldermen who have not passed the chair, but there is legally nothing to prevent the nomination of an ex-Lord Mayor, or of a junior member of the Court of Aldermen. As to aldermen, see pp. 424—426, *post*. As to liverymen, see note (*c*), p. 429, *post*. As to the office of sheriff, see p. 401, *ante*.

(*s*) Calendar Act, 1751 (25 Geo. 2, c. 30), s. 4; Judicature Act, 1851 (44 & 45 Vict. c. 68), s. 17.

(*t*) Charter (1354), Edw. 3.

(*u*) See title CONSTITUTIONAL LAW, Vol. VI., pp. 326 333.

(*v*) In which capacity he exercises the powers of two justices (City of London (Union of Parishes) Act, 1907 (7 Edw. 7, c. cxl.), s. 24); and see title MAGISTRATES, Vol. XIX., pp. 575, 577.

(*x*) See title COURTS, Vol. IX., p. 87.

(*a*) 7 Edw. 7, c. 9, s. 39 (3). This Act does not affect the raising and levying

SECT. 2. The Lord Mayor.

Powers and duties in relation to City bodies

1078. The Lord Mayor summons and presides over the Court of Aldermen, the Court of Common Council, the Common Hall, and the Court of Hustings (*b*). None of these can be held but by his permission and direction, and the business to be discussed is entirely under his control. If he cannot attend on any occasion he must appoint, under his seal, as deputy an alderman who has passed the chair.

Vacation of office.

1079. Should the office of Lord Mayor become vacant by death or otherwise, the Corporation usually suspends all important business until the election of a successor has been duly proceeded with and completed; meanwhile, for purposes of necessity, the senior alderman acts as deputy.

SECT. 3.—*The Court of Aldermen.*

Aldermen.

1080. The Court of Aldermen consists of twenty-six aldermen, including the Lord Mayor, one elected for each of the City wards (*c*).

Tenure of office.

1081. The office is held during good behaviour, but an alderman is liable to be removed from office for just and reasonable cause (*d*), and any alderman who becomes bankrupt or insolvent, or makes a composition with his creditors, or absents himself for more than six consecutive months, unless by reason of illness or other reasonable cause, or is convicted of fraud or crime, is disqualified and ceases to hold office, and the Court of Aldermen must forthwith adjudge the office to be vacant (*e*).

Disqualification.

Election on vacancy.

1082. Upon a vacancy occurring the Lord Mayor issues his precept summoning a wardmote for the election of an alderman, who must be a freeman of the City. If the electors (*f*) return a person who has been determined by the Court of Aldermen to be unfit to be an alderman, the Court may refuse to approve or admit him to the Court, and if such an unfit person is returned and rejected three times in succession, the Court may themselves nominate, elect, and admit a fit and proper person, being a freeman of the City, to fill the office. A person who refuses to serve as alderman on being elected is liable to a fine of £500, unless he can satisfy the Court that at the time of his election he was not worth £30,000 (*g*).

Duties.

1083. Each alderman has the rule and government of his ward, and may appoint a deputy from among the common councilmen for

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of the trophy tax, the proceeds of which may, however, be applied by the Commissioners of Lieutenancy for the City for certain specified purposes (*ibid.*, s. 39 (5)). As to the trophy tax, see City of London (Union of Parishes) Act, 1907 (7 Edw. 7, c. cxl.), s. 16.

(*b*) As to the Court of Hustings, the Court of Equity before the Lord Mayor, the Court of Quarter Sessions for the City, and the Court Leet for the Manor of Duke's Place, see title COURTS, Vol. IX., pp. 176—178.

(*c*) The ward of Bridge Without or Southwark does not elect an alderman, but the aldermancy of that ward is assigned to the senior elected alderman. As to elections, see title ELECTIONS, Vol. XII., pp. 190, 393.

(*d*) Stat. (1393) 17 Ric. 2, c. ii.

(*e*) Local stat. (1849) 12 & 13 Vict. c. cxiv., s. 9.

(*f*) For the franchise, see title ELECTIONS, Vol. XII., p. 190.

(*g*) Act of Common Council, 17th April, 1812.

his ward (*h*). The alderman presides at wardmotes, and must sign the lists of persons entitled to vote at ward elections (*i*). The aldermen are *ex-officio* members of the governing bodies of many philanthropic and other institutions (*j*).

The Court.

1084. The Court of Aldermen is a Court of Record, and sits in public. The meetings are convened by summons from the Lord Mayor, who presides (*k*). Thirteen form a quorum.

Jurisdiction.

1085. The Court exercises jurisdiction over the livery companies of the City (*l*), appoints special constables, may remove the City Commissioner of Police in case of misconduct (*m*), and regulates the government of the City police force (*n*) and the control of vehicular traffic (*o*).

Standing committees.

1086. The Court appoints four standing committees, namely, privileges, gaols, general purposes, and finance, the proceedings of which are governed by standing orders. The committee consists of the whole Court, and are reappointed at the commencement of each mayoralty.

Appointments.

1087. The Court appoints the Recorder (*p*), the Steward of Southwark (*q*), the officials of the Justice Rooms at the Mansion House and Guildhall, one-half of the Visiting Committee of Holloway Prison (*r*), and nominates six almoners on the Council of Almoners of Christ's Hospital.

Election petitions.

1088. Petitions against returns at ward elections are referred, by the Grand or Great Court of Wardmote (*s*) to the Court of Aldermen, which has power, in the case of a disputed election, either to declare upon whom the election has fallen, or to declare it void and order a fresh election.

(*h*) Act of Common Council, 6th December, 1712. In some wards two deputies may be appointed. A deputy may execute the greater part of the ward duties of the alderman, except statutory duties and the presiding at the wardmote held on St. Thomas's Day.

(*i*) City of London Municipal Elections Amendment Act, 1867 (30 & 31 Vict. c. i.), s. 5.

(*j*) For list, see Statement of the Corporation, referred to in note (*k*), p. 422, *ante*.

(*k*) See p. 424, *ante*.

(*l*) See title COMPANIES, Vol. V., pp. 746 *et seq.*

(*m*) See title POLICE.

(*n*) City Police Act, 1839 (2 & 3 Vict. c. xciv.); and see title POLICE.

(*o*) Metropolitan Streets Act, 1867 (30 & 31 Vict. c. 134); City of London Street Traffic Act, 1999 (9 Edw. 7, c. lxvii.).

(*p*) But a recorder cannot exercise any judicial functions unless he is appointed by the Crown to exercise such functions (Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 42 (14)). As to the Recorder, see, further, title COURTS, Vol. IX., pp. 89, 177.

(*q*) See title COURTS, Vol. IX., pp. 202, 203.

(*r*) Prison Act, 1877 (40 & 41 Vict. c. 21), and Rules of 10th March, 1890, made thereunder; see title PRISONS. This appointment is made annually.

(*s*) This is a court held on Plough Monday at the Guildhall, under the presidency of the Lord Mayor, with whom the aldermen sit, for the purpose of receiving returns from the several wards of the elections on St. Thomas's Day; to receive petitions against returns; and to admit the City marshal, ward beadles, and extra constables.

SECT. 3. The Court of Aldermen.

1089. An alderman upon election becomes a justice of the peace for the County of the City of London (*t*), and has power to do alone any act which by statute is directed to be done by more than one justice (*u*).

Judicial powers.

As justice At Guildhall.

An alderman sits twice weekly at the Guildhall to deal with summonses taken out by the police for offences under the City Police Act, 1839 (*a*), the Metropolitan Streets Acts, 1867 and 1868 (*b*), the Hackney Carriage Acts (*c*), and other Acts.

As justices for Southwark

The aldermen who have passed the chair are justices for Southwark (*d*).

At quarter sessions.

Quarter sessions are held eight times a year, the court being styled the Court of the Lord Mayor and Aldermen of London, and consisting of the Lord Mayor, aldermen, and Recorder (*e*).

As licensing justices.

The City of London is deemed to be a county borough for licensing purposes, and the Lord Mayor and aldermen are the licensing justices and the compensation authority (*f*). They also grant licences to deal in game (*g*).

As justices of oyer and terminer.

All the aldermen are justices of oyer and terminer and are named in the commission for holding the sittings of the Central Criminal Court (*h*).

Effect of creation of County Council.

1090. The powers or duties of the justices, quarter sessions, Recorder, or Common Serjeant of the City were not affected by the creation of the London County Council, except in so far as powers or duties were expressly transferred to that body (*i*), or as the powers and duties of the justices or quarter sessions of any county were altered in consequence of the transfer of powers to the newly-constituted county councils (*k*).

SECT. 4.—*The Court of Common Council.*

Constitution.

1091. The Court of the Lord Mayor, Aldermen, and Commoners of the City of London in Common Council assembled, generally

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(*t*) Charter (1712), 15 Geo. 2. As to removal, see p. 421, *ante;* and see, generally, title MAGISTRATES, Vol. XIX., p. 519.

(*u*) Poor Relief Act, 1601 (43 Eliz. c. 2), s. 7; Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43); Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 20 (10); see City of London (Union of Parishes) Act, 1907 (7 Edw. 7, c. cxl.), s. 24; and title MAGISTRATES, Vol. XIX., pp. 575, 577.

(*a*) 2 & 3 Vict. c. xciv.

(*b*) 30 & 31 Vict. c. 134; 31 & 32 Vict. c. 5; see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 207.

(*c*) See title STREET AND AERIAL TRAFFIC.

(*d*) See title COURTS, Vol. IX., pp. 202, 203.

(*e*) The Court was created by charter in 1462. It rarely tries offences, as indictable offences committed in the City are tried at the Central Criminal Court, under the Central Criminal Court Act, 1834 (4 & 5 Will. 4, c. 36). See title COURTS, Vol. IX., p. 177.

(*f*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 2; see, generally, title INTOXICATING LIQUORS, Vol. XVIII., pp. 22, 34, 51, 68.

(*g*) Game Act, 1831 (1 & 2 Will. 4, c. 32); see title GAME, Vol. XV., p. 254.

(*h*) Central Criminal Court Act, 1834 (4 & 5 Will. 4, c. 36), s. 1; see title COURTS, Vol. IX., p. 89.

(*i*) See Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 41 (1), and pp. 395, 418-422, *ante.*

(*k*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 42 (13); see title LOCAL GOVERNMENT, Vol. XIX., pp. 68 *et seq.*

SECT. 4
The Court of Common Council

styled the Court of Common Council, consists, besides the Lord Mayor and aldermen, of two hundred and six common councilmen, who are annually chosen by the electors (*l*) of twenty-five wards at wardmotes held on the 21st December, St. Thomas's Day (*m*). The nominations are made at the wardmote, and if there is a contest the election takes place the next day by ballot (*n*).

Vacancies.

1092. When a vacancy occurs in the course of the year the ward clerk informs the Lord Mayor, who issues his precept for a wardmote for the election of a successor, and the return is sent to the town clerk. At a bye-election the alderman's deputy (*o*) may preside.

Courts.

1093. The Court is called at the discretion of the Lord Mayor, and seven members can requisition him to call a Court at any time. The Lord Mayor, or his duly appointed deputy, must preside at all meetings (*p*). Forty members or upwards, of whom two at least must be aldermen, form a quorum. The proceedings are regulated by standing orders (*q*).

Appointments.

1094. The Court appoints all Corporation officers, except those appointed by the Court of Aldermen (*r*) or by the Court of Common Hall (*s*), and exercises all municipal functions in the City, except those exercised by the Court of Aldermen or by the London County Council. The Court has sole control over the landed property and estates of the Corporation, and the common seal cannot be affixed without its direction (*t*). The Court, like the Court of Aldermen,

(*l*) See title ELECTIONS, Vol. XII., p. 190. For the qualifications and disqualifications of common councilmen, see City of London Municipal Elections Amendment Act, 1867 (30 & 31 Vict. c. i.), s. 5.

(*m*) A wardmote is an assembly of all the inhabitants of the ward; see title COURTS, Vol. IX., p. 178.

(*n*) City of London Ballot Act, 1887 (50 & 51 Vict. c. xiii.), ss. 2, 3, 5; for the procedure at elections, see title ELECTIONS, Vol. XII., pp. 393—5, and Statement to the Royal Commission, pp. 39—42; see note (*k*), p. 422, *ante*.

(*o*) As to aldermen and their deputies, see p. 424, *ante*.

(*p*) See p. 424, *ante*.

(*q*) As to the admission of reporters, see title PRESS AND PRINTING.

(*r*) See p. 425, *ante*. The chief officers appointed by the Common Council are the Town Clerk, the judges of the Sheriffs' Courts (see title COURTS, Vol IX., p. 177), the Commissioner of the City Police (see, further, title POLICE), the Comptroller of the Chamber and of the Bridge House Estates, the Remembrancer, the Solicitor, the Secondary, the Clerk of the Peace, the High Bailiff of Southwark, the registrars of the Mayor's Court and City of London Court, and the City Surveyor. For a full list, see Statement of the Corporation, pp. 52, 53, referred to in note (*k*), p. 422, *ante*. The Common Serjeant and the judge of the City of London Court are appointed by the Crown (Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 42 (14)), but are paid out of the City funds. The Lord Mayor, as coroner for the City and Southwark, generally acts by a deputy-coroner, who is appointed and paid by the Court of Common Council. As to fire inquests in the City, see title CORONERS, Vol. VIII., p. 296. The Corporation may appoint a garbler or officer to examine as to the purity and cleanliness of drugs and spices (stat. (1707) 6 Anne, c. 68, s. 3).

(*s*) See p. 429, *post*.

(*t*) See note (*j*), p. 422, *ante*.

SECT 4. The Court of Common Council.

nominates or elects members of the managing bodies of many public and charitable institutions. It is the patron of eight livings.

Powers and duties.

1095. The Court is, as respects the City, the local authority under numerous Acts of Parliament that deal with various matters of local government (*u*). As regards education, it is in the same position as a metropolitan borough council (*w*), but the City, quite apart from the general law, does much to promote various forms of educational activity. It must appoint a distress committee for the purposes of the Unemployed Workmen Act, 1905 (*x*). It is the Port Sanitary Authority for the Port of London (*a*), and enforces throughout the administrative county the law relating to quarantine and the importation of animals (*b*). It controls all public markets in the county of London (*c*), and London Bridge, Blackfriars Bridge, Southwark Bridge, and Tower Bridge are all maintained and managed by it (*d*). It may make bye-laws for regulating locomotives, and may authorise locomotives to be used on any road within the City (*e*), but, if such bye-laws or authority make any difference between any main road maintained by the County Council and the other roads in the City, the approval of the County Council must be obtained (*f*).

The Court acts as overseers for the City, appoints the assessment committee, has all the non-ecclesiastical powers of the old vestries, and collects the general rate for the City (*g*).

Transfer of powers.

1096. The Local Government Board may, on the joint application of the London County Council and the Court of Common Council of the City of London, make a provisional order transferring any power from the County Council to the Court of Common Council, or *vice versâ* (*h*).

(*u*) See titles *passim*. As to powers with respect to commons, see title COMMONS AND RIGHTS OF COMMON, Vol. IV., p. 610. In addition to statutory rights, the Corporation possesses by charter or custom many rights and privileges of local government, which are carefully preserved by the general Acts dealing with the subject-matter. Thus, the Weights and Measures Acts specially preserve the rights of the City with respect to stamping or sealing weights and measures and with respect to the right of the Lord Mayor to gauge all vessels of wine, oil, honey, and other gaugeable liquors imported and landed within the City (see Weights and Measures Acts, 1824 (5 Geo. 4, c. 74), s. 25; 1878 (41 & 42 Vict. c. 49), ss. 67, 68; and 1889 (52 & 53 Vict. c. 21), s. 17; and title WEIGHTS AND MEASURES).

(*w*) Education (London) Act, 1903 (3 Edw. 7, c. 24), s. 4 (2); see title EDUCATION, Vol. XII., p. 53; pp. 402—407, *ante*, and p. 430, *post*.

(*x*) 5 Edw. 7, c. 18; see p. 413, *ante*, and title WORK AND LABOUR.

(*a*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 111; see pp. 410, 411, *ante*, and Public Health Act, 1896 (59 & 60 Vict. c. 19).

(*b*) See title ANIMALS, Vol. I., p. 430.

(*c*) As to the County of London, see p. 401, *ante*.

(*d*) See as to the City bridges, the Corporation of London (Bridges) Act, 1911.

(*e*) See Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), s. 28. As to bye-laws generally, see pp. 460, 480, *post*.

(*f*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 41 (4) (a).

(*g*) City of London (Union of Parishes) Act, 1907 (7 Edw. 7, c. cxl.), ss. 11—15. The general rate includes the sewer rate, the consolidated rate, the police rate, and any special rate such as the trophy tax (*ibid.*, s. 15); see p. 439, *post*.

(*h*) London Government Act, 1899 (62 & 63 Vict. c. 14), s. 5 (4). As to such provisional orders, see *ibid.*, s. 28 (1); Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 297, 298; and title LOCAL GOVERNMENT, Vol. XIX., p. 367.

SECT. 5.—*The Common Hall.*

SECT. 5. The Common Hall.

1097. The full style of the Common Hall is the Meeting or Assembly of the Mayor, Aldermen and Liverymen of the several companies of the City of London in Common Hall assembled. It consists of the Lord Mayor (*i*), four aldermen at least, the sheriffs (or one of them), and such of the liverymen of the companies as are freemen of the City (*k*), and meets twice in each year, on Midsummer Day and Michaelmas Day (*l*). It nominates two aldermen for the office of Lord Mayor (*m*), and elects the sheriffs (*n*), the chamberlain (*o*), the bridge masters, and the auditors. The elections are by show of hands, and, if a poll is demanded, it is conducted in the same manner as a poll for the election of common councilmen (*p*).

Constitution.

SECT. 6.—*The City Police.*

1098. The Corporation maintains its own police force. The members of the force are under the disciplinary control of the Commissioner of the Police Force of the City of London, who is appointed by the Court of Common Council, subject to the approval of the Crown, and is removable for misconduct and other reasonable cause by either the Crown or the Court of Aldermen (*q*). He

Control of the City Police.

(*i*) In the absence of the Lord Mayor, one of the sheriffs presides in Common Hall. As to the sheriffs, see p. 401, *ante*.

(*k*) There are seventy-six City companies with a livery, comprising some 9,000 liverymen who are freemen; see title COMPANIES, Vol. V., p. 746.

(*l*) The Lord Mayor may summon a Common Hall at other times if he thinks it desirable for the discussion of matters of public interest.

(*m*) See p. 423, *ante*.

(*n*) See p. 401, *ante*.

(*o*) The office of chamberlain is one of great antiquity and considerable responsibility. The Chamberlain is treasurer of the funds of the Corporation, and keeps the accounts thereof. He exercises jurisdiction over apprentices in the City and holds a court for hearing disputes and complaints concerning them; see title COURTS, Vol. IX., p. 178. He also keeps the roll of freemen and admits to the freedom of the City. The modes of admission to the freedom of the City are: (1) By servitude, which may be obtained by any male of full age on satisfactory completion of his apprenticeship to a freeman. (2) By patrimony, obtainable, when of full age, by a child, male or female, of a freeman, born in lawful wedlock after the father's admission as a freeman. (3) By redemption or purchase, which is obtained by any ratepayer on the parliamentary register for the City upon payment of a guinea; by any ratepayer on the local rate books, if approved by the Court of Common Council, on a similar payment; by any person approved by the Court of Common Council on payment of £2 6*s*. 8*d*.; by a person who is presented through one of the City companies and approved by the Court of Aldermen, on payment of one guinea. In all these cases the candidate must be of full age and not an alien. (4) By honorary presentation upon resolution of the Court of Common Council. As to freemen of the livery companies, see title COMPANIES, Vol. V., p. 748. Compare, as to freemen generally, title LOCAL GOVERNMENT, Vol. XIX., pp. 321, 322. As to their exemption from tolls, see titles HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 65; MARKETS AND FAIRS, note (*b*), p. 41, *ante*.

(*p*) That is, under the City of London Ballot Act, 1887 (50 & 51 Vict. c. xiii.); see note (*n*), p. 427, *ante*. The lists of voters are prepared by the Secondary. That official also makes the jury lists for the City: see title JURIES, Vol. XVIII., p. 236.

(*q*) City of London Police Act, 1839 (2 & 3 Vict. c. xciv.), s. 3. As to police generally, see title POLICE.

SECT. 6. **The City Police.**

appoints the police in such number as the Court of Common Council directs (*r*), and is solely responsible for suspension or dismissal from the force (*s*). The Commissioner, with the consent of the Court of Aldermen, regulates street traffic in the City (*t*), and many similar matters (*a*), and is responsible for the regulation of public-houses, coffee-houses, and shops (*b*), and for the abatement of gaming-houses (*c*).

Sphere of action.

1099. In any case of special emergency the City Police, at the request of one of the principal Secretaries of State, may be authorised by the Lord Mayor to act within the Metropolitan Police District (*d*), and the metropolitan police may, at the request of the Lord Mayor, be authorised to act within the City, in each case under the command of their respective officers (*e*).

Expenses.

1100. One-fourth of the net expenses of the City police force is paid by the Common Council out of the corporate funds, and three-fourths are defrayed out of the general rate (*f*).

Part V.—Metropolitan Borough Councils.

SECT. 1.—*Constitution.*

SUB-SECT. 1.—*In General.*

Corporate name.

1101. Each metropolitan borough is governed by a council, which is a body corporate, consisting of (*g*) and known by the name of the Mayor, Aldermen, and Councillors of the Metropolitan Borough of ——— (*h*). This body has perpetual succession and a common seal,

City of London Police Act, 1839 (2 & 3 Vict. c. xciv.), s. 9.

(*s*) *Ibid.*, s. 14.

(*t*) See London Cab and Stage Carriage Act, 1907 (7 Edw. 7, c. 55), s. 4, and title STREET AND AERIAL TRAFFIC.

(*a*) City of London Police Act, 1839 (2 & 3 Vict. c. xciv.), ss. 20, 22; Metropolitan Streets Acts, 1867 and 1868 (30 & 31 Vict. c. 134; 31 & 32 Vict. c. 5). The City Greenyard is a depôt for stabling stray horses or other animals belonging to individuals in charge of the police, and for housing the carts, trucks, or other vehicles of such persons. It is under the control of the City Lands Committee, appointed by the Common Council (see Metropolitan Paving Act, 1817 (57 Geo. 3, c. xxix.), s. 109).

(*b*) City of London Police Act, 1839 (2 & 3 Vict. c. xciv.), ss. 28, 29.

(*c*) *Ibid.*, ss. 31, 32. In the City search warrants in respect of gaming-houses are issued by a justice or by the Commissioner of the City Police, upon a written report of a superintendent of the City force, or information on oath of two or more householders, and authorise the superintendent and constables to enter the alleged gaming-house, and to arrest all persons found therein, and to seize gaming instruments, money, and securities (*ibid.*). As to gaming-houses generally, see title GAMING AND WAGERING, Vol. XV., p. 287.

(*d*) See p. 416, *ante*, and title POLICE.

(*e*) City Police Act, 1839 (2 & 3 Vict. c. xciv.), s. 21.

(*f*) *Ibid.*, ss. 57, 58. As to the contribution by the Exchequer from the Local Taxation Grant, see title POLICE.

(*g*) London Government Act, 1899 (62 & 63 Vict. c. 14), s. 2 (1).

(*h*) Westminster is now a city, and Kensington has "Royal" substituted for "Metropolitan" in its title.

and may, for the purposes of its powers and duties, and subject to the statutory provisions relating thereto, hold land without licence in mortmain (*i*). There are no *ex-officio* members of a borough council (*k*). A woman may be elected as mayor, alderman, or councillor (*l*). The total number of aldermen and councillors for a borough must not exceed seventy (*m*).

Nature. Number.

1102. Every qualified person (*n*) elected to the office of mayor, alderman, or councillor (*o*), unless exempt from liability to take office (*p*), must either accept the office within five days after notice of election or pay a fine (*q*).

Acceptance of office.

1103. Each borough is divided into wards, a number of councillors being assigned to each ward (*r*), but the wards and the number of representatives may be altered by an Order of the Local Government Board, to be procured at the expense of the borough council concerned (*s*).

Wards.

1104. A borough council must provide and maintain sufficient offices within the borough, and must take care that its clerk, or

Offices.

(*i*) The councils were established and incorporated by a series of Orders in Council, made pursuant to the London Government Act, 1899 (62 & 63 Vict. c. 14), s. 1, which are registered and printed as Stat. R. & O., 1900, Nos. 380—407 inclusive.

(*k*) See London Government Act, 1899 (62 & 63 Vict. c. 14), s. 23 (1). As to the mayor, see p. 132, *post*. Generally speaking, the provisions of the Local Government Act, 1888 (51 & 52 Vict. c. 41) (for which see title LOCAL GOVERNMENT, Vol. XIX., pp. 340 *et seq.*), with respect to the chairman of the county council and the county aldermen respectively, apply to the mayor and aldermen of a metropolitan borough respectively; and the law relating to the constitution, election, and proceedings of administrative vestries, and to the electors and members thereof, applies to the case of borough councils and the electors and councillors thereof. As to vestries, see titles ECCLESIASTICAL LAW, Vol. XI., pp. 58 *et seq.*; LOCAL GOVERNMENT, Vol. XIX., p. 261. The Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 46, which relates to disqualifications (for which see title LOCAL GOVERNMENT, Vol. XIX., pp. 264 *et seq.*), applies to the offices of mayor and alderman (London Government Act, 1899 (62 & 63 Vict. c. 14), s. 2 (4), (5)). Any distinctions are noted in the present title.

(*l*) Qualification of Women (County and Borough Councils) Act, 1907 (7 Edw. 7, c. 33), s. 1.

(*m*) London Government Act, 1899 (62 & 63 Vict. c. 14), s. 2 (3). If the mayor is elected from outside the council the whole number may be seventy-one.

(*n*) As to qualification and disqualification, see title LOCAL GOVERNMENT, Vol. XIX., pp. 263 *et seq.*, 341, 342. It is doubtful whether the Members of Local Authorities Relief Act, 1900 (63 & 64 Vict. c. 46) (see title LOCAL GOVERNMENT, Vol. XIX., p. 308, note (*f*)), applies to members of a metropolitan borough council.

(*o*) For the election of mayor, aldermen, and councillors, see title ELECTIONS, Vol. XII., pp. 395, 396.

(*p*) As to exemption, see title LOCAL GOVERNMENT, Vol. XIX., p. 297.

(*q*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), ss. 7 (1), 34; London Government Act, 1899 (62 & 63 Vict. c. 14), s. 2 (7). As to acceptance of office generally, see title LOCAL GOVERNMENT, Vol. XIX., p. 296.

(*r*) London Government Act, 1899 (62 & 63 Vict. c. 14), s. 2 (2), and Orders in Council made pursuant thereto, which are registered as Stat. R. & O., 1900, Nos. 408—425, and 504—513 inclusive. The number of councillors assigned to each ward must be divisible by three (London Government Act, 1899 (62 & 63 Vict. c. 14), s. 2 (2)).

(*s*) *Ibid.*, s. 26.

SECT. I. Constitution.

some person duly authorised by it in that behalf, attends at its office daily (Sundays, Christmas Day, and Good Friday, and days appointed for any general fast or thanksgiving alone excepted) for the purpose of receiving notices and transacting the ordinary business of the council (*t*).

SUB-SECT. 2.—*The Mayor and Aldermen.*

The mayor.

1105. The mayor of a metropolitan borough may be elected either from among the aldermen or councillors, or from persons qualified to be aldermen or councillors. He is elected in much the same way, and has the same privileges and obligations as the chairman of a county council (*a*). He is, *ex officio*, a justice of the peace for the county of London (*b*); he is not disqualified by reason of being a solicitor practising or carrying on business in the County of London or City of London, but he must not practise before any justices of the County of London (*c*). There does not seem to be power to appoint a deputy mayor.

Election of mayor and aldermen.

1106. The ordinary day of election of the mayor and aldermen is the 9th November, or if that day is Sunday, then the following day (*d*). The chairman at the meeting at which the election takes place, unless an outgoing alderman, is entitled to vote in the first instance, as well as to give a second or casting vote, if there is an equality of votes (*e*).

Number of aldermen.

1107. The number of aldermen in each council must be one-sixth of the number of councillors (*f*).

(*t*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 66. For further powers as to providing offices, see London County Council (General Powers) Act, 1893 (56 & 57 Vict. c. ccxxi.), s. 24. Any building which belonged to any body whose powers and duties have been transferred to a borough council, and which was erected wholly or partly on a churchyard, became vested in the council, subject to such right of use for church purposes as was given by the scheme (London Government Act, 1899 (62 & 63 Vict. c. 14), s. 23 (2)). Schemes relating to vestry halls etc. were made as to Bermondsey, Kensington, Paddington, Stepney, and Westminster (see Orders in Council, 9th and 25th March, 1901). A vestry room which was vested in the vicar of the parish did not pass to the council as property of the old vestry (*Westminster Corporation* v. *St. Martin-in-the-Fields (Vicar and Churchwardens)* (1906), 96 L. T. 491). As to the officers of the councils, see p. 453, *post*.

(*a*) London Government Act, 1899 (62 & 63 Vict. c. 14), s. 2 (4); see title LOCAL GOVERNMENT, Vol. XIX., p. 341. The disqualifications imposed by the Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 46, apply to the mayor (London Government Act, 1899 (62 & 63 Vict. c. 14), s. 2 (5)). See title LOCAL GOVERNMENT, Vol. XIX., pp. 264 *et seq.*

(*b*) London Government Act, 1899 (62 & 63 Vict. c. 14), s. 24. If, however, a woman is elected mayor, she is not by virtue of holding or having held that office a justice of the peace (Qualification of Women (County and Borough Councils) Act, 1907 (7 Edw. 7, c. 33), s. 1). As to oaths, see Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 2 (5), and title MAGISTRATES, Vol. XIX., p. 540.

(*c*) London Government Act, 1899 (62 & 63 Vict. c. 14), s. 24.

(*d*) *Ibid.*, s. 3 (3).

(*e*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 30.

(*f*) London Government Act, 1899 (62 & 63 Vict. c. 14), s. 2 (3). As the total membership must not exceed seventy (see p. 431, *ante*), it follows that there cannot be more than ten aldermen. For the qualification, election etc.

SUB-SECT. 3.—*Borough Councillors.* SECT. 1.

Constitution.

1108. Borough councillors are elected on the same franchise as urban district councillors (*g*), and in practically the same manner (*h*). Candidates must be borough electors (*i*), or have resided in the borough during the whole twelve months preceding the election (*k*). The disqualifications for being elected or continuing a borough councillor are the same as in the case of parish and district councillors (*l*).

Election of councillor.

The term of office is three years (*m*).

The ordinary day of election of borough councillors is the 1st November in every third year, unless that day is Sunday, when the day of election is the following day (*n*). Casual vacancies are filled in the same manner as such vacancies in other borough councils (*o*).

Day of election.

1109. At any election in any ward the whole of the vacancies must be filled, whether they were occasioned by the expiration of the term

Double returns.

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of aldermen, see note (*h*), p. 431, and p. 432, *ante*. It would seem that the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 5 (7), which disqualifies a county coroner from being a county alderman (see title CORONERS, Vol. VIII., p. 219), does not apply to the aldermen of a metropolitan borough.

(*g*) That is, by the parochial electors, who in this case are termed borough electors. For the franchise, see title ELECTIONS, Vol. XII., pp. 190, 191, and *ibid.*, *passim*, for qualifications of voters, registration etc. The revised lists in each borough must be printed and signed before the 20th October, and come into operation as the register for the purpose of borough elections on 1st November in each year (London Government Act, 1899 (62 & 63 Vict. c. 14), s. 3 (4)).

(*h*) *Ibid.*, s. 2 (5); Metropolitan Borough Councillors Election Order, 1903 (Stat. R. & O. Rev., Vol. VIII., London County, p. 43), as to which see title ELECTIONS, Vol. XII., p. 396, note (*i*).

(*i*) A woman is eligible as a candidate; see p. 431, *ante*.

(*k*) Local Government Act, 1894 (56 & 57 Vict. c. 73), ss. 23, 31; and see title LOCAL GOVERNMENT, Vol. XIX., p. 263.

(*l*) See Local Government Act, 1891 (56 & 57 Vict. c. 73), s. 46, and title LOCAL GOVERNMENT, Vol. XIX., pp. 241, 263 *et seq.*; and, as to vacation of office and penalties, *ibid.*, pp. 263—265, 330, 331. For corrupt and illegal practices at elections, see title ELECTIONS, Vol. XII., p. 345, and Metropolitan Borough Councillors Election Order, 1903 (Stat. R. & O. Rev., Vol. VIII., London County, pp. 43, 54).

(*m*) See Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 9.

(*n*) London Government Act, 1899 (62 & 63 Vict. c. 14), s. 3 (2). The Local Government Board, by Order made pursuant to *ibid.*, s. 2 (8), directed that the whole of the councillors for each borough should retire together on 1st November, 1903, and on the ordinary day of election in every third year thereafter (Stat. R. & O. Rev., Vol. VIII., London County, p. 39). The Order may be rescinded by the Board on the request of the council concerned, which request must be made in pursuance of a resolution of the council passed by a majority of two-thirds of the members present and voting at a meeting duly convened for the purpose, provided that such majority is not less than the majority of the whole council (London Government Act, 1899 (62 & 63 Vict. c. 14), s. 2 (8)). If the Order is so rescinded, the term of office of one-third of the councillors will expire each year in the manner provided by the Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 79, save in so far as special provision may be made by Order in Council. As to the coming in force of the revised register of voters, see note (*g*), *supra*, and title ELECTIONS, Vol. XII., p. 246.

(*o*) See Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), as adopted by

SECT. 1 Constitution.

of office, or by death, or otherwise (*p*). If a councillor is returned for more than one ward, he must, on or before the first subsequent meeting of the council, signify to the town clerk in writing his decision as to the ward he will represent; if he does not do so the council must make the decision (*q*).

SECT. 2.—*Proceedings.*

Meetings.

1110. The meetings of a borough council may be held upon such days, except Sundays, and at such hours, as the council from time to time determine. Any business which, by any Act of Parliament or custom, should be done on a certain day, may be done at a meeting duly convened for the purpose, and held within seven days next before or after such certain day (*r*). A meeting must be held on the 9th or 10th November for the election of mayor, and, in every third year, of aldermen (*s*), and, if the council appoints the assessment committee (*a*), for that purpose on a day between the 15th and 29th April (*b*).

How convened.

Notice required.

1111. A meeting may be convened by notice signed by the town clerk, and sent by post or otherwise to each member three days before the date appointed, and by affixing a copy on or near the door of any building where the meeting is to be held (*c*). In certain cases a longer notice is required—thus, fourteen days' notice where the meeting is to consider a resolution for transferring drainage powers to the County Council (*d*), ten days' notice by advertisement of a meeting to authorise proceedings in Parliament (*e*), and one calendar month's notice, of a meeting for the adoption of the Public Libraries Acts (*f*), or to grant superannuation or a gratuity to an officer (*g*).

Proceedings at meetings.

1112. One-third of the whole number of the council forms a quorum (*h*). At every meeting of the council the mayor, if present,

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the Local Government Act, 1891 (56 & 57 Vict. c. 73), s 48 (1), and title LOCAL GOVERNMENT, Vol. XIX, pp. 263, 264, 308, see, further, note (*r*), *infra*.

(*p*) Metropolis Management Act, 1855 (18 & 19 Vict. c 120), s 10.

(*q*) Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 39. An election to fill the vacancy must be held within a month from the decision (*ibid.*). As to acceptance of office and resignation, see title LOCAL GOVERNMENT, Vol. XIX., pp. 264 *et seq.*

(*r*) Metropolis Management Act, 1862 (25 & 26 Vict. c. 102), s. 37, as affected by the Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 31 (3).

(*s*) See pp. 431, 432, and note (*n*), p. 433, *ante*.

(*a*) See p. 437, *post*.

(*b*) Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c 67), s. 5 (4). The Local Government Board may fix another date for this meeting (*ibid*).

(*c*) Metropolis Management Amendment Act, 1856 (19 & 20 Vict. c. 112), s. 9. If the meeting is convened for a special purpose, the notice must state the purpose (*ibid.*; *Livingstone* v. *Westminster Corporation*, [1904] 2 K. B. 109, *per* BUCKLEY, J., at p. 114).

(*d*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 89.

(*e*) Borough Funds Act, 1872 (35 & 36 Vict. c. 91), s. 4; see title LOCAL GOVERNMENT, Vol. XIX., pp. 380 *et seq.*

(*f*) Public Libraries (Amendment) Act, 1893 (56 & 57 Vict. c. 11), s. 3 (1) see title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*g*) Superannuation (Metropolis) Act, 1866 (29 & 30 Vict. c. 31), s. 7.

(*h*) London Government Act, 1899 (62 & 63 Vict. c. 14), s. 2 (6).

must be the chairman (*i*). If he is absent, the members present must elect a chairman for the occasion before proceeding to other business (*k*). The chairman, in case of an equality of votes on any question, may give a second or casting vote (*l*).

Any question is decided by the votes of the majority of the members present, and the council may act notwithstanding any vacancies therein (*m*). Special majorities are required in certain cases—thus, an absolute majority of the council must be obtained before expenses are incurred in connection with bills in Parliament (*n*), and two-thirds of the council must be present to transfer drainage powers to the County Council (*o*) or to make bye-laws (*p*).

A council may regulate the proceedings at meetings by bye-laws (*q*).

Rescinding resolutions.

1113. A resolution or other act of a borough council cannot be revoked or altered at a subsequent meeting, unless such subsequent meeting is specially convened for the purpose (*r*), nor unless such revocation or alteration is determined upon by a majority consisting of two-thirds of the members present at such subsequent meeting, if the number of members present at such subsequent meeting is not greater by one-fifth than the number present when such resolution was made or such act was done, but if the number of members present at such subsequent meeting is greater by one-fifth than the number present at such former meeting, then such revocation or alteration may be determined upon by a mere majority (*s*)

Minutes.

1114. Minutes must be made of all proceedings of a borough council, with the names of the members who attend each meeting, and must be signed by the members present, or any two of them; and all entries purporting to be so signed are received as evidence, without proof of any meeting having been duly convened or held, or

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(*i*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), Sched. II., r. 9.

(*k*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 30.

(*l*) *Ibid.*

(*m*) *Ibid.*, s. 28, as altered by the London Government Act, 1899 (62 & 63 Vict. c. 14). A majority of those voting only will not suffice (*Eynsham Case* (1819), 12 Q. B. 398; *R.* v. *Christchurch Overseers* (1857), 27 L. J. (M. C.) 23, Ex. Ch; *Re Horsley, Ex parte Orde* (1871), 6 Ch. App. 881). The voting may be by show of hands or division, or as determined (*Tear* v. *Freebody* (1858), 4 C. B. (N. S.) 228).

(*n*) Borough Funds Act, 1872 (35 & 36 Vict. c. 91), s. 4; see also note (*n*), p. 433, *ante*.

(*o*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 89.

(*p*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 23 (2).

(*q*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 202; and see p. 480, *post*. As to the admission of reporters, see title PRESS AND PRINTING.

(*r*) As to convening a meeting, see p. 434, *ante*.

(*s*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 57. This provision is not empowering, but restrictive. It gives no power to revoke a resolution which has created rights as between the council and another person (*Livingstone* v. *Westminster Corporation*, [1904] 2 K. B. 109, 120). As to what amounts to a revocation or alteration, see *St. George the Martyr, Southwark, Vestry* v. *Pethebridge* (1867), 31 J. P. 279; *Sooby* v. *St. Mary Abbots, Kensington, Vestry* (1871), 35 J. P. 343; *Mayer* v. *Burslem Local Board* (1875), 39 J. P. 137; *Ex parte Richards* (1878), 3 Q. B. D. 368.

SECT. 2. Proceedings.

of the presence, at any such meeting, of the persons named in any such entry as being present thereat, or of such persons being members of the council (*a*), or of the signature of any person by whom any such entry purports to be signed, all which matters will be presumed until the contrary is proved.

Accounts.

Every council must provide and keep books in which shall be entered true and regular accounts of all sums of money received and paid by it or under its authority, and of all liabilities incurred by it, and of the several purposes for which such sums of money are received and paid and such liabilities incurred, and copies of all contracts entered into by such council (*b*).

Inspection of books and accounts.

All minute books and account books must be open to the examination of members of the council, property owners, ratepayers, and creditors, without fee (*c*).

Miscellaneous.

1115. The provisions, already referred to when dealing with the London County Council, as to contracts (*d*), services of notices (*d*), and authentication of documents (*e*), apply to a metropolitan borough council.

Reports.

1116. A borough council must in the month of June in every year cause to be printed a report of its proceedings in the execution of the Metropolis Management Act, 1855 (*f*), and in connection with other matters, which report is open to public inspection (*g*), and a council must once a year at least make a list of the parochial property under its control, which list is also open to inspection (*h*).

SECT. 3.—*Committees.*

Power to appoint.

1117. A borough council may appoint committees for such purposes as may be deemed desirable, and may at any meeting continue, alter, or discontinue any committee (*i*), and from time

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(*a*) See *Hunnings* v. *Williamson* (1883), 11 Q. B. D. 533; and title EVIDENCE, Vol. XIII., p. 555, note (*g*).

(*b*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 60.

(*c*) *Ibid.*, s. 61. A refusal to allow inspection may be punished on summary conviction by a fine not exceeding £10 (*ibid.*). As to enforcement of orders of courts of summary jurisdiction, see title MAGISTRATES, Vol. XIX., pp. 692 *et seq.*

(*d*) See p. 420, *ante*.

(*e*) See p. 421, *ante*.

(*f*) 18 & 19 Vict. c. 120.

(*g*) *Ibid.*, s. 198, as amended by the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 142, Sched. IV., and the London Government Act, 1899 (62 & 63 Vict. c. 14), s. 31, 35 (2), Sched. III. The report of the medical officer of health must be appended to this report (Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 106 (5)).

(*h*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 199.

(*i*) See *ibid.*, s. 58, as amended by the Statute Law Revision Act, 1892 (55 & 56 Vict. c. 19), and the London Government Act, 1899 (62 & 63 Vict. c. 14), Sched. III. This power extends to the appointment of a committee for the purposes of the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), see *ibid.*, s. 99 (3). Such a committee, subject to the terms of their appointment, may serve and receive notices, take proceedings, and empower any officer of the borough council to make complaints and take proceedings in their behalf, and otherwise to execute the provisions of the Act (*ibid*, s. 99 (4)). The direction to

to time may make, alter, and repeal bye-laws for regulating the business and proceedings of committees (*k*). The quorum of a committee is three (*l*).

Every committee must report their proceedings to the council, but, to the extent to which the council so directs, the acts and proceedings of the committee do not require the approval of the council (*m*). A committee cannot raise money by loan or by rate, or spend any money beyond the sum allowed by the council (*n*).

Joint committees.

1118. Two or more borough councils may appoint a joint committee. Any difference as to the apportionment of the costs of such a committee is determined by the Local Government Board (*o*).

Finance committee.

1119. A borough council must from time to time appoint a finance committee for regulating and controlling the finance of the council; and no order for payment of any sum, whether on account of capital or income, can be made by a borough council except in pursuance of a resolution of the council passed on the recommendation of the finance committee; and any costs, debt, or liability exceeding £50 must not be incurred except upon a resolution of the council passed on an estimate submitted by the finance committee. The notice of the meeting, at which any resolution for the payment of any sum by the borough council (otherwise than for ordinary periodical payments), or any resolution for incurring any costs, debt, or liability exceeding £50 will be proposed, must state the amount of the said sum, costs, debt, or liability, and the purpose for which they are to be paid or incurred. These provisions do not apply to payments made in pursuance of a precept from another authority (*p*).

Assessment committee.

1120. When the whole of a poor law union is within one borough the assessment committee is appointed by the borough council. If the borough comprises the whole of two or more unions, the council appoints only one assessment committee for

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the officer should be given in each particular case—a general power is not sufficient; see *St. Leonard Vestry* v. *Holmes* (1885), 50 J. P. 132. A committee cannot delegate its powers to individual members (*Cook* v. *Ward* (1877), 2 C. P. D. 255, C. A.). The council by appointing a committee does not deprive itself of power to deal with matters entrusted to the committee (*Huth* v. *Clarke* (1890), 25 Q. B. D. 391; *Barnsley Local Board of Health* v. *Sedgwick* (1867), L. R. 2 Q. B. 185; *Eaton* v. *Basker* (1881), 7 Q. B. D. 529, C. A.). A committee appointed for the purposes of the Public Libraries Acts may consist partly of persons not members of the council (London Government Act, 1899 (62 & 63 Vict. c. 14), s. 8 (1)). As to public libraries, see title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*k*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 202. As to bye-laws, see pp. 460, 480, *post*.

(*l*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 59.

(*m*) See *Firth* v. *Staines*, [1897] 2 Q. B. 70.

(*n*) London Government Act, 1899 (62 & 63 Vict. c. 14), s. 8 (2).

(*o*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 57, as applied by the London Government Act, 1899 (62 & 63 Vict. c. 14), s. 8 (4); see title LOCAL GOVERNMENT, Vol. XIX., pp. 246, 280, 377.

(*p*) London Government Act, 1899 (62 & 63 Vict. c. 14), s. 8 (3); see also pp. 438 *et seq.*, *post*.

SECT. 3. Committees.

those unions. Where the assessment committee is so appointed, the town clerk acts as clerk to that committee (*q*).

Distress committee.

1121. The council must appoint a distress committee for the purposes of the Unemployed Workmen Act, 1905 (*r*). The composition and procedure of the committee is regulated by the Local Government Board (*s*).

Part VI.—Metropolitan Local Finance.

SECT. 1.—*Rating Powers.*

SUB-SECT. 1.—*Of the County Council.*

County rate.

1122. The expenses of the London County Council, so far as they fall upon the rates (*t*), are collected by means of a county rate (*a*), on precepts issued to the metropolitan borough councils, and by them raised as a part of the general rate (*b*).

Where on the 13th August, 1888 (*c*), the Metropolitan Board of Works or the quarter sessions of Middlesex were authorised to incur costs for any purpose, and the Common Council of the City of London was not liable to contribute to such costs (*d*), the City of London is not liable to be assessed to county contributions in respect of costs incurred by the London County Council for such purpose,

(*q*) London Government Act, 1899 (62 & 63 Vict. c. 14), s. 13. For assessment committees, see title RATES AND RATING; and as to the town clerk generally, see pp. 453, 455, *post*.

(*r*) 5 Edw. 7, c. 18; see p. 413, *ante*.

(*s*) See note (*q*), p. 413, *ante*, and title WORK AND LABOUR.

(*t*) As to the incidence, assessment, making, allowance, publication, levy, and collection of rates generally, and the rights to inspection and copies of rates and returns, see title RATES AND RATING.

(*a*) As to the county rate, generally, see titles LOCAL GOVERNMENT, Vol. XIX., pp. 359 *et seq.*; RATES AND RATING.

(*b*) London Government Act, 1899 (62 & 63 Vict. c. 14), s. 11 (2). See pp. 439, 440, *post* Precepts in respect of Gray's Inn and the Inner Temple are sent to the stewards of those Inns. Forms of assessment and precepts are scheduled to the Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), Sched. C, but in practice they appear to be obsolete, and the county rate in London is collected in the same way as in the other counties, under the provision of the County Rate Acts, but subject to the special enactments relating to valuation in London; see, generally, titles LOCAL GOVERNMENT, Vol. XIX., pp 359 - 361; RATES AND RATING. The Local Government Board may settle the form of any precept; see note (*s*), p. 442, *post*. The demand note must show separately the part raised for general county purposes, for special county purposes, and for equalisation charges (as to this item, see p. 442, *post*). The education rate is raised as a part of the county rate, and there is no limit as to the amount of rate that may be raised for higher education (Education (London) Act, 1903 (3 Edw. 7, c. 24), Sched. I., 2); and see title EDUCATION, Vol. XII., p 47.

(*c*) The date of the passing of the Local Government Act, 1888 (51 & 52 Vict. c. 41)

(*d*) The City was not then liable to contribute to costs incurred by these authorities in respect of matters under various Acts of Parliament which were administered in the City by either the Common Council or the Court of Aldermen.

except costs incurred for purposes transferred (*e*) from the quarter sessions or justices of the City to the County Council (*f*). The County Council and the Common Council may, however, agree that this exemption shall cease in whole or in part (*g*).

The City may be assessed to county contributions in respect of the payment of the costs of assizes and sessions (*h*).

SUB-SECT 2.—*Of the City Corporation.*

1123. The control of rating and valuation in the City is with the Common Council as the overseers (*i*). Precepts for the purpose of obtaining money which is ultimately to be raised out of a rate in the City, other than a precept sent to the guardians by the Local Government Board or certain other bodies, are sent to the Common Council, and must be executed by them (*k*). The rating authority.

1124. A general rate is assessed, made, and levied by the Common Council for the whole of the City (*l*). This rate includes the sewers rate, consolidated rate, and police rate (*m*), and any rate leviable for militia purposes, as the trophy tax (*n*). No greater rates in the pound can be levied for the purposes of sewers and police than were authorised under the Acts relating to those rates (*o*). General rate.

The poor rate and the general rate must be made by the Common Council as separate and distinct rates, but they may be made at the same time and be entered in the same book (*p*). Every rate made by the Common Council must be signed by the town clerk, or such other person as the Common Council appoints (*q*).

1125. All the rates collected in the City by the Common Council must as far as practicable be levied on one demand note, which is subject to the same conditions as to form as the demand note of a borough council (*r*). Demand note.

(*e*) See p. 406, *ante*.

(*f*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 41 (3)

(*g*) *Ibid.*, s. 41 (7).

(*h*) *Ibid.*, s. 41 (5). The expression "assizes" includes the Central Criminal Court (*ibid.*, s. 100). As to what may be included in the costs of assizes and sessions, see *ibid.*, ss. 66, 93 (1), 100. As to finances of quarter sessions, see title MAGISTRATES, Vol. XIX., p. 629.

(*i*) See p. 428, *ante*. As to the appointment of the assessment committee, see *ibid.* As to the preparation of the lists of voters, see note (*p*), p. 129, *ante*

(*k*) City of London (Union of Parishes) Act, 1907 (7 Edw. 7, c. cxl.), s. 12.

(*l*) *Ibid.*, s. 15. This rate is made, collected, and levied as was the old consolidated rate, and enactments relating to that rate apply to the general rate.

(*m*) See the enactments referred to in *ibid.*, s. 15.

(*n*) The lieutenants for the City may issue precepts to the Common Council requiring them to raise money for militia expenses, and such money will be raised with and as part of the general rate (*ibid.*, s. 16). As to the trophy tax, see note (*a*), p. 423, *ante*.

(*o*) City of London (Union of Parishes) Act, 1907 (7 Edw. 7, c. cxl.), s. 15.

(*p*) *Ibid.*, s. 19.

(*q*) *Ibid.*, s. 20. See *ibid.*, and title RATES AND RATING, as to making, publication, and levying of rates.

(*r*) City of London (Union of Parishes) Act, 1907 (7 Edw. 7, c. cxl.), s. 21; see p. 441, *post*.

SECT. 1. Rating Powers.

1126. The Inner and Middle Temples contribute to the expenses of the City police proportionately to their rateable value (*s*).

SUB-SECT. 3.—*Of the Borough Councils.*

Inner and Middle Temples

1127. All money to be raised by rates to meet the expenses of the council of a metropolitan borough, including sums required to be levied by any precept served on the council (*t*), must be paid out of the general rate (*a*).

General rate in boroughs.

This rate and the poor rate must be assessed, made, and levied together by the council as one rate, called the general rate, and in the same manner as if it were the poor rate (*b*).

If the County Council has ordered (*c*) that a part of a borough shall for street purposes be placed under the management of the council of an adjoining borough, the council of the parent borough may raise by order the expenses incurred by, and paid by it to, the managing council in respect thereof (*d*).

Procedure.

1128. The borough council must from time to time, by order under its seal (*e*), require the officers it has appointed to assist it in the transaction of the business of overseers to levy, and to pay over to the borough treasurer (*f*), or into a bank named in the order, and within the time or times thereby limited, the sums which the council may require for defraying the expenses of the execution of its duties (*g*). The order must distinguish sums required in connection with sewerage or lighting from sums required for defraying other expenses (*h*), and must show separately the sum,

(*s*) City of London (Union of Parishes) Act, 1907 (7 Edw. 7, c. cxl.), s. 32.

(*t*) See pp. 441, 442, *post.*

(*a*) London Government Act, 1899 (62 & 63 Vict. c. 14), s. 10 (1); London (Rating) Scheme, 1901, confirmed by Order in Council, 9th March, 1901 (Stat. R. & O. Rev., 1904, Vol. VIII., London County, p. 84).

(*b*) London Government Act, 1899 (62 & 63 Vict. c. 14), s. 10 (2); see *Islington Borough Council* v. *London School Board*, [1903] 2 K. B. 354, C. A., and generally, London (Rating) Scheme, 1901 (Stat. R. & O., 1901, No. 288); see also title RATES AND RATING. The councils have no power to levy a church rate; see Metropolis Management Amendment Act, 1856 (19 & 20 Vict. c. 112), ss. 1, 2; London Government Act, 1899 (62 & 63 Vict. c. 14), s. 23; and title ECCLESIASTICAL LAW, Vol. XI., p. 784.

(*c*) Under the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 140, or the Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 86. See title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 200; and pp. 442, 463, *post.*

(*d*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 160. As to such orders, see *R.* v. *Strand Board of Works* (1863), 4 B. & S. 526.

(*e*) The order is effective as soon as it is sealed (*Glen* v. *Fulham Overseers* (1884), 14 Q. B. D. 328), and may be made wholly or in part for expenses already incurred, or for expenses to be thereafter incurred (Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 158).

(*f*) See p. 454, *post.*

(*g*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 158, as amended by the London Government Act, 1899 (62 & 63 Vict. c. 14), ss. 11, 31, 35 (2), Sched. III.

(*h*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 158. No separate sewers rate nor lighting rate can be levied, but the right of a tenant entitled to deduct sums paid on account of sewers rate from his rent (see *Bennett* v. *Womack* (1828), 7 B. & C. 627; *Waller* v. *Andrews* (1838), 3 M. & W.

if any, to be levied to satisfy any precept of the County Council for the purposes of the county rate (*i*).

Demand note

1129. All the rates collected in a borough from any person by the council must, as far as is practicable, be levied on one demand note, which must be in a form approved by the Local Government Board (*k*).

Exemptions.

1130. In levying the general rate, effect must be given to exemptions from rates existing before the 1st April, 1901 (*l*), by means of the deduction, from the total amount of the general rate which would otherwise be payable in respect of any hereditaments to which the exemption applies, of a proportionate part, corresponding to the exemption, of the amount produced by the rate in the pound which is treated as levied for the purposes in respect of which the exemption exists, or, in the case of a total exemption, equal to the whole amount so produced. An allowance, deduction, or commission under the Poor Rate Assessment and Collection Act, 1869 (*m*), is not to be deemed such an exemption (*n*).

Where the owners and occupiers of any hereditaments, or any class of hereditaments, are entitled to any exemption, the council must apportion the total rate in the pound amongst the various purposes for which the general rate is levied, so as to show approximately the rate in the pound required for each purpose in respect of which there is an exemption (*o*).

Rates levied with the general rate.

1131. If a rate is to be levied together with, and as an additional item of, the general rate over the whole of any parish in the borough, the rate must be included in the general rate for that parish, and where any sum is to be raised over an area not being the whole of a parish, such sum must be raised by a rate levied together with, and as an additional item of, the general rate over that area (*p*).

312; *Smith* v. *Humble* (1854), 15 C. B. 321) is preserved (London Government Act, 1899 (62 & 63 Vict. c. 14), s. 12); and see title LANDLORD AND TENANT, Vol. XVIII., p. 478

(*i*) Metropolitan Board of Works (Loans) Act, 1869 (32 & 33 Vict c. 102), s. 24; see p. 438, *ante*.

(*k*) London Government Act, 1899 (62 & 63 Vict. c. 14), s. 11 (3); see also title RATES AND RATING.

(*l*) These exceptions were—arable land, pasture land, woodlands, orchards, market gardens, and nurseries, which were liable to be assessed to sewers rate at only one-fourth of their net annual value (Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 163); property exempt or partially exempt from sewers rate, under *ibid.*, s. 164; tithe rentcharge (*Hackney and Lamberhurst Tithe Commutation Rent Charges* (1858), E. B. & E. 1); certain ancient exemptions from lighting rate (see 1 Hunt, London Local Government, 179, 180); the exemptions under the Agricultural Rates Act, 1896 (59 & 60 Vict c. 16), ss. 1, 9; under the Burial Act, 1855 (18 & 19 Vict. c. 128); and other general exemptions, for which see title RATES AND RATING; and Hunt, London Government Act, 1899, 146—150.

(*m*) 32 & 33 Vict. c. 41.

(*n*) See London (Rating) Scheme, 1901, art. 2 (1) (Stat. R. & O. Rev., 1904, Vol. VIII., London County, p. 84).

(*o*) *Ibid.*, art. 2 (2).

(*p*) *Ibid.*, art. 3 (1), (2). The same exemptions will apply in both these cases as in the case of the general rate (*ibid.*, art. 3 (3)). With the consent of the Local

SECT. 1. Rating Powers.

Any rate required to meet expenses under any Act, which does not extend to the whole borough, must be levied as an additional item of the general rate over the area to which the Act extends (*q*). The council may by its order direct the sum necessary for defraying expenses, incurred for the special benefit of any particular part of the borough, or not for the equal benefit of the whole borough, to be levied in such part, or may exempt any part from the rate, or require a less rate to be levied thereon (*r*).

Precepts.

1132. Every precept issued by any authority in London for the purpose of obtaining money which is ultimately to be raised out of a rate within a borough, other than a precept sent to guardians by the Local Government Board or by a body containing representatives elected by the guardians, must be sent to the council at its office, addressed to the council or to the town clerk. Any such precept, if so sent and addressed, is deemed to be personally served on, and must be executed by, the council (*s*).

SECT. 2.—*Equalisation of Rates.*

Equalisation fund.

1133. For the purpose of equalising the rates over the different parts of the administrative County of London, the London County Council must each year form an Equalisation Fund, equal to a rate of sixpence in the pound on the rateable value of the administrative county, according to the valuation lists as on the 6th April in the particular year, and must half-yearly determine what contribution is due from each parish to one-half of the fund, and what grant is due from that half to each parish (*t*). The contribution is determined by apportioning half the fund among the parishes in proportion to their rateable value, and the grant due to each parish by apportioning one-half the fund among the districts of the sanitary authorities (*a*) according to their population, and, where a

Contribution.

Grant.

Government Board the council may keep a separate rate-book for the purposes of the additional item (London (Rating) Scheme, 1901, art. 3 (4)).

(*q*) London Government Act, 1899 (62 & 63 Vict. c. 14), s. 10 (4).

(*r*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 159. Any such differentiation is entirely at the discretion of the council, and mandamus does not lie to compel it to make such an order (*West Middlesex Waterworks Co.* v *Wandsworth District Board* (1858), 22 J. P. 336; see also *R.* v. *Fitch* (1860), 1 L. T. 327; *R.* v. *London and Brighton Rail. Co.* (1879), 5 Q. B. D. 89, C. A.). A person aggrieved by any such discrimination may, however, appeal against the rate; see title RATES AND RATING. As to levying, as an additional item of the general rate, the sum required for the maintenance and management of an inclosed garden or ornamental ground, see Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 239; and title OPEN SPACES AND RECREATION GROUNDS.

(*s*) London Government Act, 1899 (62 & 63 Vict. c. 14), s. 11 (2). By "precept" is meant any order, certificate, warrant, or other document of a like character, and the Local Government Board may settle the form of any precept (*ibid.*). Precepts may be issued by the guardians of a poor law union (see titles POOR LAW; RATES AND RATING); the London County Council, under the County Rates Act, 1852 (15 & 16 Vict. c. 81), ss. 27, 28 (see pp. 431, 441, *ante*); and the Commissioner of Police of the Metropolis (see title POLICE).

(*t*) London (Equalisation of Rates) Act, 1894 (57 & 58 Vict. c. 53), s. 1 (1), (2).

(*a*) For the sanitary authorities, see p. 408, *ante*. The Port Sanitary Authority

SECT. 2. Equalisation of Rates.

sanitary district comprises two or more parishes, by dividing that grant among those parishes in proportion to their population, with this exception, that where the aggregate of the contributions from the parishes in the district is less than the grant apportioned to the district, the difference is paid out of the Equalisation Fund to the sanitary authority of the district, and no payment towards any equalisation charge is required from any parish in the district (*b*).

Application of payments.

1134. Subject to the foregoing provision, if the contribution from a parish is less than the grant due, the difference is paid out of the fund to the sanitary authority of the district forming or comprising the parish, and must be applied by it in defraying, first, its expenses incurred under the Public Health (London) Act, 1891 (*c*), then those incurred in respect of lighting, and finally, those incurred in respect of streets (*d*).

Accounts.

Every authority to which money is so paid must render to the Local Government Board an account showing the total amount paid, the total expenses incurred under each of the three heads, and the amount expended under each head out of the sum received from the fund (*e*).

Levy.

1135. If the contribution from a parish exceeds the grant due to the parish, the council must, for the special purpose of meeting the excess, levy on the parish a county contribution, called the equalisation charge, as a separate item of the county rate (*f*).

Forms.

1136. The forms of contribution orders, precepts, demand notes, receipts, and returns are prescribed by the Local Government Board (*g*).

(see p. 411, *ante*) is not included for this purpose (London (Equalisation of Rates) Act, 1894 (57 & 58 Vict. c. 53), s. 4 (1)).

(*b*) *Ibid.*, s. 1 (3), (4). The population is the population at the last published census, or, in any year in which a census is not taken, as estimated by the Registrar-General under *ibid.*, s. 3 (2) (*ibid.*, s. 4 (1)).

(*c*) 54 & 55 Vict. c. 76.

(*d*) London (Equalisation of Rates) Act, 1894 (57 & 58 Vict. c. 53), s. 1 (5), (6). If the district of the authority comprises two or more parishes, the sum paid must be apportioned among the parishes in proportion to their population, and the amount so apportioned to each parish must be credited to the parish in reduction of the rates required from such parish towards the above-mentioned expenses (*ibid.*).

(*e*) *Ibid.*, s. 1 (7). If the Local Government Board are satisfied that a sanitary authority has been guilty of a default under the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s 101, and have made an order limiting a time for the performance of the duty, the Board may direct the County Council to withhold the whole or any part of the payment (if any) next accruing due from the fund to such authority. Any sum so withheld must be carried forward to the credit of the fund in the following year, and the amount apportioned among the sanitary districts will be proportionately increased (London (Equalisation of Rates) Act, 1894 (57 & 58 Vict. c. 53), s. 1 (8)).

(*f*) *Ibid.*, s. 1 (5) (b).

(*g*) *Ibid.*, ss. 1 (7), 2, 3 (2); see Orders of the Local Government Board dated 19th October, 1894, 18th July, 1895, and 5th September, 1895 (Stat. R. & O. Rev., Vol. VIII., London County, pp. 11, 15, 18).

SECT. 3. Borrowing Powers.

SECT. 3.—*Borrowing Powers.*

SUB-SECT. 1.—*Of the London County Council.*

Purposes for which County Council may borrow.

1137. The London County Council may borrow for the purpose of paying off securities (*h*), for the purposes of its duties as successor of the Metropolitan Board of Works (*i*), for making loans to the managers of the Metropolitan Asylums District (*k*), for the purposes of the Local Government Act, 1888 (*l*), for lunatic asylums etc. (*m*), for tramways (*n*), for education (*o*), for the expenses of executing the Public Health (London) Act, 1891 (*p*), under the Diseases of Animals Acts (*q*), the Housing of the Working Classes Acts (*r*), the Open Spaces Act, 1906 (*s*), for making loans to borough councils and other public bodies in the Metropolis (*t*), and in other cases where authorised by any public general Act of Parliament and the annual money Act obtained by the Council (*a*).

Mode of borrowing.

1138. Except for such temporary period, not exceeding six months, as the Treasury may from time to time sanction, the Council can only borrow money in the manner authorised by the Metropolitan Board of Works (Loans) Act, 1869 (*b*), as amended by subsequent enactments (*c*), that is, by the

(*h*) Metropolitan Board of Works (Loans) Act, 1869 (32 & 33 Vict. c. 102), s. 34; Metropolitan Board of Works (Loans) Act, 1871 (34 & 35 Vict. c. 47), ss. 7, 8, 9.

(*i*) For a list of the Acts under which borrowing powers may be exercised, see Metropolitan Board of Works (Loans) Act, 1869 (32 & 33 Vict. c. 102), s. 36, and Sched I. Main drainage, Thames Embankment, and fire brigade purposes are included.

(*k*) *Ibid.*, s. 37.

(*l*) 51 & 52 Vict. c. 41.

(*m*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 271; see title LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., p. 488, note (*y*).

(*n*) Tramways Act, 1870 (33 & 34 Vict. c. 78), ss. 21, 43, see title TRAMWAYS AND LIGHT RAILWAYS.

(*o*) See title EDUCATION, Vol. XII., p. 50.

(*p*) 54 & 55 Vict. c. 76, s. 101.

(*q*) Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), s. 42; see title ANIMALS, Vol. I., pp. 430, 431.

(*r*) Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), ss. 2[illegible] 46, 66; Housing of the Working Classes Act, 1903 (3 Edw. 7, c. 39), ss. 1, 14, 15; see title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*s*) 6 Edw. 7, c. 25, s. 18; see title OPEN SPACES AND RECREATION GROUNDS.

(*t*) See pp. 445, 449, *post*.

(*a*) In every case where the County Council lends money to any corporation, body of commissioners, public body, or persons, the exercise of whose powers of borrowing is subject to the consent of the Local Government Board, the sanction of that Board to the borrowing of such money is conclusive evidence that such corporation, body of commissioners, public body, or persons had power to borrow such money (London Council (Money) Act, 1889 (52 & 53 Vict. c. 61), s. 14), and succeeding money Acts of the Council. See specially, as to the power to lend temporarily, London County Council (Money) Act, 1911 (1 & 2 Geo. 5, c. cxiv.), s. 23.

(*b*) 32 & 33 Vict. c. 102.

(*c*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 40 (9); Metropolitan Board of Works (Loans) Act, 1869 (32 & 33 Vict. c. 102), s. 3. The limit on borrowing imposed by *ibid.*, s. 38, is constantly exceeded under special sanction.

issue of consolidated stock (*d*), terminable annuities (*e*), or London county bills (*f*).

1139. The various committees of the Council (*g*) prepare estimates of the expenditure on capital account which will or may be required in the execution of the powers and duties respectively delegated to them for the ensuing financial year, and also for the first six months of the then next year. These estimates are considered by the finance committee, and submitted by that committee to the Council. If the submitted estimates are adopted by the Council, a money bill is presented to Parliament (*h*) which embodies (i.) these estimates, (ii.) the estimated capital expenditure during the financial year on projects for which parliamentary sanction is being sought by other bills, and (iii.) the amounts required in order to comply with the demands or authorisations of the Board of Education, for loans to other bodies and persons, and for various other objects. All these matters are recited in the preamble to the bill, and the precise details and sums required are set out in the schedules thereto (*i*). The bill then authorises the Council to expend sums not exceeding the aggregate mentioned under each heading, to make loans not exceeding the prescribed aggregates to metropolitan borough councils and other public bodies and persons, and confers power on the Council from time to time to create consolidated stock or annuities, or to issue bills to a prescribed limit in order to raise the money.

Parliamentary sanction.

Money bill.

1140. The Council, under the limitation from time to time imposed, raises money by the creation of capital stock called the Metropolitan Consolidated Stock, and issued in such amounts and manner, at such prices and times, on such terms, subject to such conditions, with such dividends, and redeemable (at the option of the Council) at par, at such times, and on such conditions, as the Council determines, subject to the provisions of the enabling Act (*j*). All stock created must be charged indifferently on the whole property of the Council and on the money to be raised by the county rate, and money required for dividend and redemption purposes must be paid out of the county fund (*k*).

Consolidated stock.

(*d*) See the text, *infra*.

(*e*) See p. 446, *post*.

(*f*) See p. 446, *post*.

(*g*) See p. 421, *ante*.

(*h*) All bills promoted by the London County Council, containing power to raise money by the creation of stock or on loan, must be introduced as public bills, with the exception of bills containing estimates and complying with certain limitations as to the period in which the loan may be raised and repaid (Standing Orders, 1911, House of Lords, 69; House of Commons, 194); see title PARLIAMENT.

(*i*) A money bill must be accompanied with tables giving such information as the Treasury require for the purpose of enabling a comparison to be made between the rateable value of the Metropolis and the liabilities of the County Council (Metropolitan Board of Works (Loans) Act, 1875 (38 & 39 Vict. c. 65), s. 12).

(*j*) The approval of the Treasury was required to the creation of stock issued before 7th August, 1896.

(*k*) As to the issue, transfer etc. of consolidated stock, see the Metropolitan

SECT. 3. Borrowing Powers.

The Council must keep separate accounts of the amounts raised by stock for different purposes, but accounts may be consolidated with the approval of the Treasury (*l*).

Consolidated Loans Fund.

1141. A Consolidated Loans Fund has been established for the purpose of paying the dividends on and redeeming consolidated stock, and the Council must keep a separate account of such fund, and carry thereto moneys arising from the sale, lease, or other disposition of lands, rents, and property, and either an annual sum equal to 2 per cent. on the total nominal amount of consolidated stock, whether cancelled or not, or such greater or less annual sum, approved by the Treasury as being necessary to pay all dividends on and to redeem all the stock in sixty (*m*) years from the date of the creation thereof (*n*).

Terminable annuities.

1142. Instead of the issue of any portion of consolidated stock, the Council may create terminable annuities, to which the various provisions relating to stock will apply with the necessary modifications (*o*).

London County bills.

1143. The Council may also raise any part of the money it is from time to time authorised to raise, by means of securities known as London County bills, which are issued under a warrant sealed by the Council. Each bill is sealed by the Council and attested by the clerk, and is for the payment of the sum named therein in the manner and at the date therein mentioned, such date being not less than three nor more than twelve months from the date of the bill. The principal money and interest are charged on the county rate, and are payable out of that rate, or, as regards principal, out of moneys raised by the creation of stock, and, as regards interest, out of the Consolidated Loans Fund (*p*).

Board of Works (Loans) Act, 1869 (32 & 33 Vict. c. 102), and the Metropolitan Board of Works (Loans) Act, 1871 (34 & 35 Vict. c. 47). Transfers are exempt from stamp duty (Metropolitan Board of Works (Loans) Act, 1870 (33 & 34 Vict. c. 24), s. 5); see title REVENUE. The Metropolitan Board of Works (Loans) Act, 1869 (32 & 33 Vict. c. 102), s. 22, empowered the Metropolitan Board of Works to levy a consolidated rate, but that rate has given place to the county rate which the County Council is authorised to raise by precept; see p. 438, *ante*, and title RATES AND RATING.

(*l*) Metropolitan Board of Works (Loans) Act, 1869 (32 & 33 Vict. c. 102), s. 31.

(*m*) This period has been extended in respect of loans for certain purposes, *e.g.*, under the Housing of Working Classes Acts; see title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*n*) Metropolitan Board of Works (Loans) Act, 1869 (32 & 33 Vict. c. 102), ss. 26, 27. In practice the latter alternative is adopted. As to the investment and application of the fund, see London Council (Money) Act, 1889 (52 & 53 Vict. c. 61), s. 15; London County Council (Money) Act, 1911 (1 & 2 Geo. 5, c. cxiv.), s. 16).

(*o*) Metropolitan Board of Works (Loans) Act, 1869 (32 & 33 Vict. c. 102), s. 46.

(*p*) For the mode of issue and regulations generally as to London County bills, see Metropolitan Board of Works (Money) Act, 1882 (45 & 46 Vict. c. 33); Metropolitan Board of Works (Money) Act, 1883 (46 & 47 Vict. c. 27); London County Council (Money) Acts, 1891 (54 & 55 Vict. c. 62); 1896 (59 & 60 Vict. c. ccxiv.), s. 22; 1897 (60 & 61 Vict. c. ccxx.), s. 21; and the successive annual money Acts of the Council, of which the most recent is the London County Council (Money) Act, 1911 (1 & 2 Geo. 5, c. cxiv.). By the London County Council (Money) Act, 1911 (1 & 2 Geo. 5, c. cxiv.), s. 22, the Forgery Act, 1861

Returns.

1144. On or before the 1st June in every year the Council must prepare, in a form prescribed by the Treasury, a return showing, up to the 25th March preceding, the amount of stock and the application of the money raised thereby, and the state of the Consolidated Loans Fund, and such other particulars of its loan transactions, and such estimate of its expenditure for the then current year, as the Treasury requires. Such return must be laid before both Houses of Parliament (*q*).

SUB-SECT. 2.—*Of the City Corporation.*

City borrowings.

1145. The Corporation of the City of London may borrow money upon the security of the corporate property at the pleasure of the Common Council. There do not appear to be any general statutory restrictions as to the method of borrowing, nor as to the purpose, limit, or repayment of, or other dealings with, loans.

SUB-SECT. 3.—*Of the Borough Councils.*

Powers for which borrowing authorised.

When sanction of County Council required.

1146. A metropolitan borough council may borrow without any external sanction for the purpose of paying off old securities (*r*).

With the sanction of the London County Council granted under its common seal (*s*), a borough council may borrow for the purposes of defraying expenses incurred under the Metropolis Management Acts, 1855 and 1862 (*t*), including street improvements (*u*); in connection with the supply of electricity, including the supply of electric fittings (*a*); in respect to open spaces (*b*); for providing shelters for retail street vendors (*c*); for certain purposes connected with the housing of the working classes (*d*); and in respect of certain of its powers as a sanitary authority (*e*).

(24 & 25 Vict. c. 98), ss.—8 -11 (see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 731), are applied to London County bills. As to the Consolidated Loans Fund, see p. 446, *ante*.

(*q*) Metropolitan Board of Works (Loans) Act, 1869 (32 & 33 Vict. c. 102), s. 49.

(*r*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 187. Presumably these obligations have become obsolete.

(*s*) See the Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 100. When the County Council is the sanctioning authority for a loan, an appeal lies to the Local Government Board if it refuses or neglects to give the sanction or attach conditions. The decision of the Board is final (London Government Act, 1899 (62 & 63 Vict. c. 14), s. 4 (1)).

(*t*) 18 & 19 Vict. c. 120; 25 & 26 Vict. c. 102.

(*u*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 183; Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), ss. 72, 100.

(*a*) See title ELECTRIC LIGHTING AND POWER, Vol. XII., p. 553; London County Council (General Powers) Act, 1906 (6 Edw. 7, c. cl.), s. 29; and note (*m*), p. 404, *ante*.

(*b*) Open Spaces Act, 1906 (6 Edw. 7, c. 25), s. 18; see title OPEN SPACES AND RECREATION GROUNDS.

(*c*) London County Council (General Powers) Act, 1903 (3 Edw. 7, c. lxxxvii.), s. 52. Loans under this provision must be repaid within ten years (*ibid.*).

(*d*) Housing of the Working Classes Acts, 1890 (53 & 54 Vict. c. 70), ss. 43, 46; 1894 (57 & 58 Vict. c. 55), s. 1; 1903 (3 Edw. 7, c. 39), s. 14. In certain cases of borrowing under these Acts the period of repayment is extended to eighty years (Housing of the Working Classes Act, 1903 (3 Edw. 7, c. 39), ss. 1, 15); see, generally, title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*e*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 195; Public

SECT. 3. **Borrowing Powers.**

With the sanction of the Local Government Board a council may borrow to defray the expenses of the quinquennial valuation list (*f*), for the purposes of baths and washhouses (*g*), public libraries (*h*), working class lodging-houses (*i*), burial grounds (*k*), and in respect of the exercise of certain other sanitary powers (*l*). The sanction of the Board is conclusive as to the power of the council to borrow (*m*).

When sanction of Local Government Board required.

A council has no general borrowing powers, and can only borrow when expressly authorised by statute. Any borrowing power must be exercised by the council, and cannot be delegated to a committee (*n*).

No general power.

Mode of borrowing.

1147. Money is borrowed on the security of the general rate by means of a deed of mortgage, under the seal of the council, which may be in the prescribed form or in an agreed variation thereof (*o*). The council must keep a register of mortgages, and enter therein particulars of any mortgage within fourteen days of its date (*p*). Terms as to repayment, interest etc. may be agreed, but in the absence of agreement interest is payable half-yearly, and the mortgagee or the council may, after the expiration of twelve months, require repayment or pay off on six months' notice (*q*).

Sinking fund.

1148. The council must every year set aside and invest not less than 2 per cent. on the amount of the outstanding loans to form a sinking fund for paying off mortgages, and, when and as often as the council is able and thinks it expedient to pay off one or more of the mortgages, it must draw the number of the mortgage by

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Health (London) Act, 1891, Amendment Act, 1893 (56 & 57 Vict. c. 47), s. 3; and see p. 408, *ante*, and title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*f*) See title RATES AND RATING. A borough council can only borrow for this purpose when the assessment committee have been appointed by them; see p. 437, *ante*.

(*g*) Baths and Washhouses Acts, 1846 (9 & 10 Vict. c. 74), s. 21; 1878 (41 & 42 Vict. c. 14), s. 9; Local Authorities (Treasury Powers) Act, 1906 (6 Edw. 7, c. 33); see title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*h*) Public Libraries Act, 1892 (55 & 56 Vict. c. 53), s. 19; see title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*i*) Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), ss. 25, 66; London Government Act, 1899 (62 & 63 Vict. c. 14), s. 5 (2); Local Authorities (Treasury Powers) Act, 1906 (6 Edw. 7, c. 33).

(*k*) See title BURIAL AND CREMATION, Vol. III., p. 502.

(*l*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 105 (2), (3); London County Council (General Powers) Act, 1896 (59 & 60 Vict. c. clxxxviii.), s. 32; see title PUBLIC HEALTH AND LOCAL ADMINISTRATION

(*m*) London County Council (Money) Act, 1896 (59 & 60 Vict. c. cxiv.), s. 12, and succeeding money Acts.

(*n*) London Government Act, 1899 (62 & 63 Vict. c. 14), s. 8 (2). As to powers of delegation, see note (*i*), p. 436, *ante*.

(*o*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), ss. 183, 185. For form, see *ibid.*, Sched. E, and for form of transfer of mortgage, see *ibid.*, Sched. F. As to transfers, generally, see *ibid.*, s. 189. A borough council cannot raise money by the issue of stock, or debentures, or bills; compare the powers of the London County Council in this respect; see pp. 444—447, *ante*.

(*p*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 185. The register must be open to public inspection under a penalty not exceeding £5 (*ibid.*). As to mortgages generally, see title MORTGAGE.

(*q*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 186. Payment may be enforced by the appointment of a receiver (*ibid.*, s. 188); see, generally, title RECEIVERS.

ballot, and thereupon give notice to pay off the mortgage represented by the drawn number (*r*).

Public works loans.

1149. The Public Loans Commissioners are authorised to lend money to metropolitan borough councils upon security of the rates; such a loan is repayable by such instalments, within a period not exceeding thirty years, as may in each case be agreed upon (*s*).

Loans from London County Council.

1150. The annual money Acts of the London County Council generally contain clauses authorising that Council to lend, and a borough council to borrow, money for specific purposes.

Relief to lenders.

1151. A corporate body or a person lending or proposing to lend money to a borough council is not bound to see, nor obliged to inquire, whether the loan is *intra vires*, or as to its application, or as to the regularity of the proceedings; and the seal of the council affixed, pursuant to order or resolution, to any mortgage, bond, or other instrument is binding and conclusive (*t*).

SECT. 4.—*Revenue and Expenditure.*

Sources of revenue.

1152. The income of the metropolitan councils, County, City, and borough, is derived from many and varying sources, including grants from the Exchequer, income from property, profits of undertakings, contributions from other authorities (*u*), penalties, fines, and costs recovered from offenders against statutory provisions, bye-laws, and the like, fees and sundry receipts (*a*), and finally, and chiefly, from the rate which each is authorised to make (*b*).

(*r*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), ss. 190, 191.

(*s*) Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 20.

(*t*) *Ibid.*, s. 19; see also London Council (Money) Act, 1889 (52 & 53 Vict. c. 61), s. 14. As to temporary overdrafts at the bank, see title LOCAL GOVERNMENT, Vol. XIX., p. 361, and, in addition to the cases there cited, *A.-G.* v. *West Ham Corporation*, [1910] 2 Ch. 560; *R.* v. *Locke*, [1911] 1 K. B. 680, C. A.

(*u*) The expenses of the County Council or a borough council, which includes in this respect the Common Council, of and incidental to a power or duty transferred to the one from the other, must be defrayed as part of the ordinary expenses of the exercising council, but the other council must contribute such a sum as may have been fixed when the transfer was made (see London Government Act, 1899 (62 & 63 Vict. c. 14), s. 7).

(*a*) Penalties or forfeitures recovered in respect of proceedings under the Metropolis Management Acts, 1855 (18 & 19 Vict. c. 120), and 1862 (25 & 26 Vict c. 102), go, as to one-half to the informer, and as to the remainder to the council of the borough in which the offence was committed, or to the County Council in case the injury has been sustained or the offence committed in respect of that Council. If the borough council or the County Council is the informer it takes the whole of the penalty (Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 105). Under many other Acts penalties and fines go either to the County Council, to be carried to the credit of the county fund, or to the borough council for the benefit of the general rate; and, in like manner, fees received in respect of duties imposed by numerous Acts are carried to those funds respectively. It is usual for the general powers Acts of the London County Council to contain a clause providing that whenever, in consequence of proceedings taken by the Council or its officer in respect of offences under the particular Act, a pecuniary penalty is inflicted, the amount is to be paid to the Council. Fines recovered in proceedings under the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), go to the sanitary authority (*ibid.*, s. 119).

(*b*) See pp. 438, 439, 440, *ante*. As to the complicated financial arrangements

SECT. 4. **Revenue and Expenditure.**

London County Council.

1153. Except as to the exercise of borrowing powers, the finances of the London County Council are regulated in the same way as those of other county councils (*c*). Costs incurred by it in the general performance of its functions are paid out of the county fund as for general county purposes (*d*), and the general law as to the financial relations between the Exchequer and the counties, and as to contributions by the counties towards the costs of poor law unions, sanitary officers, registrars of births, marriages, and deaths, pauper lunatics, compensation to officers, and other matters, applies to the administrative County of London and the County Council, with the variations and exceptions now to be noted (*e*).

Payments to guardians.

The County Council is excepted from the requirement (*f*) to make a grant towards the costs of officers of unions, but the County Council must pay to the guardians for every poor law union, wholly in the administrative county, such sums as the Local Government Board from time to time certify to be due from the Council in substitution for the local grants towards the remuneration of poor law medical officers, and towards the costs of drugs and medical appliances; and it must make a *per capita* grant to such guardians in respect of indoor paupers, and a proportionate grant to the guardians of a union only partially within the county (*g*).

Fire brigade fund.

Annual contributions to the County Council towards the expenses of the fire brigade, are made by certain insurance companies and the Treasury (*h*).

Income tax.

The County Council is only liable to account to the Crown for the deducted income tax on so much of the interest, paid to holders of consolidated stock, as was not paid out of income that had already been taxed (*i*).

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of the City Corporation, see Statement to Royal Commission, referred to in note (*k*), p. 422, *ante*.

(*c*) See title LOCAL GOVERNMENT, Vol. XIX., pp. 357 *et seq*

(*d*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 40 (9). For the exemption of the City from contribution to certain costs, see *ibid.*, s. 41 (3), and p 438, *ante*. Costs incurred for such exempted purposes will be paid as for a special county purpose (Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 68(3)); see title LOCAL GOVERNMENT, Vol. XIX., pp. 358, 362. The payment of the costs of assizes and sessions is a general county purpose for which the City may be assessed to county contributions, and the costs of such prosecutions in the City, as are by law payable out of the county rate, are payable out of the county fund (Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 41 (5)).

(*e*) As to the general law, see title LOCAL GOVERNMENT, Vol. XIX., pp. 350 *et seq*.

(*f*) Imposed by the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 26; see title LOCAL GOVERNMENT, Vol. XIX., p. 353.

(*g*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 43 (1); and see title POOR LAW. There is now no union only partially in the administrative county, as Penge, which is part of the Croydon Union, was transferred to Kent by Order in Council dated 15th May, 1900. The grant in respect of indoor paupers is in addition to any payments made out of the metropolitan common poor fund (Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 94; and see p. 415, *ante*).

(*h*) See Metropolitan Fire Brigade Act, 1865 (28 & 29 Vict. c. 90), ss. 13—18; and p. 417, *ante*.

(*i*) *London County Council* v. *A.-G.*, [1901] A. C. 26; but see *A.-G.* v. *London County Council*, [1907] A. C. 131, and title INCOME TAX, Vol. XVI., pp. 662, 663.

SECT. 4. Revenue and Expenditure.

1154. All payments to and by a borough council must be made to and by the borough treasurer, and all payments by the council must, unless made in pursuance of a specific statutory requirement, or of an order of a competent court, be made subject to the same formalities and conditions as govern the payments of a county council (*k*).

Borough councils.

The expenses of a borough council, including its expenses as a sanitary authority (*l*), are paid out of the general rate (*m*).

Expenses.

Where, under the Metropolis Management Act, 1855 (*n*), a borough council orders any costs, charges, or expenses to be paid by private parties, payment may be accepted by instalments within a period not exceeding twenty years, with interest at a rate not exceeding 5 per cent. per annum (*o*).

Payments by instalments.

SECT. 5.—*Accounts, Audit, and Returns.*

In general.

1155. The accounts of the London County Council and of every metropolitan borough council, and their committees and officers (including accounts relating to the making, levy, and collection of any rate made by a borough council), must be made up and audited, and the like returns made, in the same way as is required in respect of the accounts of a county council outside London (*p*).

City Corporation.

1156. The general accounts of the City Corporation are not subject to any external audit or control, but the Common Council appoints auditors annually; and the Common Council must keep separate accounts of its receipts and expenditure as overseers, and of its other expenditure out of the poor rate, and these accounts must be made up and audited in the same way as if the Common Council, acting as overseers, were a local authority within the meaning of the District Auditors Act, 1879 (*q*). The accounts relating to the making, levy, and collection of the general rate (*r*) are made up

(*k*) London Government Act, 1899 (62 & 63 Vict. c. 14), s. 9; and compare Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 80 (see title LOCAL GOVERNMENT, Vol. XIX., p. 358). The town clerk is substituted for the clerk of the county council as the countersigning officer. As to the financial arrangements of borough councils, see also Stat. R. & O., 1900, No. 534.

(*l*) See pp. 404, 408, 411, *ante*.

(*m*) London Government Act, 1899 (62 & 63 Vict. c. 14), s. 10 (1); Public Health Act (London) Act, 1891 (54 & 55 Vict. c. 76), s. 103; see p. 440, *ante*.

(*n*) 18 & 19 Vict. c. 120.

(*o*) *Ibid.*, s. 216. As to apportioning matters between the persons liable, see *ibid.*, s. 215.

(*p*) Local Government Act, 1888 (51 & 52 Vict. c 41), ss. 71, 73, and the enactments incorporated therein; London Government Act, 1899 (62 & 63 Vict. c. 14), s. 14 See London (Rate Collection) Accounts Order, 1901 (Stat. R. & O. Rev., 1904, Vol. VIII, London County, p. 88), and Ord. 534 of 1902 (Financial Statement) (*ibid.*, p. 102); title LOCAL GOVERNMENT, Vol. XIX., pp. 362, 363; and p. 421, *ante*.

(*q*) 42 & 43 Vict. c. 6; see title LOCAL GOVERNMENT, Vol. XIX., pp. 284 *et seq.*

(*r*) As to the general rate, see p. 440, *ante*; and title RATES AND RATING.

SECT. 5. Accounts, Audit, and Returns.

and audited for each year ending the 31st March in the same way as the accounts relating to the old consolidated rate (*s*).

Returns by County Council.

1157. The London County Council must, every year, deliver to the Treasury returns showing the money raised by it, and the annual rateable value, and the indebtedness in respect of loans, of every borough, union, or place that has obtained a loan from the Council (*t*).

Returns by borough council.

1158. As the authority making the poor rate, a borough council must, every year, make to the Local Government Board, at such time, and in such form, as the Board prescribe, a return of the total number of houses entered in the rate-books of the parishes in the borough. If such return is not made within one month of the required time, each member of the council is liable, on summary conviction, to a fine not exceeding £50, and not exceeding £10 for every day during which the failure to make the return continues, after the first conviction for such failure (*u*).

Local taxation returns.

1159. Returns must be made under the Local Taxation Returns Acts by every body levying rates (*a*).

Part VII.—Officers of Metropolitan Authorities (*b*).

Officers of the County Council.

1160. The London County Council has general power to appoint, and fix the remuneration of, such officers as it may think necessary (*c*).

Security and duties.

Every officer must give such security as the County Council thinks proper (*d*), and must at such times during the continuance of his office, or within three months after ceasing to hold it, and in such manner as the Council directs, deliver written accounts of all matters committed to his charge, and of his receipts and payments,

(*s*) City of London (Union of Parishes) Act, 1907 (7 Edw. 7, c. cxl.), s. 22.

(*t*) Metropolitan Board of Works (Loans) Act, 1875 (38 & 39 Vict. c. 65), s. 13. See pp. 445 *et seq.*, *ante*, as to return of loans.

(*u*) London (Equalisation of Rates) Act, 1894 (57 & 58 Vict. c. 53), s. 3 (2), (4); see also p. 442, *ante*, and Order of Local Government Board (Stat. R. & O. Rev., Vol. VIII., London County, p. 11).

(*a*) Local Taxation Returns Act, 1860 (23 & 24 Vict. c. 51); Local Taxation Returns Act, 1877 (40 & 41 Vict. c. 66); Local Government Board Act, 1871 (34 & 35 Vict. c. 70), s. 8); Highway Accounts Returns Act, 1879 (42 & 43 Vict. c. 39), s. 2.

(*b*) For the officers of the City Corporation, see pp. 425, 427, 429, *ante*.

(*c*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), ss. 19, 20. These and other provisions referred to below are applied to county councils by the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 75; as to the county officers formerly appointed by quarter sessions, see *ibid.*, ss. 3 (x.), (xi.), 5.

(*d*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), ss. 20, 21 (4).

with vouchers, and a list of persons from whom money is due in connection with his office (*e*).

Every officer must pay all money due from him to the treasurer or as the County Council directs (*f*), and is liable to a penalty for wilful failure to account or deliver up books or documents (*g*).

Bye-laws as to officers.

1161. The County Council may from time to time make bye-laws to regulate the appointment, removal, duties, conduct, and remuneration of its officers and servants (*h*).

Disqualifications.

1162. No permanent salaried officer of the County Council, required to devote his whole time to the Council's work, is eligible to serve in Parliament (*i*).

No officer nor servant of the Council may be concerned or interested in any contract or work made with, or executed for, the Council, or under colour of his office accept any fee or reward other than his proper salary and allowances (*k*).

Superannuation.

Compensation.

There are special statutory provisions as to superannuation and pensions (*l*), and the Council has a discretionary power to pay compensation to any workman or person employed by it, who is injured in the course of his work or employment, and, in the case of his death, to make such payment to his widow or children, and to effect insurances in respect of such compensation. All expenses so incurred are to be defrayed as general county purposes (*m*).

The clerk.

1163. The clerk to the County Council must be a separate officer to the clerk of the peace for the County of London (*n*); he has charge, subject to the Council's directions, of all documents of the

(*e*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 21 (1).
(*f*) *Ibid.*, s. 21 (2).
(*g*) *Ibid.*, s. 21 (3).
(*h*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 202.
(*i*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 83 (13).
(*k*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 64; so far as contracts are concerned, there is an exception in favour of officers or servants who are merely shareholders in companies contracting with the Council. As to interest in contracts, see title LOCAL GOVERNMENT, Vol. XIX., pp. 265, 268 *et seq.*
(*l*) Superannuation (Metropolis) Act, 1866 (29 & 30 Vict. c. 31); *R.* v. *St. Pancras Vestry* (1890), 24 Q. B. D. 371, C. A. (overruling *R.* v. *St. George's, Southwark, Vestry* (1887), 19 Q. B. D. 533); *R.* v. *Bromley St. Leonard Vestry* (1896), 60 J. P. 725; London County Council (General Powers) Acts, 1891 (54 & 55 Vict. c. ccvi.), Part IV.; 1892 (55 & 56 Vict. c. ccxxxviii.), Part VI.; 1907 (7 Edw. 7, c. clxxv.), Parts VII., VIII.; and 1911 (1 & 2 Geo. 5, c. lxiii.), Part II. (Superannuation), which repeals the School Board for London (Superannuation Scheme) Act, 1902 (2 Edw. 7, c. xxxvi.). As to officers transferred in 1889 from the Metropolitan Board of Works, see Local Government Act, 1888 (51 & 52 Vict. c. 41), ss. 118, 119.
(*m*) London County Council (General Powers) Act, 1895 (58 & 59 Vict. c. cxxvii.), s. 44. This power is in addition to the liability under the general law, as to which see title MASTER AND SERVANT, pp. 128 *et seq.*, *ante*. As to general county purposes, see pp. 438, 450, *ante*. As to the Council's power to contribute to hospitals where its employees are treated, see London County Council (General Powers) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. cxxix.), s. 45.
(*n*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 83 (11); see title MAGISTRATES, Vol. XIX., p. 629.

PART VII. Officers of Metropolitan Authorities.

county other than the records and documents of quarter sessions and of the justices out of sessions (*o*).

Deputy clerk.

The Council may appoint a deputy clerk to hold office during its pleasure, and to act in lieu of the clerk in case of his death, illness, or absence, or in any other cases appointed by the Council; whenever he so acts, all things required or authorised to be done by, to, or before the clerk, may be done by, to, or before his deputy (*p*).

The treasurer

1164. The County Council must appoint a treasurer, who may not be a member of the Council nor its clerk, who holds office at its pleasure. A vacancy in the office must be filled within twenty-one days (*q*).

Vacancies.

1165. The duties of clerk, deputy clerk, and treasurer, may, during vacancies or incapacity, be performed by persons appointed for the purpose by the chairman of the Council (*r*).

Other officers.

1166. In addition to those above mentioned the principal officers of the County Council include the following:—The comptroller, engineer, architect (*s*), solicitor, valuer, medical officer of health (*a*), education adviser, education officer, statistical officer, chief officer of tramways, chief officer of the fire brigade (*b*), chemist, and clerk to the asylums committee.

Officers of borough councils.

1167. The councils of metropolitan boroughs (*c*) must appoint, and may remove at will, such officers and servants as may be necessary, may fix their salaries (*d*), and may make bye-laws for regulating their appointment, removal, duties, conduct, and remuneration (*e*).

Duty as to accounting.

Officers entrusted with the custody of money must give such security as the council may think fit, and all officers and servants must furnish accounts and deliver up documents when required (*f*). There is the same provision as in the case of the County Council against officers and servants being interested in contracts with the council or accepting fees (*g*).

(*o*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 83 (11) (a). As to this provision, see *Westminster* (*Duke*) *and London County Council* v. *Bedford* (*Duke*) (1900), 16 T. L. R. 114. As to the clerk's duties in respect of valuation, see p. 395, *ante*.

(*p*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 83 (4), (11) (b).

(*q*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 18; Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 75 (16) (e), and resolution of the London County Council thereunder.

(*r*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 43; see title LOCAL GOVERNMENT, Vol. XIX, pp. 344, 345.

(*s*) As to the superintending architect of metropolitan buildings, see p. 470, *post*.

(*a*) As to the county medical officer of health, see title LOCAL GOVERNMENT, Vol. XIX., p. 346.

(*b*) As to the London Fire Brigade, see p. 417, *ante*.

(*c*) As successors under the London Government Act, 1899 (62 & 63 Vict. c. 14) to the vestries and district boards.

(*d*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 62. As to daily attendance at the offices of the council, see p. 432, *ante*. As to a joint appointment for two boroughs, see Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 139.

(*e*) *Ibid.*, s. 202.

(*f*) *Ibid.*, s. 65.

(*g*) *Ibid.*, s. 64; see p. 453, *ante*.

1168. The clerk to a metropolitan borough council is styled the town clerk (*h*). Town clerk and treasurer.

Neither the borough treasurer nor any partner of his, nor any person in the employ of either, may hold or assist in the office of town clerk; and neither the town clerk nor any partner of his, nor any person in the employ of either, may hold or assist in the office of borough treasurer (*i*).

If the town clerk be ill or absent, the council may appoint a deputy to hold office during its pleasure (*k*).

The town clerk has the powers and duties of overseers in respect of preparing jury lists and voters' lists; he may sign documents required to be signed by the overseers (*l*); and he or the collector may represent the council in bankruptcy proceedings (*m*).

1169. As the sanitary authority for the borough, the borough council are required to appoint a medical officer (or officers) of health and an adequate number of sanitary inspectors (*n*). Other officers.

1170. There are general provisions (*o*) as to superannuation and pensions, but a number of the boroughs have obtained local Acts conferring special powers as regards these matters. Superannuation; pension.

Part VIII.—Powers in regard to Land.

SECT. 1.—*Under the Local Government Acts.*

1171. The London County Council has the same general powers as other county councils of acquiring land, or any rights over land, for the purpose of any of its powers and duties (*a*). Acquisition of land by County Council.

1172. A borough council may as respects the borough exercise the same powers in regard to land as the County Council, but the By borough council.

(*h*) London Government Act, 1899 (62 & 63 Vict. c. 14), s. 4 (1). As to vestry clerks, see Vestries Act, 1850 (13 & 14 Vict. c. 57).

(*i*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 63.

(*k*) London Government Act, 1899 (62 & 63 Vict. c. 14), s. 25.

(*l*) *Ibid.*, s. 11 (1), (2). As to addressing precepts to him, see p. 442, *ante*.

(*m*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 223.

(*n*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), ss. 106—109. As to these officers, see p. 466, *post*. As to officers to assist in the business of overseers, see p. 407, *ante*.

(*o*) Superannuation (Metropolis) Act, 1866 (29 & 30 Vict. c. 31); see also as to Hammersmith and Fulham, Battersea and Westminster, Plumstead and Hackney, the Metropolis Management Amendment Act, 1885 (48 & 49 Vict. c. 33); the Metropolis Management (Battersea and Westminster) Act, 1887 (50 & 51 Vict. c. 17); and the Metropolis Management (Plumstead and Hackney) Act, 1893 (56 & 57 Vict. c. 55), respectively; and as to the transfer of officers in 1899, see the London Government Act, 1899 (62 & 63 Vict. c. 14), s. 30.

(*a*) See Local Government Act, 1888 (51 & 52 Vict. c. 41), ss. 3 (iv.), 40(6), 65 (1), (2); Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 176—178; titles COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 163, 167; LOCAL GOVERNMENT, Vol. XIX., p. 364, and *ibid.*, note (*m*).

SECT. 1. Under the Local Government Acts.

powers are to be exercised only where the land is required for the purposes of any of the powers and duties of the borough council (*b*).

SECT. 2.—*Under the Metropolis Management Acts.*

Land for sewage and other works.

1173. The London County Council and the borough councils have also powers under the Metropolis Management Act, 1855 (*c*), and Acts amending it, of acquiring land, and any right or easement in or over any land, which they deem necessary or expedient for the formation or protection of any works which they are authorised to execute under those Acts. They may also contract for the purchase, removal or abatement of any mill-dam, pound, weir, bank, wall, lock or other obstruction to the flow of water, whereby sewerage or drainage is interrupted or impeded, and for the purchase of any land, or any right or easement in or over any land, which it may be necessary or expedient to purchase to prevent the obstruction of sewerage or drainage. They may also purchase or take on lease the whole of any streams or springs of water or any rights therein which it appears to them necessary to acquire or use for the purpose of cleansing sewers and drains and other kindred purposes, or any land, which it is deemed by them advisable to purchase or take on lease, for the purpose of drawing or obtaining water from springs, or by sinking wells, and for making and providing reservoirs, tanks, aqueducts, watercourses, and any other works, or for any other purpose connected with the works, for obtaining such supply of water as aforesaid (*d*).

Application of Lands Clauses Acts.

1174. For the purpose of acquiring any such land, or any such right or easement in or over any land, the provisions of the Lands Clauses Acts (*e*) are incorporated, except the provisions as to recovery of forfeitures, penalties, and costs (*f*), and the provisions

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(*b*) London Government Act, 1899 (62 & 63 Vict. c. 14), s. 5 (2), Sched. II. Part II.

(*c*) 18 & 19 Vict. c. 120.

(*d*) *Ibid.*, s. 150, which also gives power to acquire land for deposits for refuse. There is also a proviso to *ibid.*, s. 150, prohibiting the County or borough councils using or permitting to be used any of the said waterworks for the purpose of carrying water by supply pipes into any house or factory for domestic, manufacturing or commercial purposes. The general powers of acquiring land thus given are to some extent superseded by those given in the later Acts mentioned in the previous paragraph (see the text, *supra*); but the power to acquire the water rights mentioned in this provision is of importance, inasmuch as the word "lands" in the Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 176—178, does not, so far at least as that Act is concerned, include water rights; see *ibid.*, s. 332; and title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 15, 163. A metropolitan borough council and the Common Council of the City, as sanitary authorities, can also acquire water rights in connection with certain of their duties, and the provisions of the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), apply (Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 43; see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 173.

(*e*) This expression includes the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), and the Acts for the time being in force amending the same. See title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 12.

(*f*) These are the provisions in the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), ss. 136—149. (Note: *Ibid.*, s. 149, is repealed by the Perjury Act, 1911 (1 & 2 Geo. 5, c. 6), which comes into force on 1st January, 1912).

SECT. 2. Under the Metropolis Management Acts.

applicable in the case of a purchase of land are made applicable to the case of the purchase of a right or easement in or over any land (*g*). But the provisions of these Acts "with respect to purchase and taking of land otherwise than by agreement" (*h*) are not incorporated, save for enabling the County Council to take land, or any right or easement in or over land, for the purpose of making any sewers or works for preventing the sewage or any part of the sewage within the Metropolis from passing into the Thames in or near the Metropolis, or otherwise for the purpose of the sewerage or drainage of the Metropolis, or for the purpose of making convenient roads or ways to or in connection with any sewers or works vested or to become vested in the County Council, or which it may require for making roads or ways during the construction of any sewerage works, or for spoil banks or places of deposit of surplus earth or other materials in the execution of any such works (*i*), or for the execution of flood works to prevent the overflow of the river Thames (*k*).

Consents required.

1175. No land, right or easement in or over land, for the aforesaid purposes can be taken compulsorily by the County Council without the consent in writing of one of His Majesty's principal Secretaries of State (*l*). Before applying for this consent, the Council must publish once at least in each of four consecutive weeks, in one of the daily papers published in the Metropolis, an advertisement containing certain particulars, and must also serve a notice on the owners or reputed owners, lessees or reputed lessees, and occupiers of the land intended to be taken, or of the land in or over which such right or easement is intended to be taken, such service to be made four weeks previously to the application to the Secretary of State. The notice must state the particulars of the land, right or easement so required, and that the County Council is willing to treat for the purchase

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The Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), ss. 128, 129, 130, which relate to an owner's right of pre-emption (see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 28 *et seq*), are not to apply unless the person entitled to sell and convey the land, right or easement reserves such right at the time of sale in and by the conveyance (Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 155). The County Council has power to sell any land acquired or vested in it under that Act which may be properly sold or disposed of. This power does not extend to the borough councils (*ibid.*, s. 154), as amended by London Government Act, 1899 (62 & 63 Vict. c. 14), s. 35 (2), and Sched. III., which schedule has been repealed by the Statute Law Revision Act, 1908 (8 Edw. 7, c. 49).

(*g*) As to how far "lands" under the Lands Clauses Acts include easements, see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 15.

(*h*) These words are the heading to the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), ss. 16—68, and the effect of the provision is to exclude the operation of all these sections, and these only, except for the particular purpose. See also title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 12 *et seq.*

(*i*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 152; Metropolis Management Amendment Act, 1858 (21 & 22 Vict. c. 104), s. 3, Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 22.

(*k*) Metropolis Management (Thames River Prevention of Floods) Amendment Act, 1879 (42 & 43 Vict. c. cxcvii.).

(*l*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 152.

SECT 2. Under the Metropolis Management Acts.

thereof, and as to the compensation to be made for the damage that may be sustained by reason of the proposed works (*m*).

Acquisition of rights in land

1176. The county and borough councils may also acquire rights in land in connection with their power to lay sewers through, across, or under streets and land, subject to payment of compensation. This power is independent of those previously mentioned (*n*).

SECT. 3.—*Miscellaneous Powers.*

Land for street improvements.

1177. The metropolitan borough councils and the Common Council of the City of London have also power to acquire land, either by agreement or compulsorily, for widening, altering, and improving the streets or other public places in their respective districts when such is for the public advantage. They may exercise their compulsory powers upon passing a resolution that the acquisition is necessary for such purposes (*o*). The County Council may also carry out street improvements and acquire land for the purpose by agreement. If the Council desires to acquire the land compulsorily it is empowered to promote a private bill for the purpose (*p*).

Powers of the Common Council.

1178. The Common Council of the City of London may acquire land by agreement for the purpose of the Commissioners of Sewers Acts, 1818 and 1851 (*q*), and the provisions of the Lands Clauses

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(*m*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 153. The advertisement must (1) describe the nature of the works in respect of which the land, right or easement is proposed to be taken, (2) name a place where a plan of the proposed works is open for inspection at all reasonable hours, and (3) state the quantity of land or the particulars of the right or easement that is required for the purpose of the works.

(*n*) *Hughes* v. *Metropolitan Board of Works* (1861), 9 W. R. 517; and see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 173.

(*o*) This power is contained in a local Act commonly called Michael Angelo Taylor's Act, and also known as the Metropolitan Paving Act, 1817 (57 Geo. 3, c. XXIX.), ss. 80—96. Its application was extended to the whole of the Metropolis by the Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 73. See also titles COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 8, 171, 172; HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 198 *et seq.*, where the provisions of Michael Angelo Taylor's Act, and the cases thereon are dealt with.

(*p*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 144, as amended by the Metropolis Management Amendment Act, 1856 (19 & 20 Vict. c. 112), s. 10. Local Acts of this kind have been passed by Parliament almost annually, more particularly of recent years in connection with the laying of tramways. The Lands Clauses Acts (see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 1 *et seq.*) are incorporated, with minor modifications, in regard to taking part of buildings, to compensation for recently erected buildings, and to the purchase of easements; see, for example, London County Council (General Powers) Act, 1905 (5 Edw. 7, c. ccvi.), ss. 21—23; London County Council (Tramways and Improvements) Act, 1909 (9 Edw. 7, c. lxxv.), ss 39—45. The borough councils occasionally assist the County Council to obtain the necessary widenings for the tramways by exercising their compulsory powers under Michael Angelo Taylor's Act (see note (*o*), *supra*). Such exercise is valid if exercised *bonâ fide* for the public advantage (*Parry* v. *Hammersmith Metropolitan Borough* (1904), 69 J. P. 35; *Corsellis* v. *London County Council*, [1908] 1 Ch. 13, C. A.).

(*q*) 11 & 12 Vict. c. clxiii.; 14 & 15 Vict. c. xci.

Acts (*r*) so far as necessary are made applicable (*a*). The Common Council may also from time to time provide and maintain fit and convenient offices within the City for holding meetings and transacting business, and for such purpose may purchase or hire by agreement any messuage, or tenement, or land which it may consider to be necessary (*b*).

Other statutory powers.

1179. The London County Council, the metropolitan borough councils, and the Common Council of the City of London are the local authorities to administer various public general Acts within their respective areas, and incidentally they have the powers, conferred by these statutes, of acquiring land for carrying out their objects (*c*).

SECT. 4.—*Alienation.*

Alienation.

1180. With the consent of the Local Government Board, the County Council and any metropolitan borough council may alienate any land for the time being vested in such council, except that a borough council may not alienate any recreation ground or other open space dedicated to the use of the public, or any land held on trusts which prohibit building thereon (*d*).

The County Council may also, without such consent, sell and dispose of any land purchased by or vested in it under the Metropolis Management Acts (*e*). The County Council or any borough council may also let any such land, which for the time being is not required for the purposes of those Acts (*e*), in such manner and on such terms as the council may see fit (*f*).

(*r*) See title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 1 *et seq.*

(*a*) Commissioners of Sewers Act, 1848 (11 & 12 Vict. c. clxiii.), ss 2, 3. The provisions (see pp. 456, 457, *ante*) with respect to the purchase of land otherwise than by agreement, with respect to superfluous land, and with respect to the recovery of penalties and costs, are not made applicable.

(*b*) City of London Sewers Act, 1897 (60 & 61 Vict. c. cxxxiii.).

(*c*) For example, the Acts relating to housing, education, and public libraries. As to acquiring land in the City of London for purposes of the Baths and Washhouses Acts, see City of London (Various Powers) Act, 1900 (63 & 64 Vict c. ccxxviii.), ss 14—16.

(*d*) As regards the County Council, see Local Government Act, 1888 (51 & 52 Vict. c. 41), ss. 40 (6), 61 (3), and title LOCAL GOVERNMENT, Vol. XIX., p. 364; and as regards borough councils, see London Government Act, 1899 (62 & 63 Vict. c. 14), ss 6 (5), 32. The proceeds of the sale of any land sold by a borough council are to be applied in such manner as the Local Government Board sanction towards the discharge of any loan of the council or otherwise for any purpose for which capital may be applied by the council (*ibid.*, s. 6 (5)). As to such loans, see pp. 444, 447, *ante*.

(*e*) 1855 (18 & 19 Vict. c. 120); 1856 (19 & 20 Vict. c. 112); 1862 (25 & 26 Vict. c. 102); 1890 (53 & 54 Vict. c. 54); 1890 (53 & 54 Vict. c. 66).

(*f*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 154. So much of this provision as related to sale of land by district boards and vestries was repealed by the London Government Act, 1899 (62 & 63 Vict. c. 14), s. 35 (2), Sched. III. The Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 154, contains provisions as to the form of conveyance, which are practically superseded. The conveyance must be under the seal of the Council. There is also provision for the application of the purchase-money. As to rights of pre-emption, see note (*f*), p. 456, *ante*, and provisions in the annual money Acts of the London County Council; see, for example, London County Council (Money) Act, 1890 (53 & 54 Vict. c. 41), s. 24.

SECT. 4. Alienation.

Land acquired by the Common Council of the City of London and metropolitan borough councils for widening and improving streets may be sold if not required, subject to rights of pre-emption on the part of persons from whom the rights in the land were acquired (*g*).

Part IX.—Metropolitan Bye-laws.

General powers.

1181. The London County Council may make bye-laws for the good rule and government of the county and for the prevention and suppression of nuisances not already punishable in a summary manner by virtue of any Act in force throughout the county (*h*).

A metropolitan borough council has similar powers, but the bye-laws made thereunder operate only within the borough, and must not be inconsistent with any bye-laws made by the County Council (*i*).

Exercise of powers.

1182. Under the above-mentioned powers the County Council has made bye-laws as to:—Steam organs, shooting galleries, roundabouts etc.; noisy animals; street betting and racing literature; street shouting; flash and search lights; public decency; waste paper, advertising bills, refuse etc.; window cleaning and painting; spitting; and construction of vehicles. Most of the borough councils have made bye-laws as to:—music near hospitals and public buildings; noisy hawking; jostling in streets; orange peel etc. in streets; pulling down notices; rags, bones, bottles etc.; indecent shows; noise in streets at night; music on brakes etc.; street cries; and noisy organs etc.

Special powers (1.) Of County Council;

1183. The County Council has also under various statutes made bye-laws with respect to the following:—Thames bridges and embankments, bridges other than Thames bridges, Blackwall and Greenwich tunnels, and Woolwich ferry (*k*); sewers (construction, alteration, and connections etc. (*l*)); drains (construction etc. (*l*)); subways for pipes and wires (*a*); overhead

(*g*) Michael Angelo Taylor's Act, 1817 (57 Geo. 3, c. xxix.), s. 96; but in the City of London the City of London Sewers Act, 1851 (14 & 15 Vict. c. xci.), s. 54, releases the council from those rights of pre-emption.

(*h*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 23; Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 16. As to nuisances generally, see title NUISANCE.

(*i*) London Government Act, 1899 (62 & 63 Vict. c. 14), s. 5 (2), Sched. II. (2).

(*k*) London County Council (General Powers) Act, 1892 (55 & 56 Vict. c. ccxxxviii), Part V.; London County Council (General Powers) Act, 1894 (57 & 58 Vict. c. ccxii.), Part III. As to the jurisdiction of the London County Council over such bridges, tunnels, and ferry, see pp. 395, 398, *ante*.

(*l*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), ss. 138, 202, 203; Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 83; Metropolis Management Acts Amendment (Byelaws) Act, 1899 (62 & 63 Vict. c. 15), s. 2. See titles HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 206; SEWERS AND DRAINS.

(*a*) Metropolitan Subways Act, 1868 (31 & 32 Vict. c. lxxx.), ss. 10, 11; see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 206.

wires (*b*); tramways (*c*); locomotives on bridges (*d*); water-closets, earth-closets, privies, ash-pits, cesspools and receptacles for dung (*e*); removal of refuse and offensive matter (*f*), and closing of cesspools and privies (*f*); slaughter-houses and noxious businesses (*g*) (*i.e.*, bone-boiler; manure manufacturer or tallow-melter; fat-melter or extractor; knacker; blood-drier etc.; gut-scraper and catgut maker or manufacturer; animal charcoal manufacturer; glue and size manufacturer; tripe-boiler; soap-boiler; fell-monger; fish-skin dresser; conveyer of dead horses); common lodging-houses and seamen's lodging-houses (*h*); parks and open spaces (including regulations as to bathing, games, sale of refreshments, lavatories etc. therein (*i*)); employment agencies (*k*); buildings and structures (*l*); new streets (*m*); sale of coal (*n*). The London County Council has also made regulations as to dairies, cowsheds, milkshops etc. (*o*), and as to the precautions to be observed in the case of certain diseases of horses (*p*).

(ii.) of borough councils.

1184. All the metropolitan borough councils have made bye-laws, under various statutes, for the prevention of nuisances arising from snow, ice, salt, dust, ashes, rubbish, offal, carrion, fish, filth, or other matter or thing in any street (*q*); for the prevention of nuisances

(*b*) London Overhead Wires Act, 1891 (54 & 55 Vict. c. lxxvii); see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 206.

(*c*) Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 46; see title TRAMWAYS AND LIGHT RAILWAYS.

(*d*) Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), s. 31; Locomotives Act, 1898 (61 & 62 Vict. c. 29), ss. 6, 18 (2); see title RAILWAYS AND CANALS.

(*e*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 39; see also titles NUISANCE; PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*f*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 16 (2); see also titles NUISANCE, PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*g*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 19; see titles ANIMALS, Vol. I., p. 412; NUISANCE; PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*h*) London County Council (General Powers) Act, 1902 (2 Edw. 7, c. clxxiii.), Part IX.; Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 214; see title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*i*) Metropolitan Board of Works Act, 1877 (40 & 41 Vict. c. viii.); Metropolitan Board of Works (Various Powers) Act, 1887 (50 & 51 Vict. c. cvi.), s. 50; London County Council (General Powers) Act, 1890 (53 & 54 Vict. c. ccxlii.), ss. 14–20; London County Council (General Powers) Act, 1898 (61 & 62 Vict. c. ccxxi.), s. 61; see titles OPEN SPACES AND RECREATION GROUNDS; PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*k*) London County Council (General Powers) Acts, 1905 (5 Edw. 7, c. ccvi.), s. 47; 1906 (6 Edw. 7, c. cl.), s. 34; see titles PUBLIC HEALTH AND LOCAL ADMINISTRATION; WORK AND LABOUR.

(*l*) See pp. 480, 488, *post*.

(*m*) See p. 395, *ante*, and title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 208; and compare note (*s*), p. 473, *post*.

(*n*) Weights and Measures Act, 1889 (52 & 53 Vict. c. 21), s. 28; see titles TRADE AND TRADE UNIONS; WEIGHTS AND MEASURES.

(*o*) Under the Dairies etc. Order, 1885; see titles ANIMALS, Vol. I., pp. 433, 434; FOOD AND DRUGS, Vol. XV., p. 64; PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*p*) See title ANIMALS, Vol. I., pp. 421, 430.

(*q*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 16; see titles NUISANCE; PUBLIC HEALTH AND LOCAL ADMINISTRATION.

PART IX. Metropolitan Bye-laws.

arising from any offensive matter running out of any manufactory, brewery, slaughter-house, knacker's yard, butcher's or fishmonger's shop, or dunghill, into any uncovered place, whether or not surrounded by a wall or fence (*r*); for preventing the keeping of animals on any premises in such place or manner as to be injurious or dangerous to health (*r*); for the paving of yards and open spaces in connection with dwelling-houses (*r*); for securing the cleanliness and freedom from pollution of tanks, cisterns, and other receptacles used for storing of water used, or likely to be used, by man for drinking or domestic purposes, or for manufacturing drink for the use of man (*s*); with respect to the keeping of water-closets supplied with sufficient water for their effective action (*t*); with respect to houses let in lodgings or occupied by members of more than one family (*u*). In most boroughs also there are bye-laws with respect to management of the mortuary (*a*); the decent conduct of persons using public lavatories and sanitary conveniences (*b*); the regulation of public baths (*c*); the management, use and regulation of public washhouses (*c*); and for preventing public interference with council meetings (*d*).

Most of the borough councils have also made regulations (or bye-laws) as to:—premises let by the council to persons of the working class (*e*); public libraries or museums (*f*); the removal of manure from stables or cow-houses (*g*); and underground conveniences (*h*).

Confirmation.

1185. Bye-laws made by the London County Council or a borough council under the Metropolis Management Acts (*i*) must be confirmed at a subsequent meeting of the County Council, and must be approved by the Home Secretary or Local Government Board (as the case may be). Provision is made for the publication and proof of such bye-laws (*j*).

(*r*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 16; see also titles NUISANCE; PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*s*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 50; see title NUISANCE.

(*t*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 39 (2), see also titles NUISANCE; PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*u*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 94.

(*a*) *Ibid.*, s. 88; see title BURIAL AND CREMATION, Vol. III., p. 566.

(*b*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 45; see title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*c*) Bath and Washhouses Acts, 1846 (9 & 10 Vict. c. 74), s. 34; 1878 (41 & 42 Vict. c. 14), s. 6; see title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*d*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 202. As to such meetings, see p. 434, *ante*.

(*e*) Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 62; see title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*f*) Public Libraries Acts, 1892 (55 & 56 Vict. c. 53), s. 15; 1901 (1 Edw. 7, c. 19), s. 3; Museums and Gymnasiums Act, 1891 (54 & 55 Vict. c. 22), s. 7; see title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*g*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 36 (2).

(*h*) *Ibid.*, s. 45, see title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*i*) 1855 (18 & 19 Vict. c. 120); 1856 (19 & 20 Vict. c. 112); 1862 (25 & 26 Vict. c. 102); 1890 (53 & 54 Vict. c. 54); 1890 (53 & 54 Vict. c. 66).

(*j*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), ss. 202, 203

Part X.—Execution of the Metropolis Management Acts and the Public Health (London) Act.

SECT. 1.—*Metropolis Management Acts.*

SECT. 1. Metropolis Management Acts

1186. The Metropolis Management Acts (*k*) contain a number of saving clauses (*l*):—for the Crown and Duchies of Lancaster and Cornwall (*m*), for powers and privileges exercised jointly by two or more authorities (*n*), for the Ely Place Paving Commissioners (*o*), for the Commissioners under the Crown Estate Paving Act, 1851 (*p*), for the Commissioners of Works (*q*), for the City Commissioners of Sewers (*r*), and for the Metropolitan Police Commissioners (*s*). There were also special provisions as to the making of church rates and election of churchwardens in certain parishes and districts (*t*). Saving clauses in favour of the old Commissioners of Sewers for any portion of the Metropolis enure in general in favour of the London County Council and metropolitan borough councils (*u*).

Saving clauses.

All Acts of Parliament inconsistent with the provisions of the Metropolis Management Acts (*a*) are *pro tanto* repealed (*b*). In case of conflict, provisions of local Acts may be varied by Order in Council (*c*).

1187. Where a street is in more than one metropolitan borough (*d*), or where the roadway and footpaths of a street are in different boroughs, or where the roadway and footpaths are in one borough and the adjoining houses in another (*e*), the County Council may place it for some or all of the purposes of the Metropolis Management Acts (*a*) entirely under the control of one

Transfer of powers by County Council.

Metropolis Management Acts Amendment (Byelaws) Act, 1899 (62 & 63 Vict. c. 15), ss. 2, 3, Schedule; see bye-laws made 13th October, 1891; 7th November, 1900; 30th July, 1903.

(*k*) See note (*i*), p. 462, *ante*

(*l*) See, further, title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 199.

(*m*) Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), ss. 116, 117; see title CONSTITUTIONAL LAW, Vol. VII., pp. 201, 237, 257.

(*n*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 235.

(*o*) *Ibid.*, s. 237.

(*p*) *Ibid.*, s. 240.

(*q*) *Ibid.*, s. 241; see title CONSTITUTIONAL LAW, Vol. VII., p. 137.

(*r*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 242.

(*s*) *Ibid.*, s. 215.

(*t*) Metropolis Management Amendment Act, 1856 (19 & 20 Vict. c. 112), ss. 1—3. See also London Government Act, 1899 (62 & 63 Vict. c. 14), s. 23, and note (*n*), p. 407, *ante*, as to church affairs and charities.

(*u*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 210.

(*a*) See note (*i*), p. 462, *ante*.

(*b*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 247.

(*c*) *Ibid.*, s. 248.

(*d*) *Ibid.*, s. 140; and see title SEWERS AND DRAINS.

(*e*) Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 86. As to apportionment of expenses, see the authorities cited in title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 200, note (*m*). As to stopping up streets during the execution of works, see *ibid.*, pp. 200, 201.

SECT. 1. Metropolis Management Acts.

borough council. The County Council may also place part of a borough under the control of another borough council for sewerage purposes (*f*).

Contracts.

1188. The County Council and metropolitan borough councils have a general power to enter into contracts for carrying out the Metropolis Management Acts (*g*).

Works.

1189. Works which will interfere with any railway or canal must not be commenced by a council until notice has been given to the company, who may object to the proposed method of executing the works and require arbitration thereon (*h*).

Recovery of damages, compensation etc.

1190. Where under the Metropolis Management Acts (*i*) the amount of any damages, costs, or expenses is directed to be ascertained or recovered (*j*) summarily, or is directed to be paid, and no mode of ascertaining the amount or enforcing payment is provided, the same must be ascertained by and recovered before a court of summary jurisdiction (*k*). The amount of any compensation directed to be paid by the County Council or a metropolitan borough council is (unless otherwise provided) to be similarly settled and recovered; but claims for compensation exceeding £50 must be referred to arbitration (*l*).

Recovery of penalties.

1191. Penalties imposed by the Metropolis Management Acts (*i*) or bye-laws thereunder, and damages, costs, and expenses payable under the same, may, if no special provision be made for the recovery thereof, be recovered summarily (*m*); complaints must be laid within six months after the commission or discovery of an offence (*n*).

Compensation.

1192. Where a person through any act, neglect or default, in respect of which he has incurred a penalty, has caused damage to any property of a council, he is liable to pay compensation (to be fixed by the convicting justices in case of dispute) in addition to the penalty (*o*).

(*f*) See note (*d*), p. 463, *ante*.

(*g*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 149 and see note (*i*), p. 462, *ante*.

(*h*) Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), ss. 34, 35.

(*i*) 1855 (18 & 19 Vict. c. 120); 1856 (19 & 20 Vict. c. 42); 1862 (25 & 26 Vict. c. 102); 1890 (53 & 54 Vict. c. 54); 1890 (53 & 54 Vict. c. 66).

(*j*) As to the recovery of expenses from an occupier of premises instead of the owner, see titles HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 203; LANDLORD AND TENANT, Vol. XVIII., pp. 477, 478, 489, 490, 492. As to the acceptance of payments by instalments, see p. 451, *ante*.

(*k*) As to the enforcement of orders of courts of summary jurisdiction, see title MAGISTRATES, Vol. XIX., pp. 602 *et seq.*

(*l*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 225; see *ibid.*, s. 226, as to the procedure.

(*m*) *Ibid.*, s. 227; Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), ss. 102, 104. As to the recovery of penalties, see p. 449, *ante*.

(*n*) Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 107.

(*o*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 228.

SECT. 1. Metropolis Management Acts.

1193. The provisions of the Metropolis Management Act, 1855 (*p*), imposing penalties upon persons committing offences, apply also to persons causing, ordering or, directing the commission of such offences (*q*).

Accessories.

Obstructing officers.

1194. A penalty is imposed on any person who obstructs officers or workmen in the execution of their duty (*a*) under the Metropolis Management Acts (*b*), and also on any occupier of premises who prevents the owner carrying out the provisions of the Acts (*b*) or any order made in pursuance thereof, or who refuses on demand to disclose the owner's name (*c*).

Arrest of offenders.

1195. Officers and servants of a council, police constables, and persons called upon by them for assistance may, without a warrant, arrest persons offending against the Metropolis Management Acts (*b*) and bye-laws thereunder, if their names and residences are unknown, and take them forthwith before a justice (*d*).

Validity of proceedings.

1196. Orders and proceedings under the Metropolis Management Acts (*b*) are not to be quashed for want of form or (except in cases specially provided) removed by *certiorari* (*e*).

Appeal.

1197. In certain cases a person aggrieved by an order of a metropolitan borough council may appeal therefrom to the London County Council (*f*); and a person aggrieved by any adjudication or determination of justices with respect to any penalty or forfeiture may appeal to quarter sessions (*g*).

SECT. 2.—*Public Health (London) Act.*

Application of Act.

1198. The Public Health (London) Act, 1891 (*h*), extends (save as otherwise expressly provided) to the administrative County of London, and to places elsewhere only so far as is necessary to give effect to any of its provisions in their application to London and to any place to which such provisions are expressly applied (*i*). In its application to the City certain modifications are made (*k*).

The Act (*h*) contains a definition section (*l*), and saving clauses for

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(*p*) 18 & 19 Vict. c. 120.
(*q*) Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 65.
(*a*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 208.
(*b*) See note (*i*), p. 464, *ante*.
(*c*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 209.
(*d*) *Ibid.*, s. 229.
(*e*) *Ibid.*, s. 230. As to *certiorari*, see title CROWN PRACTICE, Vol. X., pp. 155 *et seq.*
(*f*) See Metropolis Management Act[illegible] 212; 1862 (25 & 26 Vict. c. 102), s. 29;
(*g*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), ss. 201, 202.
(*h*) 54 & 55 Vict. c. 76. It repealed the whole or portions of thirty-five existing statutes (*ibid.*, s. 142, Sched. IV.).
(*i*) *Ibid.*, ss. 132, 141.
(*k*) See p. 469, *post*.
(*l*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 141.

SECT 2. Public Health (London) Act.

water rights (*a*) and the Thames Conservancy (*b*). Powers, rights and remedies given by it are cumulative (*c*).

A vessel (not being one in charge of a naval officer nor belonging to a foreign Government), whilst lying within a sanitary district, is, subject to the provisions as to the Port of London Sanitary Authority (*d*), to be treated as if it were a house within that district, the master being deemed to be the occupier (*e*).

Medical officer of health.

1199. Every sanitary authority, that is, every metropolitan borough council (*f*), must appoint one or more medical officers of health (*g*); but the Local Government Board may sanction joint appointments. A medical officer must in general reside within a mile of his district; he may exercise any of the powers of a sanitary inspector, and his annual report must be appended to the council's report (*h*).

Sanitary inspector.

1200. Every sanitary authority must appoint an adequate number of persons, qualified and competent by knowledge and experience to be sanitary inspectors, and may distribute among them the duties to be performed by such inspectors (*i*). On a complaint by the London County Council the Local Government Board may order additional appointments to be made (*k*). Inspectors must report nuisances to the authority, who must keep a book for the entry of complaints received; and inspectors must report on complaints. Such report and orders made thereon must be entered in the book and be open to inspection. It is the duty of inspectors, subject to directions of the authority or a committee thereof, to take proceedings in respect of offences (*l*).

Qualifications.

1201. Medical officers and sanitary inspectors must possess certain qualifications (*m*). The former may not be appointed for a limited term only (*n*), and can only be removed by, or with the consent of, the Local Government Board (*o*). Subject to these provisions and certain provisions as to particular officers (*p*), the Local Government Board have the same powers as in the case of a poor law district medical officer, with regard to the qualification, appointment, duties, salary, and tenure of office of every medical officer of

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(*a*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 136.
(*b*) *Ibid.*, s. 137. As to the Thames Conservancy, see p. 413, *ante*, and title WATERS AND WATERCOURSES.
(*c*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 138.
(*d*) See p. 411, *ante*.
(*e*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 110.
(*f*) See pp. 404, 408, *ante*. As to the enforcement of the duties of the borough council by the London County Council, see p. 409, *ante*.
(*g*) As to such officers, see title LOCAL GOVERNMENT, Vol. XIX., pp. 346, 347.
(*h*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 106.
(*i*) *Ibid.*, s. 107 (1).
(*k*) *Ibid.*, s. 107 (2).
(*l*) *Ibid.*, s. 107 (3).
(*m*) *Ibid.*, s. 108 (2) (a), (d).
(*n*) *Ibid.*, s 108 (2) (c).
(*o*) *Ibid.*, s. 108 (2) (b).
(*p*) For temporary provisions in favour of "existing officers," see *ibid.*, s 139.

health and sanitary inspector, and one-half of each officer's salary is payable by the County Council (*q*).

With the sanction of the Local Government Board a sanitary authority may, when necessary, make a temporary arrangement for the performance of all or any of the duties of a medical officer or sanitary inspector (*r*).

Bye-laws.

1202. Bye-laws made by the County Council or a sanitary authority under the Public Health (London) Act, 1891 (*s*), are to be made in accordance with the procedure regulating the making of bye-laws under the Public Health Act, 1875 (*t*); but, where the County Council is about to make bye-laws to be observed and enforced by a sanitary authority, notice must be given to every such authority and their representations considered (*u*).

Exercise of powers of inspection and entry.

1203. Where the Public Health (London) Act, 1891 (*s*), gives to a sanitary authority power to examine or enter premises, it may examine and enter by members of the authority or by officers or persons authorised by them either generally or in any particular case (*v*). Subject to any special enactment, a person claiming the right to enter must produce a proper authority, and persons refusing to admit him are liable to penalties (*w*). In certain cases a justice may grant a warrant authorising entry, by force if necessary, and obstruction of persons holding such a warrant is punishable in the prescribed manner (*a*).

Offences and penalties.

1204. A person is liable to a fine not exceeding £5 who wilfully obstructs any person employed in the execution of the Public Health (London) Act, 1891 (*b*), or destroys, pulls down, injures, or defaces notices or notice boards put up by authority, or wilfully damages property of a sanitary authority (*c*).

If an occupier of premises prevents the owner from obeying any provision of the Act (*b*), a petty sessional court may order him, under pain of a fine, to permit the execution of any necessary works (*d*).

An occupier who, after due request, without good cause conceals or misstates the owner's name and address, is liable to a fine not exceeding £5 (*e*).

Proceedings

1205. The Summary Jurisdiction Acts (*f*) apply to offences, fines,

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(*q*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 108 (1)
(*r*) *Ibid.*, s. 109.
(*s*) 54 & 55 Vict. c. 76.
(*t*) 38 & 39 Vict. c. 55, as to which, see title PUBLIC HEALTH AND LOCAL ADMINISTRATION. Bye-laws were made on 22nd June, 1893; 26th July, 1899; 10th October, 1901; 10th November, 1901.
(*u*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 114.
(*v*) *Ibid.*, s. 115 (1).
(*w*) *Ibid.*, s. 115 (2).
(*a*) *Ibid*, s. 115 (3)—(6).
(*b*) 54 & 55 Vict. c. 76.
(*c*) *Ibid.*, s. 116 (1).
(*d*) *Ibid.*, s. 116 (2).
(*e*) *Ibid.*, s. 116 (3). As to the recovery, from an occupier, of costs and expenses payable by an owner, see *ibid*, s. 121, and title LANDLORD AND TENANT, Vol. XVIII., pp. 478, 492.
(*f*) See title MAGISTRATES, Vol. XIX., pp. 571 *et seq.*

SECT. 2. Public Health (London) Act.

penalties, costs, and expenses directed to be prosecuted or recovered summarily, or for the prosecution or recovery of which no special provision is made; but demands not exceeding £50 may be sued for as a debt in the county court (*g*).

A judge or justice of the peace is not incapacitated from acting in cases arising under the Act by reason of his being a member of any sanitary authority, or of being, as one of a class of persons, liable in common with the others to contribute to or be benefited by any rate or fund out of which expenses incurred by a sanitary authority are defrayed (*h*).

The County Council or a sanitary authority may appear before any court or in any legal proceeding by its clerk or by any officer or member authorised by resolution either generally or in respect of any special proceeding. The clerk, or any member or officer so authorised, may institute and carry on any proceeding which the County Council or sanitary authority is authorised to institute or carry on (*i*).

The County Council may not proceed against a sanitary authority without the consent of the Local Government Board, except for the recovery of expenses or money due (*k*).

If a defendant thinks fit, he or she and his or her spouse may be examined or cross-examined as an ordinary witness (*l*).

Fines imposed on a sanitary authority are to be paid to the County Council; other fines are to be paid to the sanitary authority (*m*). Things forfeited may be sold or disposed of as the court ordering the forfeiture may direct (*n*).

Appeals.

1206. Any person deeming himself aggrieved by any conviction or order of a court of summary jurisdiction upon an information or complaint may (except as otherwise provided) appeal to quarter sessions (*o*).

In certain cases an appeal lies to the County Council against notices or acts of a sanitary authority (*p*), such appeals being regulated by the provisions of the Metropolis Management Acts (*q*) as to similar appeals (*r*).

Relief to officers.

1207. No thing done, and no contract made, by the County Council or a sanitary authority, and no thing done by any member or officer of, or person acting under the direction of, such Council or authority shall, if done *bonâ fide* for the purpose of executing the

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(*g*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 117 (1), (2). As to procedure in the county court, see title COUNTY COURTS, Vol. VIII., pp. 448 *et seq.*

(*h*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 122.

(*i*) *Ibid.*, s. 123.

(*k*) *Ibid.*, s. 117 (3).

(*l*) *Ibid.*, s. 118.

(*m*) *Ibid.*, s. 119 (1).

(*n*) *Ibid.*, s. 119 (2).

(*o*) *Ibid.*, s. 125; see title MAGISTRATES, Vol. XIX., pp. 612 *et seq.*

(*p*) *I.e.*, under the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), ss. 37, 41, 43.

(*q*) See note (*i*), p. 464, *ante*.

(*r*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 126; and see p. 421, *ante*.

Public Health (London) Act, 1891 (*s*), subject it personally to any action or liability, and any expense incurred by it is to be paid as part of the costs of executing the Act (*s*). These provisions, however, do not protect members from the liability to surcharge by the auditor (*t*).

Orders and notices.

1208. Orders must be under the seal of the County Council or sanitary authority duly authenticated: notices or other documents may be authenticated by the signature of the clerk or the officer giving or serving them (*a*). All such documents may be served by delivering the original or a true copy to, or at the usual or last known residence in England of, the addressee; or, if addressed to the owner or occupier of premises, then to some person on the premises, or, if there be no person there who can be so served, by fixing the same on some conspicuous part of the premises: they may also be served by sending the original or a true copy by post addressed to a person at such residence or premises (*b*).

Notices to be given to the owner or occupier of any premises may be addressed merely by the description of the "owner" or "occupier" of the named premises (*c*).

Notices to be given to the County Council or a sanitary authority may be addressed to the Council or authority or to the clerk, and delivered at or posted to its offices (*d*).

Inquiries.

The provisions referred to elsewhere (*e*), as to inquiries by the Local Government Board, apply to inquiries held by the Local Government Board under the Public Health (London) Act, 1891 (*f*).

Application of Act to City.

1209. In its application to the City the Public Health (London) Act, 1881 (*g*), is somewhat modified: the bye-laws made by the County Council under it do not extend to the City; no appeal lies to the County Council from the City sanitary authority (*h*), nor can the County Council require a building for *post-mortem* examinations to be provided by such authority, or institute proceedings in case of its default (*i*). If there be default, the Local Government Board may intervene and make an order upon the authority (*k*), and in certain cases of nuisances may direct the City police to institute proceedings (*l*).

(*s*) 54 & 55 Vict. c. 76.
(*t*) *Ibid.*, s. 124.
(*a*) *Ibid.*, s. 127.
(*b*) *Ibid.*, s. 128 (1).
(*c*) *Ibid.*, s. 128 (3).
(*d*) *Ibid.*, s. 128 (2).
(*e*) See titles LOCAL GOVERNMENT, Vol. XIX., p. 388; PUBLIC HEALTH AND LOCAL ADMINISTRATION; see also Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 293—296.
(*f*) 54 & 55 Vict. c. 76, s. 129.
(*g*) 54 & 55 Vict. c. 76.
(*h*) As to this authority, see pp. 460, 428, *ante*.
(*i*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 133.
(*k*) *Ibid.*, s. 135.
(*l*) *Ibid.*, s. 134.

Part XI.—Metropolitan Building Legislation.

SECT. 1. Introductory.

SECT. 1.—*Introductory.*

SUB-SECT. 1.—*Statutes.*

The London Building Acts.

1210. The London Building Acts, 1894—1909 (in this part of the title referred to as "the Acts"), comprise the London Building Act, 1894 (*m*), the London Building Act, 1894 (Amendment) Act, 1898 (*n*), the London Building Acts (Amendment) Act, 1905 (*o*), Part III. of the London County Council (General Powers) Act, 1908 (*p*), and Part IV. of the London County Council (General Powers) Act, 1909 (*q*).

References, in statutes or documents, to statutes repealed by the London Building Act, 1894 (*m*), are, so far as possible, to be read as references to the corresponding provisions of that Act (*r*).

SUB-SECT. 2.—*Authorities and Officers.*

The enforcing authorities.

1211. The provisions of the Acts (*s*) are enforced by the London County Council (*t*), a specially constituted tribunal of appeal, the superintending architect of metropolitan buildings, and the district surveyors for the various districts into which the Metropolis is divided.

(*m*) 57 & 58 Vict. c. ccxiii.

(*n*) 61 & 62 Vict. c. cxxxvii.

(*o*) 5 Edw. 7, c. ccix.; see *ibid.*, s. 2.

(*p*) 8 Edw. 7, c. cvii.; see *ibid.*, s. 15.

(*q*) 9 Edw. 7, c. cxxx.; see *ibid.*, s. 21. The London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), and the London Building Act, 1894 (Amendment) Act, 1898 (61 & 62 Vict. c. cxxxvii.), are to be read and construed together as one Act (London Building Act, 1894 (Amendment) Act, 1898 (61 & 62 Vict. c. cxxxvii.), s. 2). The London County Council (General Powers) Act, 1908 (8 Edw. 7, c. cvii.), Part III., and the London County Council (General Powers) Act, 1909 (9 Edw. 7, c. cxxx.) (see *ibid.*, s. 24), are amendments of, and are in effect incorporated with, the London Building Act, 1894 (57 & 58 Vict. c. ccxiii.). The London Building Acts (Amendment) Act, 1905 (5 Edw. 7, c. ccix.), is practically an independent enactment, but it incorporates, by express reference (see *ibid.*, ss. 6 (2), 16 (1), 18 (1), 27 (1), (2)), many of the general administrative provisions of the London Building Act, 1894 (57 & 58 Vict. c. ccxiii.).

(*r*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 218. As to the Acts repealed, see *ibid.*, ss. 214, 215, and Sched. IV. For a general saving clause, see *ibid.*, s. 215 (2); for a saving clause for existing bye-laws, *ibid.*, s. 216, and *R.* v. *Cluer, Ex parte London County Council* (1897), 77 L. T. 439; and for a saving clause for existing officers, London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 217. As to a continuing offence against a repealed enactment, see *R.* v. *Cluer, Ex parte London County Council, supra.*

(*s*) See the text, *supra.*

(*t*) The councils of the various metropolitan boroughs have some small duties under the Acts (see London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 170 (as to demolition of offending buildings); *ibid.*, s. 84 (as to licensing wooden structures); *ibid.*, s. 134 (as to sky-signs); and see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 207, 210). The expense of executing the Acts is a general county expense (London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 189; London Building Acts (Amendment) Act, 1905 (5 Edw. 7, c. ccix.), s. 43); see p. 406, *ante.*

Tribunal of appeal.

1212. The tribunal of appeal consists normally of three members, appointed respectively by the Home Secretary, the Council of the Royal Institute of British Architects, and the Council of the Surveyors' Institution (*u*), but, for the purposes of those provisions of the Acts (*a*) which relate to buildings with metal framework skeletons, or in which reinforced concrete is used, a fourth member is appointed by the Institute of Civil Engineers (*b*). No member or officer of the County Council is eligible (*c*).

Powers.

Where the Acts (*a*) allow an appeal to the tribunal of appeal, that tribunal decides the question finally, subject to its power to state a special case on a point of law (*d*), and its orders may be enforced as orders of the High Court (*e*). The tribunal may make rules of procedure, subject to the approval of the Lord Chancellor (*f*), and has power to administer oaths, require the production of books, and to make orders as to the costs of any of the parties, including the County Council (*g*). The Council is authorised to support before the tribunal decisions of the Council, its engineer, the superintending architect or a district surveyor (*h*).

The superintending architect.

1213. The County Council appoints, removes, directs, and pays the superintending architect (who must undertake no private work) and his staff of clerks (*i*). With the Council's consent he may, if temporarily incapacitated, appoint a deputy (*j*).

District surveyors.

1214. The district surveyors are not servants of the County Council, being statutory officials whose duty it is to supervise buildings and structures and work done thereto, the width and direction of streets, the building line in streets, the provision of open spaces about buildings, and the height of buildings (*k*). They are, however, appointed and are removable, and their districts are fixed, and may be varied, by the County Council (*l*). Each district

(*u*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 175. As to duration of office and reappointment, see *ibid.*, s. 176; as to removal by the Lord Chancellor, *ibid.*, s. 177; as to supplying vacancies, *ibid.*, s. 178; as to remuneration of members, *ibid.*, s. 179; and as to their offices and clerks etc., *ibid.*, s. 180. Fees and other moneys received by the tribunal are handed over to the Council, who defray all expenses of the tribunal (*ibid.*, s. 186).

(*a*) As to "the Acts," see p. 470, *ante*.

(*b*) London County Council (General Powers) Act, 1909 (9 Edw. 7, c. cxxx), s. 25; in this case the chairman has a casting vote

(*c*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 157.

(*d*) *Ibid.*, ss. 182, 183.

(*e*) *Ibid.*, s. 185.

(*f*) *Ibid.*, s. 184. See Regulations dated 1st March, 1895; 13th December, 1895.

(*g*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 183. A lump sum may be awarded for costs (*Re London Building Act*, 1894, *and Re London County Council* (1904), 68 J. P. 490).

(*h*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 181.

(*i*) *Ibid.*, s. 136.

(*j*) *Ibid.*, s. 137.

(*k*) *Ibid.*, s. 138 (*Westminster Corporation* v. *Watson*, [1902] 2 K. B. 717). As to a mandamus to a surveyor neglecting to do his duty, see *R.* v. *Redman* (1889), 6 T. L. R. 9; as to the surveyor's duties in respect of protection against fire under the London Building Acts (Amendment) Act, 1905 (5 Edw. 7, c. ccix.), see *ibid.*, ss. 16, 17.

(*l*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 139. If a district

SECT. 1. Introductory.

surveyor must maintain an office in a part of his district approved by the Council (*m*). During temporary incapacity he may, with the Council's consent, appoint a deputy (*n*); and in case of pressure of business the Council may appoint another district surveyor or other assistant surveyor to assist him (*o*). He is not to act officially in the case of any work done under his superintendence in private practice or on his own account (*p*).

Remuneration of surveyors. Fees.

1215. District surveyors are paid by fees, but the County Council may elect to pay them salaries, and to claim the fees, which may then be reduced or abolished if thought fit (*q*). Fees are due to the surveyors (1) from the Council, in respect of services connected with the formation or laying out of streets, lines of building frontage, and similar matters (*r*), and in respect of work done in preparing and giving evidence before the tribunal of appeal (*s*), and (2) from the builder employed in erecting any building or doing any work supervised by the surveyor, or, in case of his default, from the owner or occupier of the building or site in question (*t*). The fees are fixed by statute, but may be reduced by the Council (*a*).

Plans.

1216. The County Council must, in certain cases, deliver to a surveyor plans and particulars of buildings approved by it (*b*).

is varied, compensation may be payable to the surveyor affected. As to the qualification required for the office, see London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 140.

(*m*) *Ibid.*, s. 141. The council must forthwith notify any change of office to the "local authority" (*ibid.*).

(*n*) *Ibid.*, s. 142.

(*o*) *Ibid.*, s. 143. Such an assistant will receive the fees payable for work done by him (*ibid.*).

(*p*) *Ibid.*, s. 144.

(*q*) *Ibid.*, s. 158.

(*r*) *Ibid.*, s. 155.

(*s*) *Ibid.*, s. 156.

(*t*) *Ibid.*, ss. 154, 157, the latter of which provides at what stages of the work the fees are to be payable, and also for their recovery. As to what amounts to a "default," see *Corbett* v. *Badger*, [1901] 2 K. B. 278. As to who is an "owner," see *Evelyn* v. *Whichcord* (1858), E. B. & E. 126; *Caudwell* v. *Hanson* (1871), L. R. 7 Q. B. 55; *Tubb* v. *Good* (1870), L. R. 5 Q. B. 443. As to fees in the case of schools built for the County Council, see *Marsland* v. *Wallis & Sons* (1900), 65 J. P. 166; *London County Council* v. *District Surveyors' Association and Willis*, [1909] 2 K. B. 138; *Galbraith Brothers* v. *Dicksee* (1910), 74 J. P. 348. As to fees in the case of "party" structures, see *London County Council* v. *Sherman* (1905), 69 J. P. 395.

(*a*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), ss. 113, 117, 154 (1), Sched. III. In case of a diminished income consequent on a reduction of such fees, a surveyor is entitled to compensation (*ibid.*, s. 154 (2)). Increased fees are payable in the case of work falling within the special provisions as to buildings with metal framework skeletons, or in which reinforced concrete is used (London County Council (General Powers) Act, 1909 (9 Edw. 7, c. cxxx.), s. 26); and the County Council may fix the fees payable to surveyors in respect of their duties under bye-laws (London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 164 (1)). As to fees under the London Building Acts (Amendment) Act, 1905 (5 Edw. 7, c. ccix.), see *ibid.*, s. 18.

(*b*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 82 (5); London County Council (General Powers) Act, 1908 (8 Edw. 7, c. cvii.), s. 20.

SECT. 2.—*General Provisions of the London Building Acts.*

SUB-SECT. 1.—*Scope of the Acts and Definitions.*

SECT. 2. General Provisions of London Building Acts.

Scope of Acts.

1217. Provision is made for the regulation of:—formation and widening of streets (*c*); lines of building frontage (*d*); the naming and numbering of streets (*e*); open spaces about buildings and height of buildings (*f*); the construction of buildings (*g*); special and temporary buildings and wooden structures (*h*); rights of building and adjoining owners (*i*); dangerous and neglected structures (*k*); dangerous and noxious businesses (*l*); dwelling-houses on low-lying land (*m*); sky-signs (*n*); the storing of wood and timber (*o*); the prevention of obstruction in streets (*p*); and the prevention of danger from fire (*q*).

Definitions.

1218. The Acts (*r*) contain interpretation clauses defining the various terms used therein (*s*).

(*c*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), Part II.; London Building Act, 1894 (Amendment) Act, 1898 (61 & 62 Vict. c. cxxxvii.), ss. 3, 4. See title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 208.

(*d*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), Part III.; see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 209.

(*e*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), Part IV.; see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 207, 208.

(*f*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), Part V.; see pp. 481, 482, *post*.

(*g*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), Part VI.; London County Council (General Powers) Act, 1908 (8 Edw. 7, c. cvii.), Part III.; London County Council (General Powers) Act, 1909 (9 Edw. 7, c. cxxx.), Part IV.; see pp. 483 *et seq.*, *post*.

(*h*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), Part VII.; see p. 488, *post*.

(*i*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), Part VIII.; see p. 492, *post*.

(*k*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), Part IX.; London Building Act, 1894 (Amendment) Act, 1898 (61 & 62 Vict. c. cxxxvii.), s. 5; see p. 493, *post*.

(*l*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), Part X.; see p. 494, *post*.

(*m*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), Part XI.; see p. 493, *post*.

(*n*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), Part XII.

(*o*) *Ibid.*, s. 197.

(*p*) *Ibid.*, s. 199.

(*q*) London Building Act (Amendment) Act, 1905 (5 Edw. 7, c. ccix.).

(*r*) As to "the Acts," see p. 470, *ante*.

(*s*) For definitions of (*inter alia*) the following terms—"street," "way," "roadway," "centre of roadway," "prescribed distance from centre of roadway," "new building," "bressummer," "level of ground," "foundation," "base," "ground storey," "basement storey," "first storey," "topmost storey," "external wall," "party wall," "cross wall," "party fence wall," see *Watson* v. *Gray* (1880), 14 Ch. D. 192; *Drury* v. *Army and Navy Auxiliary Co-operative Society*, [1896] 2 Q. B. 271; *Knight* v. *Pursell* (1879), 11 Ch. D. 412; *Johnston* v. *Mayfair Property Co.*, [1893] W. N. 73; for "party arch," "party structure," "height," "area," "square," "cubical extent," "dwelling-house," "public building," see *Josolyne* v. *Meeson* (1885), 49 J. P. 805; *Moses* v. *Marsland*, [1901] 1 K. B. 668; for "building of the warehouse class," "occupier," "building owner," "adjoining owner," "builder," "inhabited," "habitable," see the London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 5. For definitions of "owner" in different contexts, see *ibid.*, ss. 5, 15, 23 (2), 134; of "domestic

SECT. 2. General Provisions of London Building Acts.

SUB-SECT. 2.—*Exemptions and Saving Clauses.*

Exemptions.

1219. Several classes of buildings are exempt from all or some of the provisions of the Acts (*t*), so long as they continue to be used for the same purpose or retain the same character (*u*). In some cases, too, those provisions conflict with the provisions of a special Act authorising the construction of works; if so, the special Act must in general prevail (*v*).

The Crown.

There are saving clauses in favour of the Crown; and Government buildings and police buildings are exempt from the provisions relating to buildings and structures (*a*).

The Inns of Court.

The property of the Inns of Court is subject only to the building line provisions (*b*).

Partial exemptions.

1220. The following are exempt from the provisions as to "construction of buildings," and "special and temporary buildings and wooden structures":—bridges, piers, jetties, embankment walls, retaining walls, and wharf or quay walls (*c*); certain public or *quasi*-public buildings, including the Mansion House, Guildhall, Royal Exchange, Bank of England, sessions houses, offices, certain county buildings, and certain markets (*d*); certain buildings

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building" in different contexts, see London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), ss. 5, 39; of "structure," see *ibid.*, s. 102; of "dangerous business" and "noxious business," see *ibid.*, ss. 118, 119; of "sky-sign," see *ibid.*, s. 125; of "pillar" and "girder," see London County Council (General Powers) Act, 1909 (9 Edw. 7, c. cxxx.), s. 21; of "fire-resisting materials," see London Building Act (Amendment) Act, 1905 (5 Edw. 7, c. ccix.), s. 5, Sched. I. For definition of "daily penalty," see London County Council (General Powers) Act, 1908 (8 Edw. 7, c. cvii.), s. 3, and compare London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 200. For the special purposes of the London Building Act (Amendment) Act, 1905 (8 Edw. 7, c. cvii.), s. 6, defines the following:—"owner," "rack-rent," "upper storey," "high building," "new building," "existing building," "certified building," "plans;" and *ibid.*, s. 13, defines "convert." See, further, title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 19 (for meaning of "street"), p. 22 ("way"), p. 23 ("roadway"), p. 207, note (*q*) ("construction"), p. 208, note (*d*) ("forming or laying out"), p. 209, note (*s*) ("general line of buildings"), p. 210 ("building," "structure.")

(*t*) See p. 470, *ante*.

(*u*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 206; London Building Act (Amendment) Act, 1905 (5 Edw. 7, c. ccix.), ss. 27 (1), 39.

(*v*) See title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 199; and *Crystal Palace Co.* v. *London County Council* (1900), 16 T. L. R. 184. As to railway companies, see the London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), ss. 13 (6), 20, 31, and the London Building Act, 1894 (Amendment) Act, 1898 (61 & 62 Vict. c. cxxxvii.), s. 3 (4); and as to gas companies, the London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 205, and the London Building Act, 1894 (Amendment) Act, 1898 (61 & 62 Vict. c. cxxxvii.), s. 9.

(*a*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 202; London Building Acts (Amendment) Act, 1905 (5 Edw. 7, c. ccix.), ss. 41, 42; London County Council (General Powers) Act, 1908 (8 Edw. 7, c. cvii.), ss. 22, 77, 78; London County Council (General Powers) Act, 1909 (9 Edw. 7, c. cxxx.), s. 69; and see *Drury* v. *Rickard* (1899), 63 J. P. 374; *R.* v. *Jay* (1857), 8 E. & B. 469; Metropolitan Police Courts Act, 1897 (60 & 61 Vict. c. 26), s. 3 (2).

(*b*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 204; London Building Acts (Amendment) Act, 1905 (5 Edw. 7, c. ccix), s. 28.

(*c*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 201 (1).

(*d*) *Ibid.*, s. 201 (2), (3), (4), (5), (6), (7). See also, as to the London County Council's new offices, the County Office Site (London) Act, 1906 (6 Edw. 7, c. lxxxvi.), s. 4 (1); as to its tramcar sheds, London County Council (Tramways and Improvements) Acts, 1904 (4 Edw. 7, c. ccxxxi.), s. 59, and 1906

belonging to railway, canal, dock, and gas companies (*e*); certain low structures of small size, and certain non-public buildings standing apart from others (*f*); low party fence walls (*g*); greenhouses (with some qualifications) (*h*); window flower boxes (subject to certain conditions) (*i*); and small openings for ventilating valves (*k*). Buildings used for the supply of electricity are special buildings subject to special provisions instead of to the general provisions as to "open spaces about buildings and height of buildings," "construction of buildings," and "special and temporary buildings and wooden structures" (*l*).

Gas-works and distilleries are exempt from the provisions as to "dangerous and noxious trades" (*m*).

Certain premises of railway, canal, and dock companies are exempt from the provisions as to "storage of wood and timber" (*n*).

There is a saving clause for sites belonging to the London Education Authority (*o*), and also various saving clauses for local authorities (*p*).

Buildings of historical or architectural interest may, with the consent of the County Council, be restored with the same materials and in the same design as before (*q*).

Certain provisions of the Acts (*r*) do not apply, or apply with variations, to the City (*s*).

The National Telephone Company have, although only occupiers, an owner's right of appeal in certain cases (*t*).

Exemptions from fire protection clauses.

1221. The following are exempt from the provisions of the London Building Acts (Amendment) Act, 1905 (*u*) (relating to protection against fire):—Certain property of dock companies (*a*), of railway companies (*b*), of electric lighting companies (*c*), of gas companies (*d*); of certain banks and insurance offices (including

(6 Edw. 7, c. clxxxi.), s. 47 (3); and as to its fire brigade buildings, London County Council (General Powers) Act, 1908 (8 Edw. 7, c. cvii.), s. 74 (1).

(*e*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), ss. 86, 201 (8), (9). As to these exemptions, see cases cited in title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 199, note (*t*).

(*f*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 201 (10), (11), (12); see the concluding paragraph of *ibid.*, s. 201, as to future additions to such exempted buildings.

(*g*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 201 (13).

(*h*) *Ibid.*, s. 201 (14), (15).

(*i*) *Ibid.*, s. 201 (16).

(*k*) *Ibid.*, s. 201 (17).

(*l*) *Ibid.*, s. 203.

(*m*) *Ibid.*, s. 121.

(*n*) *Ibid.*, s. 197 (6).

(*o*) *Ibid.*, s. 21; and see cases cited in title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 199, note (*d*).

(*p*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), ss. 6, 13 (5), 213.

(*q*) *Ibid.*, s. 191.

(*r*) As to "the Acts," see p. 470, *ante*.

(*s*) *Ibid.*, ss. 4, 9 (4), (5), 11 (4), (5), 13 (2), 39, 104, 135, 165, 199.

(*t*) London Building Acts (Amendment) Act, 1905 (5 Edw. 7, c. ccix.), s. 22 (2).

(*u*) 5 Edw. 7, c. ccix.

(*a*) London Building Acts (Amendment) Act, 1905 (5 Edw. 7, c. ccix.), s. 29.

(*b*) *Ibid.*, ss. 30, 32, 38.

(*c*) *Ibid.*, s. 31.

(*d*) *Ibid.*, s. 33.

SECT. 2. General Provisions of London Building Acts.

Staple Inn) (*e*); the Stock Exchange buildings (*f*); the Albert Hall (*g*); certain bonded warehouses (*h*); certain existing buildings of public wharfingers (*i*); the Mansion House, Guildhall, and Royal Exchange; certain public buildings of the City and certain markets (*k*); and, in general, factories, workshops, and common lodging-houses (*l*).

SUB-SECT. 3.—*Application of the Acts where Buildings Rebuilt, Altered, or Converted.*

Buildings before 1895.

1222. Buildings erected, or commenced, or contracted for before the 1st January, 1895, if in conformity with the then existing law, are deemed to comply with the London Building Act, 1894 (*m*), subject, however, to its provisions as to new buildings or the alteration of buildings (*n*). Such provisions as to new buildings extend to any building which has been taken down for more than one-half of its cubical extent and re-erected, or commenced to be re-erected, wholly or partially on the same site, and to any space between walls and buildings which is roofed or commenced to be roofed (*o*).

When consent of Council required.

1223. Without the consent of the County Council a building may not be so altered as to make it, by reason of such alteration, not in conformity with the provisions of the London Building Act, 1894 (*p*).

Unless the County Council otherwise allows, where a party or external wall, not in such conformity, has been taken down, burnt, or destroyed to the extent of one-half thereof (in superficial feet), every portion not in conformity must be made to conform, or be taken down before rebuilding (*q*).

Every addition to, or alteration of, a building, and any other work done in, to, or upon a building (except that of necessary repair not affecting the construction of any external or party wall) is subject to the statutory provisions and to the bye-laws relating to new buildings (*r*).

In general, the consent of the County Council is required before a building may be so converted that in its new form it will not

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(*e*) London Building Acts (Amendment) Act, 1905 (5 Edw. 7, c. ccix.), s. 34.
(*f*) *Ibid.*, s. 35.
(*g*) *Ibid.*, s. 37.
(*h*) *Ibid.*, s. 40.
(*i*) *Ibid.*, s. 36.
(*k*) *Ibid.*, s. 39.
(*l*) *Ibid.*, s. 26. In their case protection from danger by fire is secured by the Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 14, and the London County Council (General Powers) Act, 1902 (2 Edw. 7, c. clxxiii.), s. 47.
(*m*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.).
(*n*) *Ibid.*, ss. 210, 212; see *Tanner* v. *Oldman*, [1896] 1 Q. B. 60.
(*o*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 5 (6). As to new buildings, see p. 488, *post*.
(*p*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 207. The London Building Acts (Amendment) Act, 1905 (5 Edw. 7, c. ccix.), also contains provisions as to the rebuilding, alteration, or conversion of buildings so far as concerns the matters dealt with by it (see *ibid.*, ss. 6 (i.)).
(*q*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii), s. 208; *Crow* v. *Redhouse* (1895), 59 J. P. 551, 663, C. A.
(*r*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 209.

comply with the statutory provisions applicable to its particular class (*s*).

SUB-SECT. 4.—*Building Notices.*

Building notices.

1224. In order to facilitate supervision and prevent evasion of the Acts (*t*), notices must be given to the district surveyors as follows:—when a building or structure or work (*u*) is about to be begun, two clear days before it is begun; when a building or structure or work is, after commencement, suspended for more than three months, two clear days before it is resumed; and where, during the progress of a building or structure or work, the builder is changed, two clear days before a new builder enters upon its continuance (*x*). In cases of emergency, however, work may be begun at once, provided notice be given within twenty-four hours (*y*).

Time.

By whom given.

1225. The building notice must be given by the builder or other person causing or directing the work to be executed, and must give the information required by the statute (*x*); it is, as against the builder, *primâ facie* evidence of the nature of the proposed work (*a*).

SUB-SECT. 5.—*Duties and Powers of District Surveyors.*

Inspection.

1226. Upon receipt of a building notice, and also, though no notice has been given, upon learning *aliunde* of any work affected by the Acts (*b*) or bye-laws, and also from time to time during the progress of any work so affected, the surveyor must inspect such work as often as may be necessary, and cause the statutory provisions and bye-laws to be observed (*c*). For such purpose he is given wide powers of entry (*d*).

Notice of objection.

1227. If a building notice discloses any proposed contravention of the Acts (*b*), the surveyor must serve on the builder or building owner a notice of objection; the validity of an objection so raised may be questioned within fourteen days by an appeal to petty sessions (*e*).

(*s*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 211.

(*t*) As to "the Acts," see p. 470, *ante*.

(*u*) As to what is a "building or structure or work," see *Stevens* v. *Gourlay* (1859), 29 L. J. (C. P.) 1; *Venner* v. *M'Donell*, [1897] 1 Q. B. 421; *Handover* v. *Meeson* (1903), 67 J. P. 313; *Whitechapel Board of Works* v. *Crow* (1901), 84 L. T. 595; *Charing Cross and Strand Electricity Supply Corporation* v. *Woodthorpe* (1903), 88 L. T. 772; *County of London Electric Supply Co.* v. *Perkins* (1908), 72 J. P. 133; *Westminster Corporation* v. *Watson*, [1902] 2 K. B. 717; *Moran & Son, Ltd.* v. *Marsland*, [1909] 1 K. B. 744. As to notices in case of schools, see *London County Council* v. *District Surveyors' Association and Willis*, [1909] 2 K. B. 138; *Galbraith Brothers* v. *Dickses* (1910), 74 J. P. 348.

(*x*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 145.

(*y*) *Ibid.* s. 149.

(*a*) *Ibid.*, s. 147.

(*b*) As to "the Acts," see p. 470, *ante*.

(*c*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 146.

(*d*) *Ibid.*, s. 148 (see *ibid.*, s. 193, as to entry within one month after discovery that work has been done without notice having been served); see also London Building Acts Amendment Act, 1905 (5 Edw. 7, c. ccix.), s. 23 (2).

(*e*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 150; as to failure to give notice of objection, see *Coggin* v. *Duff* (1907), 71 J. P. 302.

SECT. 2. General Provisions of London Building Acts.

Notice of irregularity.

1228. If in executing any work the requirements of the Acts (*f*) are infringed, or if the surveyor, on inspecting work in respect of which no notice has been served, finds it so far advanced that he cannot ascertain whether the Acts (*f*) have been complied with, he must serve on the builder a notice of irregularity requiring him within forty-eight hours to set right the irregularity, or (as the case may be) to lay open sufficient of the work to permit a proper inspection (*g*). Where the builder has no longer control of the premises, provision is made for serving such a notice on, and enforcing it against, the owner or occupier or person causing the work to be done (*h*). A notice of irregularity is enforced by an order of a petty sessional court; and, if such order is not obeyed, the County Council may, after seven days' notice, enter and execute the necessary works, and recover the expenses summarily from the person in default or the owner (*i*).

Proceedings.

1229. The County Council may undertake any proceedings on behalf of a district surveyor, or may pay the costs incurred by him in taking any proceedings (*j*).

Returns.

1230. A district surveyor must make to the County Council, signed monthly returns (with the specified details) of all notices and complaints received by him and the results thereof, of all petty sessional proceedings taken by him, of all works supervised and special services performed by him, and of all fees charged or received (*k*).

Effect of return.

Such return is a certificate that all works enumerated therein as completed have been duly surveyed by him and are in compliance with the Acts (*l*).

Notice of probable irregularity.

It is also a surveyor's duty to notify to the County Council any actual or probable irregularity brought to his knowledge, but with which he has no power to deal (*m*).

SUB-SECT. 6.—*Sanctions, Notices, Plans etc.*

Sanctions.

1231. Whenever the County Council may refuse its sanction to any act or omission, it may grant the sanction subject to conditions which, if accepted, are binding on the applicant (*n*).

In most cases, if the period limited for giving any sanction or making any objection would expire on any day between the 8th

(*f*) As to "the Acts," see p. 470, *ante*.
(*g*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 151.
(*h*) *Ibid.*, s. 152, which obviates the difficulty disclosed by such cases as *Parsons* v. *Timewell* (1879), 44 J. P. 296; *Smith* v. *Legg*, [1893] 1 Q. B. 398; *Wallen* v. *Lister*, [1894] 1 Q. B. 312.
(*i*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 153; as to the time for taking proceedings, see *Bovill* v. *Gibbs* (1887), 51 J. P. 485.
(*j*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 159.
(*k*) *Ibid.*, s. 160; as to audit of accounts of fees, see *ibid.*, s. 162. As to such fees, see also p. 472, *ante*.
(*l*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 161.
(*m*) *Ibid.*, s. 163.
(*n*) *Ibid.*, s. 190.

August and the 14th September, the period is to be deemed extended for twenty-eight days (*o*). SECT. 2. General Provisions of London Building Acts.

1232. Notices and orders must be in writing; orders must be under the seal of the County Council. Other documents may be signed by the clerk or by the officer giving or serving them (*p*).

1233. Approval of plans is to be signified by the signature of the superintending architect (*q*). Plans deposited with the Council or a district surveyor become the property of the Council (*r*). Notices etc. Plans.

SUB-SECT. 7.—*Legal Proceedings, Expenses, and Penalties.*

1234. Penalties (*s*) and expenses under the Acts (*t*) and bye-laws may, apart from special provision, be recovered summarily (*u*); and the application of penalties is provided for by the Acts (*a*). Proceedings taken by a district surveyor may be continued by his deputy or successor (*b*), and no proceedings with respect to a building are to be affected by the removal or fall of its roof (*c*). Proceedings etc.

1235. Where any such expenses are to be borne by, or are recoverable from, the owner of premises, they must in the first instance be paid by the owner entitled in possession or the occupier (up to the amount of any rent due from him), and provision is made for obtaining contributions from successive owners or other persons interested in the premises (*d*). Contribution.

(*o*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 174.

(*p*) *Ibid.*, s. 187. As to service, see *ibid.*, s. 188; and as to service of documents in cases of dangerous or neglected structures, see London Building Act, 1894 (Amendment) Act, 1898 (61 & 62 Vict. c. cxxxvii.), s. 5, passed in consequence of the decision in *R.* v. *Mead*, [1898] 1 Q. B. 110.

(*q*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 195.

(*r*) *Ibid.*, s. 194.

(*s*) The provisions imposing penalties are the following.—As to offences against bye-laws, London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 161 (1); as to offences against the statutes, *ibid.*, s. 200, as amended by the London Building Act, 1894 (Amendment) Act, 1898 (61 & 62 Vict. c. cxxxvii.), ss. 6, 7; the London Building Acts (Amendment) Act, 1905 (5 Edw. 7 c. ccix.), s. 24; and the London County Council (General Powers) Act, 1908 (8 Edw. 7, c. cvii.), ss. 18 (5), 21.

(*t*) As to "the Acts," see p. 470, *ante*.

(*u*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 166. As to the time limit for proceeding generally, see *Labalmondiere* v. *Addison* (1858), 1 E. & E. 41 (dangerous structure expenses); *Paddington Vestry* v. *Snow* (1881), 45 L. T. 475 (building line offence); *Metropolitan Board of Works* v. *Anthony* (1884), 49 J. P. 229 (temporary structure); *Bovill* v. *Gibbs* (1887), 51 J. P. 485 (notice of irregularity); *London County Council* v. *Cross* (1892), 66 L. T. 731, C. A. (building line offence); *Hull* v. *London County Council*, [1901] 1 K. B. 580 (projection); *Corbett* v. *Badger*, [1901] 2 K. B. 276 (surveyor's fees); *Ellis* v. *London County Council*, [1904] 1 K. B. 283 (building on low-lying land). As to the time limit when work has been done without serving a building notice, see London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 193.

(*a*) *Ibid.*, s. 169.

(*b*) *Ibid.*, s. 167.

(*c*) *Ibid.*, s. 198.

(*d*) *Ibid.*, s. 173; London Building Acts (Amendment) Act, 1905 (5 Edw. 7, c. ccix.), s. 20 (*Mourilyan* v. *Labalmondiere* (1861), 1 E. & E. 533; *Debenham* v. *Metropolitan Board of Works* (1880), 6 Q. B. D. 112; *Hunt* v. *Harris* (1865), 12

SECT. 2. General Provisions of London Building Acts.

In cases of offences under the London Building Acts (Amendment) Act, 1905 (*e*), the owner of a building, though *primâ facie* liable, may prove in excuse that he has used due diligence to enforce the Act (*e*), and that the occupier or some other person is responsible (*f*).

Relief to owners.

When owner cannot be found.

1236. Where anything is required to be done to or by an owner of premises, and no owner can be found, a county court judge may give consents on his behalf and dispense with service of notices (*g*), and settle the time and manner of executing any works (*h*); and in certain cases he may apportion expenses (*i*).

Demolition orders.

1237. Where an offender after conviction neglects to bring his building into conformity with the Acts (*k*), the County Council may obtain an order authorising it to demolish or alter the building: it may sell the materials to recoup itself and recover any deficit, accounting for any balance (*l*).

SUB-SECT. 8.—*Right of Entry.*

Entry.

1238. An owner, builder or other person and his servant, may, for the purpose of complying with any notice or order served or made on him, enter a building after due notice to the occupier and do all necessary work (*m*). Servants of the County Council have also wide powers of entry (*n*).

SUB-SECT. 9.—*Bye-laws*

Bye-laws.

1239. The County Council has power to make bye-laws upon (*inter alia*) the following matters:—Forms of notices; foundations and sites of buildings; thickness and quality of substances used in building walls; dimensions of joists and bressummers, quality of plastering; the filling up of excavations, means of escape from fire in buildings exceeding 60 feet in height; and the duties and fees of district surveyors (*o*).

L. T. 421; *Erle* v. *Maughan* (1863), 8 L. T. 637; and see title LANDLORD AND TENANT, Vol. XVIII., p. 479.

(*e*) 5 Edw. 7, c. ccix.

(*f*) *Ibid.*, s. 19.
London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 196.
Ibid., s. 168.
London Building Acts (Amendment) Act, 1905 (5 Edw. 7, c. ccix.), s 20

(*k*) As to "the Acts," see p. 470, *ante*.

(*l*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), ss. 170, 172. As to a borough council's powers under *ibid.*, s. 170, see London Government Act, 1899 (62 & 63 Vict. c. 14), s. 5 (2), Sched. II. (2).

(*m*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 192; compare *Smith* v. *Legg*, [1893] 1 Q. B. 398; *Wallen* v. *Lister*, [1894] 1 Q. B. 312; *Welsh & Son* v. *West Ham Corporation*, [1900] 1 Q. B. 324.

(*n*) As to the powers of entry conferred on district surveyors, see p. 477, *ante*, and London Building Acts (Amendment) Act, 1905 (5 Edw. 7, c. ccix.), s. 23.

(*o*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), ss. 164, 165; see Bye-laws of 13th October, 1891; 30th July, 1901; 25th March, 1902; 8th November, 1904; 10th December, 1907.

SECT. 3.—*Open Spaces about Buildings and Height of Buildings.*

SECT. 3. Open Spaces about Buildings and Height of Buildings.

1240. A domestic building (*p*) erected after the 1st January, 1895, and having a habitable (*q*) basement, must have in its rear (but not necessarily adjoining the rear boundary of the premises), and exclusively belonging thereto, an open space of at least 100 square feet, free from any erection thereon, above the level of the adjoining pavement (*r*).

Light and ventilation of habitable basements.

1241. In the case of domestic buildings (*p*) erected after the 1st January, 1895, there are complicated rules, varying according as the building abuts upon a new street or old street, as to the provision in the rear thereof of an open space exclusively belonging thereto and extending to 150 square feet, and as to fixing the height of the building with reference to the space required in the rear thereof. There are special rules as to corner buildings and irregular sites, and houses abutting on open spaces, and where the County Council has a discretion there is, in general, an appeal to the tribunal of appeal (*s*). Where a domestic building (*p*) (not being a dwelling-house inhabited or adapted to be inhabited by persons of the working class (*t*)) is to be erected on a site occupied up to a certain date by a similar building, special provision is made for allowing the new building to occupy as large an area of ground as that occupied by the previously existing building (*u*). There is

Open spaces in rear of buildings.

(*p*) A "domestic building" for the purposes of the provisions referred to in the text, *infra*, and on p. 482, does not include a building used or constructed or adapted to be used wholly or principally as offices or counting-houses. For the general purposes of the Acts (see p. 470, *ante*) the term includes a dwelling-house (*i.e.*, a building used or constructed or adapted to be used wholly or principally for human habitation) and any other building not being a "public building," or "of the warehouse class." A "public building" means one used or constructed or adapted to be used as a church, chapel, or other place of public worship, school, college, or place of instruction (not being merely a dwelling-house so used), hospital, workhouse, public theatre, public hall, public concert room, public ballroom, public lecture room, public library, public exhibition room, public place of assembly, or for any other public purpose, or (provided it exceeds 250,000 cubic feet, or has sleeping accommodation for over 100 persons) as an hotel, lodging-house, home, refuge or shelter. A "building of the warehouse class" means a warehouse, factory, manufactory, brewery or distillery, and any other building exceeding 150,000 cubic feet, and not being a "public" nor a "domestic" building (London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), ss. 5 (25), (26), (27), (28), 39). *Semble*, a building (*e.g.*, a large hotel) may be both a domestic building and a public building (*London County Council* v. *Davis*, *London County Council* v. *Rowton House Co.* (1897), 77 L. T. 693). The Stock Exchange is a "public building" (London Building Act, 1894 (Amendment) Act, 1898 (61 & 62 Vict. c. cxxxvii.), s. 8).

(*q*) "Habitable" means constructed or adapted to be inhabited; and an "inhabited" room means one in which some person passes or is likely to pass the night, or which is or is likely to be used as a living room (London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 5 (37), (38)).

(*r*) *Ibid.*, s. 40.

(*s*) *Ibid.*, s. 41.

(*t*) As to this expression, see *London County Council* v. *Davis*, *London County Council* v. *Rowton House Co.*, *supra*; *Crow* v. *Davis* (1903), 67 J. P. 319; *Crow* v. *Davis* (1904), 68 J. P. 447; and see the text, *infra*.

(*u*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 43; see *Paynter* v. *Watson*, [1898] 2 Q. B. 31.

SECT. 3. **Open Spaces about Buildings and Height of Buildings.**

also a special provision as to certain buildings with stables in the rear (*v*).

It is for the superintending architect to determine and certify if necessary, subject to an appeal to the tribunal of appeal, which is the front or rear of a building (*w*).

Working class dwellings.

1242. In the case of a dwelling-house inhabited, or adapted to be inhabited, by persons of the working class (*x*), erected after the 1st January, 1895, and not abutting on a street, there must be provided about it, to the satisfaction of the County Council (or tribunal of appeal) sufficient open space or spaces for the admission of light and air thereto (*a*).

Cleared areas.

1243. The foregoing provisions may be relaxed by the County Council, or tribunal of appeal, where a person is rearranging a cleared area by laying out or widening streets (*b*).

Courtyards.

1244. Where light or air is admitted to a domestic building by means of a court, such court and windows opening into it must comply with certain requirements as to height and ventilation (*c*).

Height of buildings.

1245. A building, not being a church or chapel, may not, in general, be erected, or subsequently raised, to a greater height than 80 feet (exclusive of two storeys in the roof and of ornamental towers or turrets or other decorations) without the consent of the County Council (*d*). Special provision is made as to the rebuilding of existing buildings up to the original height, and as to the raising of one building in a continuous block or row to the height of the others (*e*).

No existing building, not being a church or chapel, on the side of a street formed or laid out after the 7th August, 1862, and less than 50 feet wide, may, without the consent of the County Council, be raised, and no new building may without such consent be erected on the side of any such street so that the height of such building shall exceed the distance of its front or nearest external wall from the opposite side of such street. Special provision is made as to the rebuilding of existing buildings, and as to buildings on corner sites (*f*).

None of the foregoing provisions prevent a topmost storey being raised merely to bring habitable rooms in such storey into conformity with the statutory requirements as to such rooms (*g*),

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(*v*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 52.
(*w*) *Ibid.*, s. 46.
(*x*) See note (*t*), p. 481, *ante*.
(*a*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 42.
(*b*) *Ibid.*, s. 44.
(*c*) *Ibid.*, s. 45.
(*d*) *Ibid.*, s. 47; see *ibid.*, s. 48, as to the procedure for obtaining consent, and as to the right of appeal if it is refused.
(*e*) *Ibid.*, s. 47.
(*f*) *Ibid.*, s. 49. As to the effect of this provision, see *A.-G.* v. *Metcalf and Greig*, [1908] 1 Ch. 327, C. A.; the "corner site" provisions supersede the decision in *London County Council* v. *Lawrance & Sons*, [1893] 2 Q. B. 228; *London County Council* v. *Worley*, [1894] 2 Q. B. 826.
(*g*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 50.

or to prevent the re-erection on the same site, and of not greater dimensions, of any working class dwelling-house erected by a local authority before the 25th August, 1894 (*h*).

Certain buildings are exempt from the above requirements (*i*).

SECT. 3. Open Spaces about Buildings and Height of Buildings.

SECT. 4.—*Construction of Buildings.*

Walls.

1246. Subject to bye-laws made by the County Council, and to provisions as to the use of reinforced concrete (*j*), and metal skeleton frameworks (*k*), walls must be constructed of the substances, in the manner, and of not less than the thickness, prescribed by the London Building Act, 1894 (*l*).

Recesses and openings.

1247. All recesses in external and party walls, and all openings in external walls, must comply with certain rules as to area and construction, unless the superintending architect thinks fit in any special case to relax such rules (*m*).

Timber in external walls.

1248. Woodwork fixed in an external wall must with certain exceptions be set back four inches at least from the external face of such wall (*n*).

Bressummer.

1249. Every bressummer must be supported in the required manner, different rules applying according to whether it is of wood or metal, and bears upon a party wall or not (*o*).

Parapets.

1250. If a gutter, any part of which is formed of combustible materials, adjoins an external wall, such wall must be carried up of the prescribed width, and to the prescribed height, to form a parapet (*p*).

Party walls.

1251. Every party wall (*q*) must be carried up of the prescribed thickness to the prescribed height above the roof, flat, or gutter of the highest adjoining building, and above any turret, dormer, lantern light, or other erection of combustible materials on the roof or flat of any building within four feet of it, and above any part of any roof opposite to and within four feet of it (*r*). Restrictions are placed on the making of chases in party walls (*s*).

(*h*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 51; see note (*t*), p. 481, *ante*.

(*i*) See pp. 474, 475, *ante*.

(*j*) See p. 487, *post*.

(*k*) See p. 487, *post*.

(*l*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 53. *Ibid.*, Sched. I., lays down rules on the following points:—Structure of building; construction of walls; thickness of walls; hollow walls; height of storey; height of external and party walls; length of walls; footings of walls; underpinning; thickening of walls; cross walls.

(*m*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 54.

(*n*) *Ibid.*, s. 55.

(*o*) *Ibid.*, s. 56.

(*p*) *Ibid.*, s. 57.

(*q*) As to what is a party wall, see *ibid.*, ss. 5 (16), 58; *Knight* v. *Pursell* (1879), 11 Ch. D. 412; *Williams* v. *Bull* (1890), *Times*, 15th February; *Johnston* v. *Mayfair Property Co.*, [1893] W. N. 73; *Drury* v. *Army and Navy Auxiliary Co-operative Supply*, [1896] 2 Q. B. 271; *London, Gloucestershire and North Hants Dairy Co.* v. *Morley and Lanceley*, [1911] 2 K. B. 256; settled, [1911] W. N. 213, C. A. (settled on terms).

(*r*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 59.

(*s*) *Ibid.*, s. 60.

SECT. 4. Construction of Buildings.

Roofs.

1252. The roof, flat, and gutter of every building and every turret, dormer, lantern light, skylight, or other erection on such roof or flat, must, with certain qualifications as to cornices, barge boards, and frames, be covered with incombustible materials (*t*); and the inclination of roofs (except in the case of towers, turrets, and spires) must not exceed a certain angle (*a*).

Chimneys etc.

1253. Elaborate rules are laid down as to the construction and bearing of chimneys, the inclination of chimneys and flues, the construction of flues, chimney breasts, jambs, and fireplace backs, and the provision and fixing of hearth-stones: chimneys and flues must not be cut into except for specified purposes, and no woodwork or wooden plug is permissible in or within a certain distance (*b*).

Furnaces etc.

1254. Special rules are applicable to the construction of chimney shafts for the furnaces of steam engines, breweries, distilleries or manufactories (*c*); and as to the construction of floors above furnaces and ovens (*d*), floors beneath ovens, boilers, coppers, stoves, and pipes for conveying smoke, heated air, steam or hot water (*e*).

Staircases etc.

1255. In a public building and in any other building exceeding 125,000 cubic feet, which is constructed or adapted to be used as a dwelling-house for separate families, the floors of lobbies, passages, and landings, and the stairs, must be of fire-resisting material and carried by supports of such material (*f*).

The principal staircase in every dwelling-house must be adequately ventilated, the requirements varying with different classes of house (*g*).

Rooms.

1256. Every habitable room (*h*) must be of the prescribed height, varying according as the room is in the roof or not; must have a window opening into the open air, and otherwise satisfy the rules as to height and size of aperture and construction. In a dwelling-house every basement room, with a wooden floor not made of solid wood bedded on concrete, must have sufficient air space for ventilation. A habitable room above a stable, and any staircase or other access thereto, must be properly cut off from such stable by a floor or wall (as the case may be) of the prescribed materials and structure. It is an offence knowingly to suffer to be inhabited any room constructed after the 1st January, 1895, which does not conform to the foregoing requirements (*i*).

(*t*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 61 (1); see *Payne* v. *Wright*, [1892] 1 Q. B. 104.
(*a*) *Ibid.*, s. 61 (3), (4).
(*b*) *Ibid.*, s. 64.
(*c*) *Ibid.*, s. 65.
(*d*) *Ibid.*, s. 67.
(*e*) *Ibid.*, s. 66.
(*f*) *Ibid.*, s. 68.
(*g*) *Ibid.*, s. 69.
(*h*) See note (*g*), p. 481, *ante*.
(*i*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 70.

Arches over and under passages etc.

1257. Party and other arches and floors over public ways or over passages leading through or under a building to premises in other occupation, and arches and other constructions under passages leading to premises in other occupation or under public ways or intended public ways, must be formed of incombustible materials and constructed in the specified manner (*k*).

Projections.

1258. Projections (*l*) from buildings (except, in some cases, eaves, bargeboards, cornices, and window dressings) must be of fire-proof material, properly secured to the building, and must not project more than a specified distance. There are special rules as to projecting woodwork of shop fronts, bay windows to dwelling-houses, projecting oriel windows, and turrets. Projections must be properly guttered and spouted (*m*).

Separation of buildings.

1259. Every building must be separated by either an external wall, a party wall, or other proper party structure from any adjoining building (*n*). If a building exceeding 1,000 square feet in area is used partly for trade or manufacture and partly as a dwelling-house, the two parts must be separated by walls and floors of fire-resisting materials, and other specified requirements intended to guard against danger by fire must be complied with. The part used for trade may also be subject to the provisions applicable to buildings of the warehouse class (*o*). In a building exceeding 2,500 square feet in area, containing separate sets of chambers, offices or rooms, the floors and principal staircases must be of fire-resisting materials (*p*).

Floors etc.

Cubical extent.

In general no building of the warehouse class (*q*), and no building nor part of one used for any trade or manufacture, may exceed 250,000 cubic feet (*r*), unless so divided by division walls (*s*) that no division exceeds that cubical extent; nor may any addition be made to a building which will cause this rule to be infringed (*t*): but the County Council, if satisfied with the arrangements for lessoning danger by fire, may relax the rule so long as a building is

(*k*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), ss. 71, 72; and see note (*u*), p. 477, *ante*.

(*l*) As to projections from buildings, see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 210, 211.

(*m*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 73. As to what is a projection, see *Pears, Ltd.* v. *London County Council* (1911), 75 J. P. 461.

(*n*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 74 (1).

(*o*) *Ibid.*, s. 74 (2); see note (*p*), p. 481, *ante*. As to the application of this provision to a public-house with dwelling rooms above, see *Carritt* v. *Godson & Son*, [1899] 2 Q. B. 193; *Dicksee* v. *Hoskins*, [1901] 2 K. B. 122, 660, C. A.

(*p*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 74 (3). The concluding words of this provision recognise the correctness of the decision in *Moir* v. *Williams*, [1892] 1 Q. B. 264, C. A.

(*q*) See definition in note (*p*), p. 481, *ante*.

(*r*) The cubical extent of a building is the space contained within the external surfaces of its walls and roof, and the upper surface of the floor of its lowest storey (London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 5 (24)).

(*s*) Provisions as to "party walls" (as to which, see p. 483, *ante*) are, unless relaxed by the County Council, to apply to such "division walls" (London County Council (General Powers) Act, 1908 (8 Edw. 7, c. cvii.), s. 19; compare *Drury* v. *Army and Navy Auxiliary Co-operative Supply*, [1896] 2 Q. B. 271).

(*t*) London County Council (General Powers) Act, 1908 (8 Edw. 7, c. cvii), s. 17 (1). The proviso prohibiting additions remedies the defect disclosed by *Scott* v. *Legg* (1877), 10 Q. B. D. 236, C. A.

SECT. 4. Construction of Buildings.

used for a particular trade or manufacture (*a*); and the County Council may allow division floors of suitable construction to be deemed division walls (*b*). These provisions do not apply to any building more than two miles from St. Paul's Cathedral, solely used for the manufacture of machinery and boilers of steam vessels, for a retort house, the manufacture of gas or generating electricity, and consisting of one floor only, and constructed throughout of incombustible material (*c*). Such buildings come within the rules as to special buildings (*d*).

Uniting buildings.

1260. Buildings may not without the consent of the County Council be united unless they are wholly in one occupation, and unless, when so united, and considered as one building, they would be in accordance with the Acts (*e*). An opening may not be made in any division wall separating divisions of a building of the warehouse class or used for any trade or manufacture, or in any party wall, or in two external walls, separating buildings, in any case in which such divisions or buildings, if taken together, would exceed 250,000 cubic feet, unless such opening and the door thereof comply with certain conditions designed to lessen the danger from fire (*f*). Whenever any buildings which have been united cease to be in one occupation, the owner, or owners, must forthwith give notice to the district surveyor, and must (unless the County Council consents to the contrary) block up the connecting openings in the prescribed manner (*g*). For the purposes of the foregoing provisions, buildings are deemed to be united when any opening is made in the party wall or external walls separating them, or when they are so connected that there is access from one to the other without passing into the open air (*h*); and such provisions extend to all openings made or proposed to be made after the 1st August, 1908, in any party wall or two external walls or in any divisional wall, notwithstanding the existence, in any such wall, of an opening

(*a*) London County Council (General Powers) Act, 1908 (8 Edw. 7, c. cvii.), s. 17 (2).

(*b*) *Ibid.*, s. 17 (3), enacted to meet the decision in *Holland* v. *Wallen* (1894), 58 J. P. 132.

(*c*) London County Council (General Powers) Act, 1908 (8 Edw. 7, c. cvii.), s. 17 (4).

(*d*) They are, for the purposes of the provisions as to "special buildings," to be deemed buildings to which the general provisions of the London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), Part VI., are inapplicable. As to "special buildings," see p. 488, *post*. The effect of the London County Council (General Powers) Act, 1908 (8 Edw. 7, c. cvii.), s. 17 (4), appears to be that these excepted buildings come under the London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 82 (2), and may not under any circumstances exceed 250,000 cubic feet. If so, the result was presumably unintentional.

(*e*) London County Council (General Powers) Act, 1908 (8 Edw. 7, c. cvii.), s. 18 (1); and see p. 470, *ante*.

(*f*) *Ibid.*, s. 18 (2).

(*g*) *Ibid.*, s. 18 (3); penalty for failure to give notice, not exceeding £5 (*ibid.*).

(*h*) London County Council (General Powers) Act, 1908 (8 Edw. 7, c. cvii.), s. 18 (4); and see *Ashby* v. *Woodthorpe* (1863), 33 L. J. (M. C.) 68, decided under the earlier statutes. An addition to an existing building is not a "uniting" (*Scott* v. *Legg* (1877), 10 Q. B. D. 236, C. A.); nor is the erection of two connected buildings (*Goodchild* v. *Matthews* (1903), 67 J. P. 296).

uniting buildings or connecting divisions of a building; and to such buildings as if they had not previously been united (*i*).

Public buildings.

1261. Notwithstanding anything in the Acts (*j*), every public building (*k*), including its walls, roofs, floors, galleries, and staircases, must be constructed to the approval of the district surveyor or the tribunal of appeal. It must not be used until finally approved, and after approval no unauthorised work may be done to it. Except as regards the rules as to construction, the statutory provisions as to "buildings" in general apply to public buildings (*l*). The conversion of any other building into a public building is to be treated as the construction of a public building (*m*). In the case of new churches, chapels, public halls and similar buildings, and in the case of an increase of accommodation in existing buildings of the class, staircases, passages, exits, and doors thereto must comply with certain requirements (*n*).

Railway arches.

1262. The Acts (*j*) apply to buildings erected after the 1st January, 1895, in, under, abutting on, or by inclosure of a railway arch, if such building is adapted for use as a human habitation (*o*).

Iron and steel buildings.

1263. Subject to certain conditions intended to insure structural stability, it is lawful to erect buildings wherein the loads and stresses are transmitted through each storey to the foundations by a skeleton framework of metal or partly by such a framework and partly by a party wall or party walls: buildings so erected must in other respects comply with the general provisions of the Acts (*j*), so far as applicable to them (*p*).

Reinforced concrete.

1264. The County Council may make regulations with respect to the construction of buildings wholly or partly of reinforced concrete, and to the use and composition of reinforced concrete in such construction. Subject thereto, buildings may be constructed wholly or partly of reinforced concrete, but must in other respects comply with the general provisions of the Acts (*j*) so far as applicable to them (*q*). For the purpose of framing regulations the County Council may carry out tests (*r*). Regulations must be made with

(*i*) London County Council (General Powers) Act, 1908 (8 Edw. 7, c. cvii.), s. 18 (5); enacted in consequence of the decision in *Woodthorp* v. *Spencer and Husbands* (1899), 63 J. P. 246.

(*j*) As to "the Acts," see p. 470, *ante*.

(*k*) For definition, see note (*p*), p. 481, *ante*. The ordinary rules applicable to domestic buildings do not apply; compare *R.* v. *Carruthers* (1864), 4 B. & S. 804.

(*l*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 78. For the rules as to construction, see p. 483 *et seq.*, *ante*. As to refixing movable floors and fixing temporary seats in public buildings, see *Handover* v. *Messon* (1903), 67 J. P. 313; *Venner* v. *M'Donell*, [1897] 1 Q. B. 421.

(*m*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 79.

(*n*) *Ibid.*, s. 80.

(*o*) *Ibid.*, s. 81.

(*p*) London County Council (General Powers) Act, 1909 (9 Edw. 7, c. cxxx.), ss. 22, 27. Definitions of the words "pillar" and "girder," which appear frequently in the conditions, are contained in *ibid.*, s. 21.

(*q*) *Ibid.*, ss. 23 (1), (2), 27.

(*r*) *Ibid.*, s. 23 (1).

SECT. 4. Construction of Buildings.

special formalities, and require the approval of the Local Government Board, and must be published in the prescribed manner (*s*). Certain professional bodies are entitled to receive notice of the intended application for the Board's approval (*t*).

Certain buildings are exempt from the ordinary rules as to construction (*u*).

SECT. 5.—*Special and Temporary Buildings and Wooden Structures.*

Special and temporary buildings.

1265. Buildings and structures of iron, or to which the ordinary construction rules (*x*) are inapplicable or inappropriate, having regard to the purpose for which such buildings are intended, must be so built as to satisfy the County Council's requirements (*a*). The Council may limit the time during which such buildings may be allowed to stand; and at the expiration of the period may remove them if the owner fails to do so (*b*).

Wooden structures.

1266. No wooden structure (except certain hoardings and builders' temporary or movable sheds) may be erected unless the borough council grants a licence, which may be conditional or limited as respects time (*c*).

SECT. 6.—*Protection against Fire and Means of Escape in case of Fire.*

New buildings.

1267. Every new building (*d*), except a dwelling-house occupied as such by not more than one family (*e*), which is either (1) a high building (*f*), or (2) a building in which sleeping accommodation is

(*s*) London County Council (General Powers) Act, 1909 (9 Edw. 7, c. xxx.), s. 23 (3), (5).

(*t*) *Ibid.*, s. 23 (4).

(*u*) See pp. 474, 475, *ante*.

(*x*) See pp. 483 *et seq.*, *ante*.

(*a*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 82.

(*b*) *Ibid.*, s. 83, making provision for the difficulty disclosed in *Parsons* v. *Timewell* (1879), 44 J. P. 296.

(*c*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 84; London Government Act, 1899 (62 & 63 Vict. c. 14), s. 5 (1), Sched. II. (1). As to this provision, see *London County Council* v. *Candler* (1891), 55 J. P. 679; *London County Council* v. *Pearce*, [1892] 2 Q. B. 109; *London County Council* v. *Humphreys*, [1894] 2 Q. B. 755; *Westminster Corporation* v. *London County Council*, [1902] 1 K. B. 326; *Westminster Corporation* v. *Watson*, [1902] 2 K. B. 717; *R.* v. *Cluer, Ex parte London County Council* (1897), 77 L. T. 439; *Metropolitan Board of Works* v. *Anthony* (1884), 49 J. P. 229; *Hall* v. *Smallpiece* (1890), 54 J. P. 710. A stack of loose timber is not a "structure" (London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 85).

(*d*) A "new building" for the purposes of these provisions as to fire protection is contrasted with an "existing building" (see the text, *infra*), and means any building not substantially begun on the 1st January, 1906, or which has been taken down, burnt, or destroyed for more than half its cubical extent and re-erected after that date, or the cubical extent of which has been doubled after that date, and any existing building altered after that date so as to become a "high building" (see note (*f*), *infra*) (London Building Acts (Amendment) Act, 1905 (5 Edw. 7, c. ccix.), s. 6 (v.), (vi.)).

(*e*) See *London County Council* v. *Cannon Brewery Co., Ltd.*, [1911] 1 K. B. 235.

(*f*) A "high building" means a building of which any storey is an "upper storey," *i.e.*, a storey having the upper surface of its floor more than 50 feet high according to the prescribed rules of measurement (London Building Acts (Amendment) Act, 1905 (5 Edw. 7, c. ccix.), s. 6 (iii.), (iv.)).

provided for more than twenty persons, or which is occupied, or constructed or adapted to be occupied, by more than twenty persons, or in which more than twenty persons are employed, or which is constructed or adapted for the employment therein of more than twenty persons, must be provided, in accordance with plans approved by the County Council (or the tribunal of appeal), with such means of escape in case of fire as can under the circumstances be reasonably required (*g*). In the case of a high building (not being one within class (2)) means of escape from upper storeys (*h*) alone can be required (*i*).

SECT. 6. Protection against Fire and Means of Escape in case of Fire.

1268. No upper storey (*h*) in a high building (not being one within the above-mentioned class (2) (*j*)), and no part of any building within such class, may be occupied or let for occupation until certified by the County Council or adjudged by the tribunal of appeal to be properly provided with means of escape and to comply with any conditions prescribed (*k*); but this does not prevent the continuous occupation during rebuilding of any portion of a building partially taken down, burnt, or destroyed (*l*). Where by reason of any change of circumstances, change in the mode of user, structural alteration or addition, or increase in the number of occupants or employees, the risk of fire or difficulty of escape is subsequently increased substantially, the certificate or adjudication of approval will in general become void, and the building be deemed an "existing building" (*m*).

Certificate of approval.

1269. If any existing building (*n*), except a dwelling-house occupied as such by not more than one family, which is either (1) a high building (*o*), or (2) a building in which sleeping accommodation is provided for more than twenty persons, or which is occupied by more than twenty persons, or in which more than twenty persons are employed, is in the opinion of the County Council not provided with proper and sufficient means of escape in case of fire, the Council may by notice require the owner to provide such means of escape as under the circumstances can reasonably be required (*p*). In the case of a high building (not being one within class (2)), means of escape from upper storeys (*q*) alone can be required (*r*). The

Existing buildings.

(*g*) London Building Acts (Amendment) Act, 1905 (5 Edw. 7, c. ccix.), ss. 7 (1), 22 (1) (a); see *ibid.*, sub-s. 7 (1), and *London County Council* v. *Spink & Son, Ltd.*, [1908] 2 K. B. 447, as to deposit and approval of plans etc. As to the jurisdiction of the tribunal of appeal on the question whether the superintending architect has properly withheld his certificate, see *London County Council* v. *Clark* (1911), 132 L. T. Jo. 109.

(*h*) For definition of upper storey, see note (*f*), p. 488, *ante*.

(*i*) London Building Acts (Amendment) Act, 1905 (5 Edw. 7, c. ccix.), s. 7 (4).

(*j*) See p. 488, *ante*.

(*k*) London Building Acts (Amendment) Act, 1905 (5 Edw. 7, c. ccix.), ss. 7 (2), 22 (1) (a). A certificate may be presumed if not formally refused after notice of completion (*ibid.*).

(*l*) *Ibid.*, s. 8.

(*m*) *Ibid.*, s. 7 (3); and see the text, *infra*.

(*n*) See note (*d*), p. 488, *ante*.

(*o*) See note (*f*), p. 488, *ante*.

(*p*) London Building Acts (Amendment) Act, 1905 (5 Edw. 7, c. ccix.), s. 9 (1).

(*q*) See note (*f*), p. 488, *ante*.

(*r*) London Building Acts (Amendment) Act, 1905 (5 Edw. 7, c. ccix.), s. 9 (4).

SECT. 6. **Protection against Fire and Means of Escape in case of Fire.**

owner must comply with the County Council's requirements subject to a right of appeal to the tribunal of appeal and to a right to submit alternative proposals for the Council's consideration (*s*). If an owner is convicted of failing to comply with the requirements of the Council or of the tribunal, or of failing to execute approved alternative proposals, the court, in addition to imposing a fine, may prohibit till further order the occupation of the building or upper storey, as the case may be (*t*).

Compliance with requirements of County Council.

Projecting shops.

1270. Where any part of a building (whether new or existing) (*u*) used or adapted to be used as a shop, projects seven feet or more beyond the main front of any building of which it forms part, and in which any persons are employed or sleep, the projecting portion must be provided with a roof not less than five inches thick of fire-resisting materials, and any lantern lights or ventilating cowls therein must comply with certain conditions (*a*). In a proper case the foregoing requirements may be relaxed by the County Council or the tribunal of appeal (*b*).

Storage of inflammable liquids.

1271. It is unlawful knowingly or wilfully to use or permit to be used as a living room, workshop, or workroom, any room constructed over or communicating directly with any part of a building used for the storage of petroleum or any other inflammable liquid kept for sale or trade purposes in such quantities or manner as to be liable to cause fire or explosion, unless there be provided, to the satisfaction of the County Council, or of the tribunal of appeal, adequate safeguards to prevent the spread of fire to such room, and means of ready escape therefrom (*c*).

Access to roof.

1272. Every existing building (*d*) to which the above-mentioned (*e*) provisions as to projecting shops apply, and every other existing building, except a dwelling-house occupied as such by not more than two families (*f*), and every new building, if it has more than two storeys above the ground storey, or if it exceeds thirty feet in height (*g*), must comply with the following requirements, unless it is a building regulated by the previously mentioned (*h*)

(*s*) London Building Acts (Amendment) Act, 1905 (5 Edw. 7, c. ccix), ss. 9 (1), 22 (1) (b).

(*t*) *Ibid.*, s. 9 (2); a register of such orders must be kept (*ibid.*, s. 9 (3)).

(*u*) See note (*d*), p. 488, *ante*.

(*a*) London Building Acts (Amendment) Act, 1905 (5 Edw. 7, c. ccix.), ss. 10 (1), (2), (3), 22 (1) (e); as to the "main front" of a building, see *London County Council* v. *Cannon Brewery Co., Ltd.*, [1911] 1 K. B. 235; see also *Fleming* v. *London County Council*, *Metropolitan Railway* v. *London County Council*, [1911] A. C. 1.

(*b*) London Building Acts (Amendment) Act, 1905 (5 Edw. 7, c. ccix.), ss. 10 (4), 22 (1) (c).

(*c*) *Ibid*, ss. 11 (1), 22 (1) (d); s. 11 (1) gives examples of "inflammable liquid," and the Petroleum Act, 1871 (34 & 35 Vict. c. 105), s. 3, defines "petroleum."

(*d*) See note (*e*), p. 488, and p. 489, *ante*.

(*e*) See the text, *supra*.

(*f*) See *London County Council* v. *Cannon Brewery Co., Ltd.*, *supra*.

(*g*) As to measuring height, see note (*f*), p. 488, *ante*.

(*h*) *I.e.*, the provisions as to new buildings; see p. 488, *ante*; and as to existing buildings, see p. 489, *ante*.

provisions as to protection against fire. It must have a suitable dormer window, door, trap-door, step-ladder, or other proper means of access to the roof, and a sufficient parapet or guard rail on the roof (*i*). In a suitable case the County Council or the tribunal of appeal may relax the requirements (*k*).

SECT. 6. **Protection against Fire and Means of Escape in case of Fire.**

1273. No person may, without the written consent (*l*) of the County Council or of the tribunal of appeal, convert (*m*) a building so that it will not conform to the statutory requirements as to fire protection, or knowingly or wilfully suffer any building when so converted to be used or occupied (*n*).

Conversion of buildings.

1274. The owner of a building must keep in good repair and working order all means of escape in case of fire, and it is an offence knowingly or wilfully to obstruct them or to render them less commodious or to suffer other persons to do so (*o*).

Maintenance of means of escape.

1275. Provision is made for apportioning the expense of providing protection against danger from fire amongst the various persons interested in a building (*p*), and also for compensating an occupier for any damage done in executing works (*q*).

Expenses. Compensation.

1276. Certain buildings are exempt from the foregoing requirements (*r*); and there are special statutory provisions and regulations applicable in the case of theatres, music-halls, and other places of public resort (*s*)

Special buildings.

SECT. 7.—*Rights of Building Owners and Adjoining Owners.*

1277. An elaborate code of provisions deals with the right of one of two adjoining owners to erect, subject to certain conditions, a "party wall" upon the line of junction between the properties, instead of an external wall entirely on his own land, and the rights which the two owners may exercise in relation to any party wall (*t*).

Party walls.

(*i*) London Building Acts (Amendment) Act, 1905 (5 Edw. 7, c. ccix.), s. 12 (1), (3).

(*k*) *Ibid.*, ss. 12 (2), 22 (1) (c).

(*l*) Notice of any "conversion" must be given to the County Council (*ibid.*, s. 13); and in certain circumstances its consent may be inferred (*ibid.*, s. 13).

(*m*) "Convert" includes any change of user, whether involving structural alteration or not (*ibid.*, s. 13).

(*n*) *Ibid.*, ss. 13, 22 (1) (e).

(*o*) *Ibid.*, s. 14.

(*p*) *Ibid.*, s. 20.

(*q*) *Ibid.*, s. 21.

(*r*) See p. 475, *ante*.

(*s*) Metropolis Management and Building Acts Amendment Act, 1878 (41 & 42 Vict. c. 32); Metropolitan Board of Works (Various Powers) Act, 1882 (45 & 46 Vict. c. lvi.), s. 45. See *St. James's Hall Co.* v. *London County Council*, [1901] 2 K. B. 250; *R.* v. *Hannay*, [1891] 2 Q. B. 709; see also title THEATRES AND OTHER PLACES OF ENTERTAINMENT.

(*t*) London Building Act, 1894 (57 & 58 Vict. c. cxiii.), ss. 87—101. As to who is "an owner" for these purposes, see *List* v. *Tharp*, [1897] 1 Ch. 260; *Orf* v. *Payton* (1904), 69 J. P. 103; *Hunt* v. *Harris* (1865), 12 L. T. 421; for definition of "party wall," see London Building Act, 1894 (57 & 58 Vict. c. cxiii.), s. 5 (16); and note (*q*), p. 483, *ante*. A wall may be a party wall for such part of its height as it is so used, and cease to be a party wall for the rest

SECT. 7. **Rights of Building Owners and Adjoining Owners.**

A building owner may not build a party wall if objection be duly taken, but in certain cases he may place the footings of his external wall on his neighbour's land (*u*). The rights of a building owner in relation to party structures include the right to repair, rebuild, and underpin, when such works are necessary (*a*); to replace structures not in conformity with the statute by proper structures; to raise walls on condition of making good all damage (*b*); to replace a wall by one strong enough to bear his intended buildings (*c*); to cut into walls and cut away projections (*d*).

Where a building owner proposes to exercise his rights in regard to a party stucture, the adjoining owner may, for his own purposes, require him to build on it flues, chimneys, and similar work (*e*).

Exercise of rights.

1278. Except by consent, or in cases of emergency, a building owner must not exercise his rights without due notice to the adjoining owner and occupier (*f*): he must carry on the work without undue delay (*g*), take proper steps for safeguarding the adjoining land and building (*h*), and not cause any unnecessary inconvenience to the owner or occupier thereof (*i*). A building owner has wide powers of entry for the purpose of executing work (*k*).

Arbitration.

1279. If a building owner's notice or an adjoining owner's requisition is not assented to within fourteen days, the questions between them must be settled by arbitration in manner provided by the Act (*l*).

of its height (*London, Gloucestershire and North Hants Dairy Co.* v. *Morley and Lanceley*, [1911] 2 K. B. 257); S. C. on appeal, [1911] W. N. 213, C. A (settled on terms); partition of a party wall may be granted (*Mayfair Property Co.* v. *Johnston*, [1894] 1 Ch. 508).

(*u*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 87.

(*a*) Damp in sufficient quantities may justify repair (*Minturn* v. *Barry*, [1911] 2 K. B. 265).

(*b*) Compare *Crofts* v. *Haldane* (1867), L. R. 2 Q. B. 194.

(*c*) Compare *Foot* v. *Hodgson* (1890), 25 Q. B. D. 160.

(*d*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 88. A party wall may be defective within this provision if it allows damp to penetrate (*Minturn* v. *Barry*, *supra*).

(*e*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 89.

(*f*) *Ibid.*, s. 90 (1). As to such notices, see *Wheeler* v. *Gray* (1859), 28 L. J. (C. P.) 200, Ex. Ch.; *Sims* v. *Estates Co., Ltd.* (1866), 14 L. T. 55; *Major* v. *Park Lane Co.* (1866), 14 L. T. 543; *Fillingham* v. *Wood*, [1891] 1 Ch. 51; *List* v. *Tharp*, [1897] 1 Ch. 260; *Hobbs, Hart & Co.* v. *Grover*, [1899] 1 Ch. 11, C. A.; *Leadbetter* v. *Marylebone Corporation* [1904] 2 K. B. 893; *Leadbetter* v. *Marylebone Corporation*, [1905] 1 K. B. 661, C. A.; *Orf* v. *Payton* (1904), 69 J. P. 103; *Lewis and Salome* v. *Charing Cross, Euston, and Hampstead Railway*, [1906] 1 Ch. 508; *Crosby* v. *Alhambra Co., Ltd.*, [1907] 1 Ch. 295.

(*g*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 90 (4).

(*h*) *Ibid.*, s. 90 (2). *Thompson* v. *Hill* (1870), L. R. 5 C. P. 564, is therefore superseded. In certain cases he must "underpin"; see London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 93.

(*i*) *Ibid.*, s. 90 (3). For instances of actions against building owners or their builders, see *Williams* v. *Golding* (1865), L. R. 1 C. P. 69; *Lemaitre* v. *Davis* (1881), 19 Ch. D. 281; *Hughes* v. *Percival* (1883), 8 App. Cas. 443; *White* v. *Peto Brothers* (1888), 58 L. T. 710; *Joliffe* v. *Woodhouse* (1894), 38 Sol. Jo. 578, C. A.

(*k*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 92; and see p. 480, *ante*.

(*l*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), ss. 90 (5), (6), (7), 91.

SECT. 7. Rights of Building Owners and Adjoining Owners.

Expenses.

1280. The expenses of work to a party structure are in some cases to be borne by the building owner alone, or by the adjoining owner alone, if done on his requisition; in other cases they are to be divided between the two owners according to the use made of the structure by each; and, in certain cases, where the building owner has borne the cost, the adjoining owner, may be required subsequently to make a payment to the building owner, or his successor in title (*m*), if he makes use of the structure (*n*). Provision is made for the delivery of accounts and settlement thereof by arbitration (*o*), for the ownership of the structure until any contributions due are paid (*p*), and for the giving of security if required by either owner (*q*). There is a saving clause for easements of light and other easements (*r*).

SECT. 8.—*Miscellaneous.*

SUB-SECT. 1.—*Dwelling-houses on Low-lying Land.*

House below high-water mark.

1281. Without the permission of the County Council it is unlawful to erect a dwelling-house on land below the high-water mark, which cannot be drained by gravitation into an existing sewer of the County Council: the County Council may make regulations as to building on such sites (*s*).

SUB-SECT. 2.—*Dangerous and Neglected Structures.*

Dangerous and neglected structures.

1282. It is the duty of the district surveyor to report, and of the County Council to cause a survey to be made of, any structure which is in a dangerous state (*t*). If the structure is on such survey certified to be dangerous, the Council must cause it to be secured and protected, and call upon the owner to take it down or secure or repair it (*a*). Provision is made for the owner disputing the

Until the award is given the work must not be begun (*Standard Bank of British South America* v. *Stokes* (1878), 9 Ch. D. 68; *Leadbetter* v. *Marylebone Corporation*, [1905] 1 K. B. 661, C. A.). As to the jurisdiction of the arbitrators in such cases, see *Crofts* v. *Haldane* (1867), L. R. 2 Q. B. 194; *Re Stone and Hastie*, [1903] 2 K. B. 463; *Leadbetter* v. *Marylebone Corporation*, [1904] 2 K. B. 893; *Adams* v. *Marylebone Borough Council*, [1907] 2 K. B. 822, C. A.

(*m*) *Mason* v. *Fulham Corporation*, [1910] 1 K. B. 631.

(*o*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), ss. 99, 100.

(*p*) *Ibid.*, s. 99; and see *Mason* v. *Fulham Corporation*, *supra*.

(*q*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 94.

(*r*) *Ibid.*, s. 101.

(*s*) *Ibid.*, ss. 122—124; and see *Ellis* v. *London County Council*, [1904] 1 K. B. 283.

(*t*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), ss. 103, 105. See *ibid.*, s. 102, as to what a "structure" includes for this purpose; as to the meaning of the words "in a dangerous state," see *London County Council* v. *Herring*, [1894] 2 Q. B. 522. As to the application of the provision to a dangerous canal bridge, see *Regent's Canal and Dock Co.* v. *London County Council* (1909), 73 J. P. 276, C. A.

(*a*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 106; London Building Act, 1894 (Amendment) Act, 1898 (61 & 62 Vict. c. cxxxvii.), s. 5; *London County Council* v. *Hobbis* (1897), 61 J. P. 85. As to reinstating a pavement after removal of a dangerous structure, see *Crisp* v. *London County Council*, [1899] 1 Q. B. 720.

SECT. 8. Miscellaneous.

County Council's requirements (*b*), for enforcing compliance, and for recovery of expenses incurred by the County Council (*c*). Inmates of a structure certified to be dangerous may be removed by order of a petty sessional court (*d*).

If a structure is ruinous or dilapidated, a petty sessional court, on complaint by the County Council, may order it to be taken down or repaired or rebuilt. If such order is not obeyed, the Council may do the work and recover the expenses from the owner (*e*).

SUB-SECT. 3.—*Sky-signs.*

Sky-signs.

1283. The erection of sky-signs is prohibited (*f*), and provision is made for their removal if erected (*g*).

SUB-SECT. 4.—*Dangerous and Noxious Businesses.*

Dangerous and noxious businesses.

1284. There are special provisions as to erecting buildings in the vicinity of premises used for certain dangerous businesses, or certain noxious businesses (*h*), and there are restrictions as to the carrying on of such businesses within a specified distance of other buildings or public ways (*i*).

Storing timber.

1285. There are provisions regulating the storing of wood, timber, or casks near to streets or furnaces (*k*).

(*b*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 107; *London County Council* v. *Bernstein* (1897), 61 J. P. 630.
(*c*) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), ss. 107—112, 116.
(*d*) *Ibid.*, s. 114.
(*e*) *Ibid.*, ss. 115, 116.
(*f*) *Ibid.*, ss. 127, 134; London Government Act, 1899 (62 & 63 Vict. c. 14), s. 5 (1), Sched. II., Part I. As to what is a sky-sign, see London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 125, and the following cases:—*London County Council* v. *Carwardine & Co.* (1892), 68 L. T. 761; *Tussaud* v. *London County Council* (1892), 57 J. P. 184; *London County Council* v. *Savoy Hotel Co., Ltd.* (1896), 60 J. P. 457. The London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), provided for the continuance of old sky-signs for a limited period (see *ibid.*, ss. 126, 128—133).
(*g*) *Ibid.*, s. 134.
(*h*) *Ibid.*, ss. 118, 119.
(*i*) *Ibid.*, ss. 118, 119, 120.
(*k*) *Ibid.*, s. 197; London Government Act, 1899 (62 & 63 Vict. c. 14), s. 5 (2), Sched. II., Part II.

METROPOLITAN.

See ECCLESIASTICAL LAW.

MIDWIVES.

See MEDICINE AND PHARMACY; PUBLIC HEALTH AND LOCAL ADMINISTRATION.

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See ROYAL FORCES.

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MINES, MINERALS, AND QUARRIES.

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Part I.—Definitions.

SECT. 1.—*Terms Descriptive of Mineral Sites.*

1286. The word "mine" is used in various senses. It denotes an underground excavation made for the purpose of getting minerals (*a*), and also a stratum or vein (*b*), or aggregation of strata or veins (*c*), of minerals, whether open (*d*) or unopened (*e*), and whether within the property of one surface owner (*f*) or of several (*g*). It is also used to denote the cubical space occupied, or formerly occupied, by minerals (*h*). This use of the word is more particularly of importance in the construction of instruments by which the title to the Mine.

(*a*) *Glasgow* (*Lord Provost and Magistrates*) v. *Farie* (1888), 13 App. Cas. 657; *Midland Rail. Co.* v. *Haunchwood Brick and Tile Co.* (1882), 20 Ch D. 552; and see Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 75.

(*b*) *Abinger* (*Lord*) v. *Ashton* (1873), L. R. 17 Eq. 358, 369; *Ramsay* v. *Blair* (1876), 1 App. Cas. 701, 705; compare *Batten Pooll* v. *Kennedy*, [1907] 1 Ch. 256, 266.

(*c*) *Spencer* v. *Scurr* (1862), 31 Beav. 334.

(*d*) *Astry* v. *Ballard* (1677), 2 Mod. Rep. 193.

(*e*) *Case of Mines* (1568), 1 Plowd. 310, 337.

(*f*) *Ivimey* v. *Stocker* (1866), 1 Ch. App. 396, 407.

(*g*) *Van Mining Co.* v. *Llanidloes* (*Overseers*) (1876), 1 Ex. D. 310, 319.

(*h*) *Bowser* v. *Maclean* (1860), 2 De G. F. & J. 415, 420; *Proud* v. *Bates* (1865), 34 L. J. (CH.) 406, 411; *Hamilton* (*Duke*) v. *Graham* (1871), L. R. 2 Sc. & Div. 166; *Ramsay* v. *Blair* (1876), 1 App. Cas. 701; *Batten Pooll* v. *Kennedy*, [1907] 1 Ch. 256.

SECT. 1. Terms Descriptive of Mineral Sites.

mines is severed from the title to the surface. Whether such an instrument be a grant (*i*), lease (*k*), or Act of Parliament (*l*), the effect is to sever the land into parallel layers (*m*). By a species of analogy open workings of minerals, such as iron, usually got by underground workings, are commonly called mines (*n*).

The meaning of the word "mine" may be varied by the context in which it is found (*o*).

Quarry.

A quarry, equally with a mine, is an excavation made for the purpose of getting minerals. The true distinction between them appears to be that a quarry is primarily an open surface working (*p*). But if substances usually got by open workings are got by underground workings, such workings may nevertheless for certain purposes be mines (*q*).

Vein.

A vein or lode is a tabular body of mineral which has been formed subsequently to the rocks which inclose it (*r*).

Seam.

A bed or seam is some special member of a group of stratified rocks (*s*).

Colliery.

In its legal sense the word "colliery" includes, or may include, the seam or seams of coal being worked as one enterprise together with the workings and apparatus necessary for getting the coal, and the business of getting and disposing of the coal worked (*t*).

SECT. 2.—*Terms Descriptive of Mineral Substances.*

Minerals.

1287. There is no general definition of the term "mineral." Any substance which is part of the natural formation of the earth (*a*), except the common soil or rock of the country (*b*), may be a mineral;

(*i*) *Ramsay* v. *Blair* (1876), 1 App. Cas. 701.

(*k*) *Hamilton* (*Duke*) v. *Graham* (1871), L. R. 2 Sc. & Div. 166; *Proud* v. *Bates* (1865), 34 L. J. (CH.) 406, 411.

(*l*) *Ballacorkish Silver, Lead, and Copper Mining Co.* v. *Harrison* (1873), L. R. 5 P. C. 49.

(*m*) *Eardley* v. *Granville* (1876), 3 Ch. D. 826; see also *Ruabon Brick and Terra Cotta Co.* v. *Great Western Rail. Co.*, [1893] 1 Ch. 427, C. A.; *Batten Pooll* v. *Kennedy*, [1907] 1 Ch. 256.

(*n*) *Glasgow* (*Lord Provost and Magistrates*) v. *Farie* (1888), 13 App. Cas. 657.

(*o*) *Midland Rail. Co.* v. *Haunchwood Brick and Tile Co.* (1882), 20 Ch. D. 552, 555; *Glasgow* (*Lord Provost and Magistrates*) v. *Farie*, *supra*, at p. 675.

(*p*) *Darvill* v. *Roper* (1855), 3 Drew. 294; *Glasgow* (*Lord Provost and Magistrates*) v. *Farie*, *supra*; *Bell* v. *Wilson* (1866), 1 Ch. App. 303, 308; *Errington* v. *Metropolitan District Rail. Co.* (1882), 19 Ch. D. 559, 571, C. A. For statutory definitions of quarry, see note (*q*), p. 634, *post*.

(*q*) *R.* v. *Sedgley* (*Inhabitants*) (1831), 2 B. & Ad. 65 (limestone); *R.* v. *Dunsford* (1835), 2 Ad. & El. 568 (freestone); *R.* v. *Brettell* (1832), 3 B. & Ad. 424 (clay); *Cleveland* (*Duchess Dowager*) v. *Meyrick* (1867), 37 L. J. (CH.) 125 (slate); *Sim* v. *Evans* (1875), 23 W. R. 730 (slate); compare *Jones* v. *Cwmorthen Slate Co.* (1879), 5 Ex. D. 93, C. A.

(*r*) Foster, Elements of Mining and Quarrying, p. 3.

(*s*) *Ibid*, p. 2.

(*t*) *County of Gloucester Bank* v. *Rudry Merthyr Steam and House Coal Colliery Co.*, [1895] 1 Ch. 629, C. A.; *Chaytor* v. *Trotter* (1902), 87 L. T. 33, 35, C. A.; see *Hodgson* v. *Field* (1806), 7 East, 613, 620.

(*a*) *Elwes* v. *Brigg Gas Co.* (1886), 33 Ch. D. 562; *Boileau* v. *Heath*, [1898] 2 Ch. 301; *Scott* v. *Midland Rail. Co.* (1897), 13 T. L. R. 398.

(*b*) *Glasgow* (*Lord Provost and Magistrates*) v. *Farie*, *supra*; *Great Western*

SECT. 2. Terms Descriptive of Mineral Substances.

and in construing a document or an Act of Parliament (*c*) it is a question of fact whether any given substance is a mineral or not (*d*). The test is what, at the date of the instrument in question, the word meant in the vernacular of the mining world, the commercial world, and landowners (*e*); but there are other considerations to be taken into account. The word "mineral" is susceptible of limitation or expansion, according to the intention with which it is used (*f*). The intention may be inferred from the document itself or from consideration of the circumstances in which it was made. In the case of the document itself the inference may be drawn from a comparison of other parts of the document (*g*), or from the immediate context (*h*).

Railway v. *Carpalla United China Clay Co., Ltd.*, [1910] A. C. 83; *North British Railway* v. *Budhill Coal and Sandstone Co.*, [1910] A. C. 116; *Great Western Railway* v. *Blades*, [1901] 2 Ch. 624; *Re Todd, Burleston & Co.* v. *North Eastern Railway*, [1903] 1 K. B. 603, C. A.

(*c*) *Great Western Railway* v. *Carpalla United China Clay Co., Ltd., supra; North British Railway* v. *Budhill Coal and Sandstone Co., supra.* The *dicta* of Lord WATSON in *Glasgow* (*Lord Provost and Magistrates*) v. *Farie* (1888), 13 App. Cas. 657, at p. 674; and of Lord HERSCHELL in *Midland Rail. Co. and Kettering, Thrapston and Huntingdon Rail. Co.* v. *Robinson* (1889), 15 App. Cas. 19, at p. 27, to the effect that instruments between private parties are subject to different rules of construction from statutory enactments cannot be considered law.

(*d*) *Great Western Railway* v. *Carpalla United China Clay Co., Ltd., supra; North British Railway* v. *Budhill Coal and Sandstone Co., supra; Staples* v. *Young*, [1908] 1 I. R. 135, C. A.; *George Skey & Co., Ltd.* v. *Parsons* (1909), 101 L. T. 103; *Symington* v. *Caledonian Rail. Co.*, [1911] W. N. 231, H. L.

(*e*) *Hext* v. *Gill* (1872), 7 Ch. App. 699, *per* JAMES, L.J., at p. 719, approved by Lord HALSBURY, L.C., in *Glasgow* (*Lord Provost and Magistrates*) v. *Farie, supra*, at p. 669, and adopted in *North British Railway* v. *Budhill Coal and Sandstone Co., supra*, and see title DEEDS AND OTHER INSTRUMENTS, Vol. X., pp 436 *et seq.* The definition given by MELLISH, L.J., in *Hext* v. *Gill, supra*, at p. 712 (followed in *Jersey* (*Earl*) v. *Neath Poor Law Union Guardians* (1889), 22 Q. B. D. 555, C. A.; *Johnstone* v. *Crompton & Co.*, [1899] 2 Ch. 190; *Great Western Railway* v. *Blades*, [1901] 2 Ch. 624; and with modifications in *Glasgow* (*Lord Provost and Magistrates*) v. *Farie, supra*, at p. 685; and *Great Western Railway* v. *Carpalla United China Clay Co., Ltd.*, [1909] 1 Ch. 218, C. A.), cannot now be considered of any authority. The numerous cases in which specific substances have been decided or assumed to be minerals must be considered as decisions on the particular facts; see for instance, *Bell* v. *Wilson* (1866), 1 Ch. App. 303 (freestone); *Midland Rail. Co.* v. *Checkley* (1867), L. R. 4 Eq. 19 (stone); *A.-G. for the Isle of Man* v. *Mylchreest* (1879), 4 App. Cas. 294, 305, P. C. (clay and sand); *Errington* v. *Metropolitan District Rail. Co.* (1882), 19 Ch. D. 559 (clay and gravel); *Loosemore* v. *Tiverton and North Devon Rail. Co.* (1882), 22 Ch. D. 25, C. A. (clay), reversed (1884), 9 App. Cas. 480; *Midland Rail. Co.* v. *Haunchwood Brick and Tile Co.* (1882), 20 Ch. D. 552 (clay); *Tucker* v. *Linger* (1883), 8 App. Cas. 508 (flints); *Robinson* v. *Milne* (1884), 53 L. J. (CH.) 1070 (brick-earth); *Jersey* (*Earl*) v. *Neath Poor Law Union Guardians, supra* (brick-earth and clay); *Shaftesbury* v. *Wallace*, [1897] 1 I. R. 381 (brick-earth); *Trinidad Asphalt Co.* v. *Ambard*, [1899] A. C. 594, P. C. (pitch); *Fishbourne* v. *Hamilton* (1890), 25 L. R. Ir. 483, C. A. (limestone); see also *North British Railway* v. *Budhill Coal and Sandstone Co., supra* (sandstone); *Caledonian Rail. Co.* v. *Glenboig Union Fireclay Co.*, [1911] A. C. 290 (fireclay); *Caledonian Rail. Co.* v. *Symington*, [1911] S. C. 552; reversed *Symington* v. *Caledonian Rail. Co.*, [1911] W. N. 231, H. L. (freestone), the last three cases being decisions on the Railways Clauses Consolidation (Scotland) Act, 1845 (8 & 9 Vict. c. 33). Each case depends on its own circumstances.

(*f*) *Glasgow* (*Lord Provost and Magistrates*) v. *Farie, supra, per* Lord WATSON, at p. 675.

(*g*) *Rosse* (*Earl*) v. *Wainman* (1845), 14 M. & W. 859.

(*h*) *A.-G. for the Isle of Man* v. *Mylchreest* (1879), 4 App. Cas. 294, P. C.

SECT. 2. Terms Descriptive of Mineral Substances.

The word most commonly found in immediate collocation with the word "minerals" is the word "mines," as in the phrase "mines and minerals," or its equivalent (*i*) "mines of minerals" (*k*). Although the word "mine" primarily refers to underground workings, yet so used it does not narrow the meaning of "minerals," and the phrase *primâ facie* includes minerals which can only be got by surface workings (*l*). Moreover the fact that the owner of the minerals is not entitled to get minerals by surface workings is not sufficient to restrict the meaning of minerals (*m*); but the meaning may be restricted by proof of a custom the existence of which is incompatible with the *primâ facie* meaning (*n*), or by the particular circumstances of the case being such as to lead to the inference that all minerals cannot have been intended to be referred to (*o*).

The word "minerals" does not comprise the cubical space occupied or formerly occupied by mineral substances, although the word "mines" does (*p*).

SECT. 3.—*Surface, Subsoil, Land etc.*

Surface.

1288. In addition to the actual plane surface, the word "surface" may include all the land except the mines (*q*) or the soil overlying the minerals (*r*).

Subsoil and land.

The term "subsoil" includes everything from the surface to the centre of the earth (*s*), and *primâ facie* "land" or "lands" include everything on or under the soil (*t*). The meaning of the word "land" has in some cases been held to be restricted by the context (*a*).

Soil.

The term "soil" is co-extensive in meaning with the term "land" (*b*), and similarly its meaning may be restricted by the context so as to exclude the mines (*c*).

(*i*) *Great Western Railway* v. *Carpalla United China Clay Co., Ltd*, [1910] A. C. 83, *per* Lord MACNAGHTEN, at p. 85.

(*k*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 77; Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 18.

(*l*) *Hext* v. *Gill* (1872), 7 Ch. App. 699; *Glasgow (Lord Provost and Magistrates)* v. *Farie* (1888), 13 App. Cas. 657, 690; *Midland Rail. Co. and Kettering, Thrapston, and Huntingdon Rail. Co.* v. *Robinson* (1889), 15 App. Cas. 19.

(*m*) *Bell* v. *Wilson* (1866), 1 Ch. App. 303; *Hext* v. *Gill, supra.*

(*n*) *A.-G. for the Isle of Man* v. *Mylchreest* (1879), 4 App. Cas. 294, P. C.; *Tucker* v. *Linger* (1883), 8 App. Cas. 508.

(*o*) *Darvill* v. *Roper* (1855), 3 Drew. 294.

(*p*) *Ramsay* v. *Blair* (1876), 1 App. Cas. 701; *Ballacorkish Silver, Lead, and Copper Mining Co.* v. *Harrison* (1873), L. R. 5 P. C. 49; see *Batten Pooll* v. *Kennedy*, [1907] 1 Ch. 256.

(*q*) *Pountney* v. *Clayton* (1883), 11 Q. B. D. 820, 839, 840, C. A.

(*r*) *Humphries* v. *Brogden* (1850), 12 Q. B. 739.

(*s*) *Cox* v. *Glue* (1848), 5 C. B. 533.

(*t*) *Newtomen* v. *Coulson* (1877), 5 Ch D. 133, 142, C. A.; Shep. Touch., ed. Preston, 90; *Campbell* v. *Leach* (1775), Amb. 740, 748. The word "lands" as used in the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 6, includes mines; see *Smith* v. *Great Western Rail. Co.* (1887), 3 App. Cas. 165. So also in the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 6; see *Holliday* v. *Wakefield Corporation*, [1891] A. C. 81.

(*a*) *Thursby* v. *Briercliffe-with-Entwistle (Churchwardens etc.)*, [1895] A. C. 32; see *R.* v. *West Ardsley (Inhabitants)* (1863), 4 B. & S. 95.

(*b*) *Townley* v. *Gibson* (1788), 2 Term Rep. 701; *Pretty* v. *Solly* (1859), 26 Beav. 606; *Wakefield* v. *Buccleuch (Duke)* (1867), L. R. 4 Eq 613.

(*c*) *Pretty* v. *Solly, supra*, *Buccleuch (Duke)* v. *Wakefield* (1870), L. R. 4 H. L. 377.

The words "close" (*d*), "tenement" (*e*), and "hereditament" (*f*) are sufficiently wide to include the mines.

SECT. 4.—*Open and New Mines or Quarries.*

Close, tenement, hereditament.

1289. A mine is said to be open when it has been devoted by a person lawfully entitled to do so to the purpose of making a profit by the working and sale of the minerals therein (*g*). The question what is an open mine derives its importance from its bearing upon the rights of limited owners (*h*). The mine, if open at the time of the creation of limited estates, remains an open mine (*i*), and a mine may be opened, during the subsistence of the limitations under which such estates arise, either by a person having an estate enabling him to do so, as a tenant in tail in possession (*k*), or a person specially empowered, as a trustee having power to work (*l*) or lease mines (*m*).

Mines when open.

The rules which apply to mines apply similarly to quarries (*n*) and other open workings, such as brickfields (*o*) or gravel pits (*p*).

1290. Whether a mine is open or not is a question of intention (*q*), and the intention may be evidenced in various ways. If the mine has been worked and the produce sold it is clear that it is open (*r*), even if no profits have been made (*s*). It is open if it is included in a lease, reserving a share of profits, under which the lessee has worked (*t*), or in an agreement for a lease under which a dead rent has become payable (*u*); or if a proper working shaft has been sunk to the seam (*x*).

A question of intention.

It is not every working that will render a mine or quarry open; thus, if the working be wrongful (*a*), or purely experimental (*b*), or for a restricted purpose, as for fuel or to repair a particular tenement (*c*),

Not every working renders a mine open.

(*d*) *Cox* v. *Glue* (1848), 5 C. B. 533; see title LANDLORD AND TENANT, Vol. XVIII., p. 412.
(*e*) *Loosemore* v. *Tiverton and North Devon Rail. Co.* (1882), 22 Ch. D. 25, 43, C. A.
(*f*) *Dunn* v. *Birmingham Canal Co* (1872), L. R. 8 Q. B. 42, 48, Ex. Ch.
(*g*) *Elias* v. *Griffith* (1878), 8 Ch. D. 521, C. A.
(*h*) See p. 514, *post*; and see, generally, title SETTLEMENTS.
(*i*) *Greville-Nugent* v. *Mackenzie*, [1900] A. C. 83.
(*k*) *Clavering* v. *Clavering* (1726), 2 P. Wms. 388; see p. 511, *post*.
(*l*) *Chaytor* v. *Trotter* (1902), 87 L. T. 33, C. A.
(*m*) *Daly* v. *Beckett* (1857), 24 Beav. 114; *Cowley (Earl)* v. *Wellesley* (1866), L. R. 1 Eq. 656; *Campbell* v. *Wardlaw* (1883), 8 App. Cas. 641.
(*n*) *Elias* v. *Griffith* (1878), 8 Ch. D. 521, C. A., affirmed on another point, *sub nom. Elias* v. *Snowdon Slate Quarries Co.* (1879), 4 App. Cas. 454.
(*o*) *Cowley (Earl)* v. *Wellesley* (1866), L. R. 1 Eq. 656.
(*p*) *Huntley* v. *Russell* (1848), 13 Q. B. 572. As to bogs, see *Coppinger* v. *Gubbins* (1846), 3 Jo. & Lat. 397.
(*q*) *Chaytor* v. *Trotter*, *supra*.
(*r*) *Elias* v. *Snowdon Slate Quarries Co.*, *supra*, *per* Lord SELBORNE, at p. 465.
(*s*) *Elias* v. *Griffith*, *supra*.
(*t*) *Elias* v. *Snowdon Slate Quarries Co.*, *supra*.
(*u*) *Re Kemeys-Tynte*, *Kemeys-Tynte* v. *Kemeys-Tynte*, [1892] 2 Ch. 211; see *Stoughton* v. *Leigh* (1808), 1 Taunt. 402.
(*x*) *Chaytor* v. *Trotter*, *supra*.
(*a*) *Bartlett* v. *Phillips* (1859) 4 De G. & J. 414, C. A.; *Ecclesiastical Commissioners* v. *Wodehouse*, [1895] 1 Ch. 552.
(*b*) *Chaytor* v. *Trotter*, *supra*.
(*c*) *Elias* v. *Snowdon Slate Quarries Co.*, *supra*.

SECT. 4. Open and New Mines or Quarries.

the mine is not open. The grant of a limited right, as for instance a grant to tenants of the right to scrape or scour for coal on the outcrop, is also insufficient (*d*), and so are workings by a person having a statutory right independently of the owner (*e*). When a mine or quarry is open, the sinking of a new pit on the same vein or seam, or breaking ground in a new place on the same rock, is not necessarily opening a new mine (*f*); but the sinking of a shaft, for the purpose of working a mineral not worked in an existing open mine would be an opening of a new mine (*g*). As a rule, the existence of an open mine on one part of an estate does not make the other mines open mines (*h*), especially where the estate is severed by lands in different ownership (*i*).

Mine ceasing to be open.

1291. It is a question of degree whether a mine once opened, which has not been worked for a time, does or does not cease to be an open mine (*k*). If working ceases for a reasonable period only, such as seventeen years, the mine will remain open (*l*): so also, although working has ceased for a longer period, if such cessation be due to an unremunerative market for the produce (*m*). But if a mine has not been worked for 100 years, or has been abandoned for the benefit of the inheritance, it ceases to be an open mine (*m*).

Part II.—Property in Mines.

SECT. 1.—*Primâ facie Ownership.*

Surface owner's *primâ facie* property in mines.

1292. The ownership in the mines under land may be severed from the ownership of the surface (*n*); and the mines so severed are a separate tenement, capable of being held for the same estates as other hereditaments (*o*) and with the like incidental rights of ownership (*p*). The severance may be effected by conveyance (*q*) or by Act

(*d*) *Stepney* v. *Chambers*, [1866] W. N. 401.

(*e*) *Huntley* v. *Russell* (1849), 13 Q. B. 572; see *Ross* v. *Adcock* (1868), L. R. 3 C. P. 655.

(*f*) *Elias* v. *Snowdon Slate Quarries Co.* (1879), 4 App. Cas 454; *Clavering* v. *Clavering* (1726), 2 P. Wms. 388; *Spencer* v. *Scurr* (1862), 31 Beav. 334; *Cowley (Earl)* v. *Wellesley* (1866), L. R. 1 Eq. 656; *Bagot* v. *Bagot*, *Legge* v. *Legge* (1863), 32 Beav. 509.

(*g*) *Spencer* v. *Scurr* (1862), 31 Leav. 334.

(*h*) *Campbell* v. *Wardlaw* (1883), 8 App. Cas. 641.

(*i*) *Re Maynard's Settled Estate*, [1899] 2 Ch. 347.

(*k*) *Bagot* v. *Bagot*, *Legge* v. *Legge*, *supra*; *Greville-Nugent* v. *Mackenzie*, [1900] A. C. 83; see *Viner* v. *Vaughan* (1840), 2 Beav. 466.

(*l*) *Re Chaytor*, [1900] 2 Ch. 804.

(*m*) *Bagot* v. *Bagot*, *Legge* v. *Legge*, *supra*.

(*n*) *Barnes* v. *Mawson* (1813), 1 M. & S. 77; *Rowe* v. *Grenfel* (1824), Ry. & M 396; *Harris* v. *Ryding* (1839), 5 M. & W. 60; *Cox* v. *Glue* (1848), 5. C. B. 533 *Humphries* v. *Brogden* (1850), 12 Q. B. 739; *Keyse* v. *Powell* (1853), 2 E. & B. 132.

(*o*) *Port* v. *Turton* (1763), 2 Wils. 169. As to such estates, see title REAL PROPERTY AND CHATTELS REAL.

(*p*) *Hamilton (Duke)* v. *Graham* (1871), L. R. 2 Sc. & Div. 166; *Seaman* v. *Vawdry* (1810), 16 Ves. 390.

(*q*) *Harris* v. *Ryding*, *supra*; *Cox* v. *Glue*, *supra*.

of Parliament (*r*). In the absence of evidence the severance may be inferred from a long and continuous course of enjoyment of the mines by persons other than the owners of the surface (*a*). SECT. 1. Primâ facie Ownership.

Although the mines may thus be a separate tenement, yet *primâ facie* the owner of the surface of land is entitled *ex jure naturæ* to all beneath it (*b*), except mines of gold and silver (*c*); and it is immaterial that the owner has only a title acquired by acts of ownership on the surface (*d*). If an estate in fee simple in land is acquired by enlargement of a long term, the estate thus acquired includes the mines if not already severed at the time the enlargement is made (*e*).

1293. Proof of ownership of the mines under any parcel of land does not raise any presumption or afford any evidence regarding ownership of the surface (*f*). No *primâ facie* right of mine-owner to surface.

SECT. 2.—*Conditions of Surface affecting Property.*

SUB-SECT. 1.—*Highways.*

1294. *Primâ facie* mines situate beneath a highway are owned by the owners of the land adjoining the highway on either side, the point of division being the centre of the road (*g*). The presumption is a deduction from the doctrine that a conveyance of land bounded by a highway passes the soil of a moiety of the highway (*h*). The presumption does not apply in the case of a railway (*i*), nor in the case of roads set out under an Inclosure Act. In the latter case the property in the mines *primâ facie* remains in the lord of the manor (*k*). Mines under highways.

The rights of the owners of mines under land taken for the

(*r*) *E.g.*, severance of mines from surface has been effected by numerous Inclosure Acts; see title COMMONS AND RIGHTS OF COMMON, Vol. IV., p. 535.

(*a*) *Rowe* v. *Grenfel* (1824), Ry. & M. 396; *Cox* v. *Glue* (1848), 5 C. B. 533; and see title EVIDENCE, Vol. XIII., p. 442.

(*b*) *Rowbotham* v. *Wilson* (1860), 8 H. L. Cas. 348; *Case of Mines* (1568), 1 Plowd. 310, 336. This presumption is incidentally referred to in numerous cases; see, *e.g.*, *Curtis* v. *Daniel* (1808), 10 East, 273; *Rowe* v. *Grenfel*, *supra*; *R.* v. *Pitt* (1833), 5 B. & Ad. 565; *Rogers* v. *Brenton* (1847), 10 Q. B. 26; *Pountney* v. *Clayton* (1883), 11 Q. B. D. 820, C. A.

(*c*) *Case of Mines*, *supra*. Mines of gold and silver are royal mines, and are vested in the Crown. For the law affecting royal mines, see title CONSTITUTIONAL LAW, Vol. VII., pp. 116—118.

(*d*) *Seddon* v. *Smith* (1877), 36 L. T. 168, C. A.

(*e*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 65 (6).

(*f*) *Tyrwhitt* v. *Wynne* (1819), 2 B. & Ald. 554.

(*g*) *Goodtitle* d. *Chester* v. *Alker* (1757), 1 Burr. 133; *Baird* v. *Tunbridge Wells Corporation*, [1894] 2 Q. B. 867, C. A., *per* A. L. SMITH, L.J., at p. 883; and see, generally, title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 51—55.

(*h*) *Chamber Colliery Co.* v. *Rochdale Canal Co.*, [1895] A. C. 564, *per* Lord MACNAGHTEN, at p. 585.

(*i*) *Thompson* v. *Hickman*, [1907] 1 Ch. 550.

(*k*) *Seddon* v. *Smith*, *supra*. The ownership of the mines is often a question of the construction of the particular Act; see *Poole* v. *Huskisson* (1843), 11 M. & W. 827; *Haigh* v. *West*, [1893] 2 Q. B. 19, 29, C. A.; and title COMMONS AND RIGHTS OF COMMON, Vol. IV., p. 565.

SECT. 2. Conditions of Surface affecting Property.

purposes of widening highways (*l*), under land forming the site of highways stopped up and sold (*m*), under land used for any turnpike road (*n*), under certain disturnpiked roads or highways which have or become vested in any urban sanitary authority (*o*), and under or adjacent to any road under or across which electric lines are laid (*p*), are protected by statute.

SUB-SECT. 2.—*Rivers and Seashore.*

Mines beneath rivers and seashore.

1295. The mines beneath the bed of a non-navigable river belong *primâ facie* to the owners of the adjoining lands as owners of the bed of the river (*q*). Mines under navigable rivers (*r*), under the shore between low-water mark and ordinary high-water mark (known as the foreshore) (*s*), and under the bed of the sea adjoining the shore (*t*) belong, *primâ facie*, to the Crown as the owner of the beds of navigable rivers, of the foreshore, and of the bed of the sea. Mines under the foreshore may, however, be shown to belong to the adjoining owner (*a*).

SECT. 3.—*Property where Ownership is Limited.*

Lands held by limited owners.

1296. Where mines, whether as part of the land or as a separate tenement, are held for an estate for life or for years or from year to year, the right of possession in the mines, and in the cubical space formerly occupied by minerals which have been worked, is vested in the tenant for life (*b*) or termor (*c*) or tenant from year to year (*c*), as the case may be, and the inheritance is vested in the remainderman or reversioner.

(*l*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 82; see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 105.

(*m*) Turnpike Roads Act, 1822 (3 Geo 4, c. 126), s. 88.

(*n*) Turnpike Roads Act, 1827 (7 & 8 Geo. 4, c. 24), s. 18.

(*o*) Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), s. 27, referring to highways becoming vested in a local authority by virtue of the Public Health Act, 1848 (11 & 12 Vict. c. 63), s. 68, and the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 149; and see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 56, 58, 102, 159. The minerals must be got so as not to damage the road (see *A.-G.* v. *Conduit Colliery Co.*, [1895] 1 Q. B. 301). If the road is damaged the measure of damages is the cost of making an equally commodious road (*Lodge Holes Colliery Co., Ltd.* v. *Wednesbury Corporation*, [1908] A. C. 323).

(*p*) See title ELECTRIC LIGHTING AND POWER, Vol. XII., p. 585.

(*q*) *Chamber Colliery Co.* v. *Rochdale Canal Co.*, [1895] A. C. 564; and see title WATERS AND WATERCOURSES.

(*r*) *Lyon* v. *Fishmongers' Co.* (1876), 1 App. Cas. 662.

(*s*) *Lopez* v. *Andrew* (1826), 3 Man. & Ry. (K. B.) 329, n.; *A.-G.* v. *Chambers* (1854), 4 De G. M. & G. 206; see Crown Lands Act, 1866 (29 & 30 Vict. c. 62), s. 21.

(*t*) *A.-G.* v. *Chambers*, *supra*.

(*a*) *A.-G.* v. *Hanmer* (1858), 27 L. J. (CH.) 837.

(*b*) *Attersoll* v. *Stevens* (1808), 1 Taunt. 1835; *Lewis* v. *Branthwaite* (1831), 2 B. & Ad. 437; *Keyse* v. *Powell* (1853), 2 E. & B. 132; and see pp. 515, 523, 535, *post*, and, generally, titles REAL PROPERTY AND CHATTELS REAL; SETTLEMENTS.

(*c*) *Raine* v. *Alderson* (1838), 6 Scott, 691; *Milne* v. *Taylor* (1850), 16 L. T. (O. S.) 172.

SECT. 4.—*Property affected by Tenure of Surface.*

SECT. 4
Property affected by Tenure of Surface.

1297. Apart from special custom, the property in the mines and minerals in or under lands of copyhold (*d*) and customary freehold (*e*) tenure is vested in the lord of the manor and the right of possession in the tenant, and the lord cannot enter and work the mines without the consent of the tenant. The tenant may thus maintain trespass against the lord (*f*) or a stranger (*g*) entering upon the minerals without consent, and his interest in the minerals is an estate in the land (*h*) which may be excepted on a surrender (*i*). The vacant space created by working minerals is subject to the same rights of property and possession as the same space when occupied by minerals (*k*).

Mines under copyholds and customary freeholds.

Special customs may give to the lord and tenant rights differing from those *primâ facie* appertaining to their respective positions. Thus the lord may be entitled to get mines without the consent of the tenant (*l*), or the property in the minerals may be vested in the tenant (*m*), or the lord may have a limited (*n*) or unlimited (*o*) right to get, or to get and dispose of, the minerals.

Special customs.

1298. On enfranchisement at common law mines and minerals pass to the tenant as part of the freehold (*p*). If, however, the enfranchisement is made under the Copyhold Act, 1894 (*q*), the respective rights of the lord and tenant to mines and minerals remain unaffected, in the absence of express consent.

Effect of enfranchisement.

(*d*) *Player* v. *Roberts* (1631), W. Jo. 243; *Bourne* v. *Taylor* (1808), 10 East. 189; *Grey* v. *Northumberland* (*Duke*) (1809), 17 Ves. 281; *Lewis* v. *Branthwaite* (1831), 2 B. & Ad. 437; *Dearden* v. *Evans* (1839), 8 L. J. (EX.) 171; *Bowser* v. *Maclean* (1860), 2 De G. F. & J. 415; *Eardley* v. *Granville* (1876), 3 Ch. D. 826; *A.-G.* v. *Tomline* (1877), 5 Ch. D. 750; and see title COPYHOLDS, Vol. VIII., pp. 22—24.

(*e*) *Winchester* (*Bishop*) v. *Knight* (1718), 1 P. Wms. 406; *Portland* (*Duke*) v. *Hill* (1866), L. R. 2 Eq. 765. The fact that in particular lands the minerals are worked by the lord and not by the tenant is evidence that the freehold is in the lord; see *Brown* v. *Rawlins* (1806), 7 East, 409.

(*f*) *Bourne* v. *Taylor*, *supra*.

(*g*) *Lewis* v. *Branthwaite*, *supra*.

(*h*) *Eardley* v. *Granville*, *supra*.

(*i*) *Anglesea* (*Marquis*) v. *Hatherton* (*Lord*) (1842), 12 L. J. (EX.) 57, *per* PARKE, B., at p. 61.

(*k*) *Eardley* v. *Granville*, *supra*; *Bowser* v. *Maclean*, *supra*.

(*l*) *Bourne* v. *Taylor*, *supra*; *Eardley* v. *Granville*, *supra*; *A.-G.* v. *Tomline*, *supra*.

(*m*) *Doe* d. *Conolly* v. *Vernon and Vyse* (1804), 5 East, 51; *Keyse* v. *Powell* (1853), 2 E. & B. 132; *Phillips* v. *Homfray*, *Fothergill* v. *Phillips* (1871), 6 Ch. App. 770; *Moggridge* v. *Hall*, *Llanover* (*Lady*) v. *Homfray*, *Phillips* v. *Llanover* (*Lady*) (1880), 13 Ch. D. 380.

(*n*) *Portland* (*Duke*) v. *Hill* (1866), L. R. 2 Eq. 765 (a case of customary freeholds).

(*o*) *Salisbury* (*Marquis*) v. *Gladstone* (1861), 9 H. L. Cas. 692.

(*p*) *Townley* v. *Gibson* (1788), 2 Term Rep. 701; see title COPYHOLDS, Vol. VIII., p. 114.

(*q*) Copyhold Act, 1894 (57 & 58 Vict. c. 46), s. 23; see title COPYHOLDS, Vol. VIII., p. 127. As to the ownership of minerals under the waste of a manor, see titles COMMONS AND RIGHTS OF COMMON, Vol. IV., pp. 503 *et seq.*; COPYHOLDS, Vol. VIII., p. 24.

SECT. 5. **Property presumed from Acts of Ownership.**

SECT. 5.—*Property presumed from Acts of Ownership.*

Presumed from acts of ownership.

1299. Acts of ownership exercised over mines or quarries may, apart from statute, in the absence or inadequacy of rebutting evidence, give rise to a presumption of ownership (*r*), even in favour of a mere wrongdoer or trespasser (*s*), or if exercised during the statutory period may support a statutory title (*t*). There may also be evidence of a custom regarding the working of minerals in a manor (*u*) or some other area (*a*) wherein customary rights prevail.

Extent of area affected by presumption from acts of ownership.

1300. As the act of working minerals constitutes a removal, *pro tanto*, of that which gives a particular place its value, the question arises how far constructive possession of a wider area can be inferred from actual possession of a limited area (*b*). Thus, acts of taking or dealing with minerals under certain lands are evidence of the ownership of the minerals under other lands within the same boundaries (*c*); and, if possession is taken under a document, constructive possession will be inferred of so many seams (*d*) or such areas (*e*) as are intended to be comprised in the document; but mere trespass on a neighbouring mine for more than twelve years gives no title to such mine (*f*). Generally, where title is established or evidenced by lapse of time, constructive possession of an area wider than that actually worked will only be inferred in cases where such inference is necessary to give effect to contractual obligations or to preserve the good faith and honesty of a bargain (*g*).

Part III.—Right to Work Mines and Quarries.

SECT. 1.—*Rights Dependent on Extent of Owner's Interest.*

SUB-SECT. 1.—*Absolute Owners.*

Owner in fee simple or in fee tail.

1301. A tenant in fee simple may work mines and dispose of the produce at his pleasure, even though subject to an executory

(*r*) *Hanmer* v. *Chance* (1865), 4 De G. J. & Sm. 626. See title EVIDENCE, Vol. XIII., p. 442.

(*s*) *Ashton* v. *Stock* (1877), 6 Ch. D. 719.

(*t*) *Thew* v. *Wingate* (1862), 10 B. & S. 714; *Smith* v. *Stocks* (1869), 10 B. & S. 701; see title LIMITATION OF ACTIONS, Vol. XIX., pp. 109, 111.

(*u*) *Warrick* v. *Queen's College, Oxford* (1871), 6 Ch. App. 716; *Heath* v. *Deane*, [1905] 2 Ch. 86, 93. As to proof, see title COMMONS AND RIGHTS OF COMMON, Vol. IV., pp. 472, 491.

(*a*) *A.-G.* v. *Mathias* (1858), 4 K. & J. 579.

(*b*) See title BOUNDARIES, FENCES, AND PARTY WALLS, Vol. III., pp. 141, 148, 149.

(*c*) *Barnes* v. *Mawson* (1813), 1 M. & S. 77; *Tyrwhitt* v. *Wynne* (1819), 2 B. & Ald. 554 (waste of manor); *Doe* d. *Falmouth* (*Earl*) v. *Alderson* (1836), 1 M. & W. 210 (tin bounds); *Wild* v. *Holt* (1842), 11 L. J. (EX.) 285; *Taylor* v. *Parry* (1840), 9 L. J. (C. P.) 298.

(*d*) *Low Moor Co.* v. *Stanley Coal Co.* (1878), 34 L. T. 186, C. A.

(*e*) *Davis* v. *Shepherd* (1866), 1 Ch. App. 410.

(*f*) *Dartmouth* (*Earl*) v. *Spittle* (1871), 19 W. R. 444; *Thompson* v. *Hickman*, [1907] 1 Ch. 550.

(*g*) *Glyn* v. *Howell*, [1909] 1 Ch. 666, *per* EVE, J., at p. 678; see *M'Donnell* v. *M'Kinty* (1847), 10 I. L. R. 514. As to presumption of ownership of submarine mines in Scotland, see *Lord Advocate* v. *Wemyss*, [1900] A. C. 48.

limitation over (*h*); and a tenant in tail in possession, inasmuch as he may at any time convert his estate into an estate in fee simple, has the like rights (*i*). The guardian of an infant tenant in tail may exercise the right of working incident to the infant's estate (*k*). Mines belonging to a lunatic may be worked by his committee under the direction of the court (*l*).

SECT. 1. Rights Dependent on Extent of Owner's Interest.

If the ownership of the mines is severed from that of the surface, the owner of the mines has similar absolute powers of using as he may think fit the empty space from which minerals have been worked (*m*); and, where for the purpose of properly working mines excepted from a grant, roads have been extended into the adjoining strata, such owner is entitled to use such roads for any purpose (*n*). If the ownership of minerals only is severed, the owner of the minerals has no power to use the empty space except for the purpose of getting the remaining minerals (*o*).

SUB-SECT. 2.—*Co-owners.*

1302. Persons jointly interested in a mine or quarry may be legally related to each other in three different ways. Thus (1) they may be merely co-owners of the property, or (2) they may be co-owners of the property and partners in working it, or (3) they may form a partnership, the mine or quarry itself being the partnership property. Three relations.

1303. In the case of mines held by co-owners, each co-owner is entitled to enter and work provided he does not take more than his share nor work wastefully (*p*). If he takes more than his share he may be made liable in an action for an account (*q*); but in such action he will be allowed the costs of severing the minerals and bringing them to bank (*r*). If there has been actual ouster the person excluded may recover mesne profits (*s*). In case of disagreement a receiver or manager will not be appointed, as this would involve working under the supervision of the court for an indefinite period (*t*). In taking an account, one co-owner of a mine Co-owners.

(*h*) *Turner* v. *Wright* (1860), 2 De G. F. & J. 234.
(*i*) *A.-G.* v. *Marlborough* (*Duke*) (1818), 3 Madd. 498.
(*k*) *Lyddal* v. *Cluvering* (1741), Amb. 371, n.; and see title INFANTS AND CHILDREN, Vol. XVII., p. 131.
(*l*) *Ex parte Tabbart* (1801), 6 Ves. 428; see title LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., p. 446.
(*m*) *Proud* v. *Bates* (1865), 34 L. J. (CH.) 406; *Hamilton* (*Duke*) v. *Graham* (1871), L. R. 2 Sc. & Div. 166; *Great Western Rail. Co.* v. *Cefn Cribbwr Brick Co.*, [1894] 2 Ch. 157.
(*n*) *Batten Pooll* v. *Kennedy*, [1907] 1 Ch. 256.
(*o*) *Ramsay* v. *Blair* (1876), 1 App. Cas. 701.
(*p*) *Job* v. *Potton* (1875), L. R. 20 Eq. 84; see *Glyn* v. *Howell*, [1909] 1 Ch. 666, 677, and *Wilkinson* v. *Haygarth* (1847), 12 Q. B. 837.
(*q*) *Denys* v. *Shuckburgh* (1840), 4 Y & C. (EX.) 42; *Bentley* v. *Bates* (1840), 4 Y. & C. (EX.) 182; *Re Smith* (*Mary*) (*a Lunatic*) (1874), 10 Ch. App. 79; *Adair* v. *New River Co. and Metropolitan Water Board* (1908), 25 T. L. R. 193, 196; see also stat. (1705) 4 & 5 Ann. c. 3, which provided for accounts as between co-owners.
(*r*) *Roberts* v. *Eberhardt* (1853), Kay, 148.
(*s*) *Denys* v. *Shuckburgh* (1840), 4 Y. & C. (EX.) 42.
(*t*) *Roberts* v. *Eberhardt*, *supra*; compare *Jefferys* v. *Smith* (1820), 1 Jac. & W. 298.

SECT. 1. Rights Dependent on Extent of Owner's Interest.

or quarry who has worked with the consent of the others will be given allowances as for necessaries not given to co-owners in possession of other species of property (*u*). Any co-owner can assign his share without the consent of the others (*a*), but he is not entitled to have the mine sold without such consent (*b*), except in an action for partition or sale (*c*).

Partners in profits.

1304. If co-owners of a mine are partners in the profits and not in the mine itself, their rights and liabilities are determined partly by the law of co-ownership and partly by the law of partnership (*d*).

Each partner is entitled to take part in the working so long as he works properly and does not obstruct nor interfere with the others (*e*); and he may maintain an action for an account against the others without seeking a dissolution (*f*), but if a dissolution is not sought a receiver or manager will not in general be appointed (*g*). If, however, dissolution is asked for, a receiver will be appointed on an interlocutory application, provided the applicant shows exclusion or interference (*h*). Each partner who has incurred expense in working or preserving the mine is entitled to be recouped out of profits before any division is made (*i*). If one partner becomes indebted to the partnership the others will have a lien on his share for the amount of such indebtedness (*j*).

If two tenants in common of a mine at their joint expense construct a shaft on lands belonging to one of them, money paid by a stranger as wayleave belongs to both (*k*).

Partners in mine and profits.

1305. If co-owners are partners both in the mine and in the profits their relations generally are regulated by the law of partnership (*l*).

Each partner is entitled to take part in the working so long as he acts with due regard to the rights of the other partners (*m*), and each may bind the others by incurring debts for wages goods, and supplies necessary for carrying on the mine (*n*), but not by drawing, making, accepting, or indorsing bills of exchange or

(*u*) *Scott* v. *Nesbitt* (1808), 14 Ves. 438.
(*a*) *Bentley* v. *Bates* (1840), 4 Y. & C. (EX.) 182; and see titles REAL PROPERTY AND CHATTELS REAL; SALE OF LAND.
(*b*) *Steward* v. *Blakeway* (1869), 4 Ch App. 603.
(*c*) Partition Acts, 1868 and 1876 (31 & 32 Vict. c. 40; 39 & 40 Vict. c. 17); see title PARTITION.
(*d*) See title PARTNERSHIP.
(*e*) *Jefferys* v. *Smith* (1820), 1 Jac. & W. 298; *Roberts* v. *Eberhardt* (1853), Kay, 148. He may also assign his share without the consent of the other partners (*Bentley* v. *Bates*, *supra*).
(*f*) *Bentley* v. *Bates*, *supra*.
(*g*) See titles PARTNERSHIP; RECEIVERS.
(*h*) *Roberts* v. *Eberhardt*, *supra*; *Lees* v. *Jones* (1857), 3 Jur. (N. S.) 954.
(*i*) *Roberts* v. *Eberhardt*, *supra*.
(*j*) *Fereday* v. *Wightwick* (1829), 1 Russ. & M. 45; *Crawshay* v. *Maule* (1818), 1 Swan. 495.
(*k*) *Clegg* v. *Clegg* (1862), 3 Giff. 322.
(*l*) See, generally, title PARTNERSHIP.
(*m*) *Rowe* v. *Wood* (1822), 2 Jac. & W. 553; *Roberts* v. *Eberhardt*, *supra*.
(*n*) *Re German Mining Co.*, *Ex parte Chippendale* (1854), 4 De G. M. & G. 19, C. A.

promissory notes (*o*). A partner is entitled to be repaid money advanced by him for the purpose of carrying on the business (*p*); but there is some doubt whether a partner in a mining partnership is entitled to borrow money on the credit of the partnership (*q*). The better opinion appears to be that he is not.

SECT. 1. **Rights Dependent on Extent of Owner's Interest.**

All proper expenses in working or preserving the mine ought to be deducted from the profits before any division is made (*r*), and each partner is liable to contribute in case of loss (*s*), unless the loss is caused by the improper conduct of some members of the partnership (*t*).

Expenses of working.

A partner may transfer his share either absolutely or by way of mortgage, but the rights of the transferee will be those of a part owner, including the right to an account, and not those of a partner (*a*), unless by express or tacit agreement he is accepted as a partner by the other partners (*b*). A mortgagee may enforce his security by foreclosure, and in such action may obtain an account as at the date of the issue of the writ, but he cannot contest any dealings with capital or profits or object to the management of the mine before that date (*c*). If a person who is a mortgagee of a share becomes also a partner, his rights as mortgagee will be modified by the obligations he assumes toward the other partners (*d*).

Transfer of share.

Any partner in an action for dissolution, and in some special cases without asking for dissolution (*e*), is entitled to the appointment on interlocutory application of a receiver and manager, provided he can show mismanagement or exclusion (*f*).

Action for dissolution.

1306. A person claiming to assert an equitable right with regard to mining property, as to a share in a renewed lease (*g*), must, owing

Equitable owners.

(*o*) *Ducarrey* v. *Gill* (1830), Mood & M. 450; *Bentley* v. *Bates* (1840), 4 Y. & C. (EX.) 182; *Thicknesse* v. *Bromilow* (1832), 2 Cr. & J. 425; *Brown* v. *Byers* (1847), 16 L. J. (EX.) 112. A partner who signs a bill on behalf of the partnership is personally liable thereon (*Brown* v. *Byers*, *supra*); as to acquiescence by a partner, see *Harrison* v. *Heathorn* (1843), 12 L. J. (C. P.) 282.

(*p*) *Re German Mining Co., Ex parte Chippendale* (1854), 4 De G. M. & G. 19, C. A. If one partner becomes indebted to the partnership the others have a lien on his share for the amount of the debt (*Fereday* v. *Wightwick* (1829), 1 Russ. & M. 45).

(*q*) *Burmester* v. *Norris* (1851), 21 L. J. (EX.) 43; *Re German Mining Co., Ex parte Chippendale*, *supra*; *Ducarrey* v. *Gill*, *supra*; *Brown* v. *Kidyer* (1858), 28 L. J. (EX.) 66.

(*r*) *Roberts* v. *Eberhardt* (1853), Kay, 148.

(*s*) *Re German Mining Co., Ex parte Chippendale*, *supra*.

(*t*) *Thomas* v *Atherton* (1878), 10 Ch. D. 185, C. A.

(*a*) *Bentley* v. *Bates*, *supra*; *Redmayne* v. *Forster* (1866), L. R. 2 Eq. 467; see Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 31.

(*b*) See *Jefferys* v. *Smith* (1826), 3 Russ. 158; *Crawshay* v. *Maule* (1818), 1 Swan. 495.

(*c*) *Redmayne* v. *Forster*, *supra*. In this case, as the other partners had a right of pre-emption, it was held that they were necessary parties to the action for foreclosure.

(*d*) *Rowe* v. *Wood* (1822), 2 Jac. & W. 553.

(*e*) *Sheppard* v. *Oxenford* (1855), 1 K. & J. 491. No order will be made if dissolution is not claimed where the application is made on behalf of a lunatic (*Rowlands* v. *Evans*, *Williams* v. *Rowlands* (1861), 30 Beav. 302).

(*f*) *Roberts* v. *Eberhardt*, *supra*.

(*g*) A partner renewing in his own name a lease of the partnership is a

SECT. 1. Rights Dependent on Extent of Owner's Interest.

to the speculative nature of mining property, apply for relief promptly otherwise he will be refused on the ground of laches (*h*), but this rule is not applicable if the applicant has been refused information necessary to enable him to decide what course to adopt (*i*).

Abandonment of legal right.

Laches is not, however, sufficient to bar a legal right (*k*). Abandonment must be shown (*l*), but abandonment will be presumed from a delay amounting to six years (*m*).

SUB-SECT. 3.—*Owners having Limited Interests.*

Powers of limited owners to work mines.

1307. The rights of limited owners are governed by the doctrine of waste (*n*).

Working new or unopened mines or quarries is waste, but working open mines is not waste; it is enjoyment of the profits of the estate (*o*). The right to commit waste is not incident to the estate of a tenant for life (*p*) or years (*q*). Consequently, in the absence of express provision contained in the instrument under which their estates arise, tenants for life (*r*) (including in such class any person entitled to an estate as tenant by the curtesy (*s*) or as dowress (*t*) or jointress (*a*)) and tenants for years (*b*) may work opened mines, but may not dig in new mines except for the purposes of repairs, improvements, or the like (*c*).

trustee of the new lease for the partnership (*Featherstonhaugh* v. *Fenwick* (1810), 17 Ves. 298; *Clegg* v. *Fishwick* (1849), 1 Mac. & G. 294; *Clegg* v. *Edmondson* (1857), 8 De G. M. & G. 787, C. A.; *Clements* v. *Hall* (1858), 2 De G. & J. 173, C. A.; and see title PARTNERSHIP).

(*h*) *Senhouse* v. *Christian* (1795), 19 Beav. 356, n.; *Norway* v. *Rowe* (1812), 19 Ves 144; *Prendergast* v. *Turton* (1841), 1 Y. & C. Ch. Cas. 98; (1843) 13 L. J. (CH.) 268; *Clegg* v. *Edmondson*, *supra*; and see title EQUITY, Vol. XIII., p. 168.

(*i*) *Clements* v. *Hall*, *supra*.

(*k*) *Clarke and Chapman* v. *Hart* (1858), 6 H. L. Cas. 633.

(*l*) *Clarke and Chapman* v. *Hart*, *supra*; *Palmer* v. *Moore*, [1900] A. C. 293, P. C.

(*m*) *Rule* v. *Jewell* (1881), 18 Ch. D. 660; see title LIMITATION OF ACTIONS, Vol. XIX., p. 170.

(*n*) Co. Litt. 53 b. As to waste generally, see titles LANDLORD AND TENANT, Vol. XVIII., pp. 496 *et seq.*; SETTLEMENTS.

(*o*) Co. Litt. 54 b; *Campbell* v. *Wardlaw* (1883), 8 App. Cas. 641; *Dashwood* v. *Magniac*, [1891] 3 Ch. 306, 327, C. A.

(*p*) Co. Litt. 54 b; *Whitfield* v. *Bewit* (1724), 2 P. Wms. 240; *Viner* v. *Vaughan* (1840), 2 Beav. 466.

(*q*) Co. Litt. 54 b; *Saunders's Case* (1599), 5 Co. Rep. 12 a; *Clegg* v. *Rowland* (1866), L. R. 2 Eq. 160; *Elias* v. *Snowdon Slate Quarries Co.* (1879), 4 App. Cas. 454. It is immaterial that the term is of great duration; see *Elias* v. *Griffith* (1877), 8 Ch. D. 521, C. A.

(*r*) *Saunders's Case*, *supra*; *Clavering* v. *Clavering* (1726), 2 P. Wms. 388; *Campbell* v. *Leach* (1775), Amb. 740; *Viner* v. *Vaughan* (1840), 2 Beav. 466; *Bagot* v. *Bagot*, *Legge* v. *Legge* (1863), 32 Beav. 509; *Campbell* v. *Wardlaw*, *supra*; *Dashwood* v. *Magniac*, *supra*.

Cru. Dig., Vol. I., tit. Curtesy, 2nd ed., 158.

(*a*) *Dickin* v. *Hamer* (1860), 1 Drew. & Sm. 284.

(*b*) *Tracy* v. *Tracy* (1681), 1 Vern. 23.

(*b*) *Saunders's Case*, *supra*; *Astry* v. *Ballard* (1677), 2 Mod. Rep. 193; *Clegg* v. *Rowland*, *supra*; *Elias* v. *Snowdon Slate Quarries Co.*, *supra*. As to Ireland, see the Landlord and Tenant Law Amendment Act, Ireland, 1860 (23 & 24 Vict. c. 154), s. 27

(*c*) Co. Litt. 53 b.

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1308. In conformity with this principle a tenant for life is entitled to receive the profits from mines worked under a demise made (*d*) or contracted to be made (*e*) by the settlor, or made in exercise of powers given by the settlor (*f*) (or by the Settled Land Acts, 1882—1890 (*g*), subject to the statutory limitations), or derived from workings of open mines by the trustees of the settlement (*h*). A tenant for lives (*i*) or for a term of years (*j*) renewable for ever is subject to the same rule as an ordinary tenant for life or years. If minerals have been worked in and under land held by a tenant for life or years, or at will, the tenant may use the empty space created by the working in any manner he chooses (*k*).

Right to take profits of open mines.

Where mines are included in a residuary devise of realty, a tenant for life is entitled to the profits so long as the mines are properly retained unconverted by the trustees (*l*). If, however, an interest in mines of the nature of personal property, such as a term of years (*m*) or shares in a mining company (*n*), be included in a residuary bequest, it is a question of construction of the will whether the property is to be enjoyed in specie (*o*) or notionally converted and interest paid upon the value (*p*).

1309. The rights of a tenant for life may be varied by the instrument under which he holds from those normally incident to his estate. Thus he may be restrained from working open mines (*q*), or may, by being given an estate without impeachment of waste, be enabled to open new mines (*r*). The fact that a settlement contains an express grant of land and mines to the trustees does not enlarge the powers of the tenant for life with regard to mines (*s*).

Special provisions of settlement.

(*d*) *Spencer* v. *Scurr* (1862), 31 Beav. 334; *Miller* v. *Miller* (1872), L. R. 13 Eq. 263.

(*e*) *Re Kemeys-Tynte*, *Kemeys-Tynte* v. *Kemeys-Tynte*, [1892] 2 Ch. 211.

(*f*) *Daly* v. *Beckett* (1857), 24 Beav. 114; *Re North*, *Garton* v. *Cumberland*, [1909] 1 Ch. 625; *Chaytor* v. *Trotter* (1902), 87 L. T. 33, C. A.

(*g*) Settled Land Act, 1882 (45 & 46 Vict. c. 38); Settled Land Act, 1884 (47 & 48 Vict. c. 18); Settled Land Acts (Amendment) Act, 1887 (50 & 51 Vict. c. 30); Settled Land Act, 1889 (52 & 53 Vict. c. 36); and Settled Land Act, 1890 (53 & 54 Vict. c. 69); see pp. 529, 530, *post*.

(*h*) *Cowley* (*Earl*) v. *Wellesley* (1866), 35 Beav. 635.

(*i*) *Coppinger* v. *Gubbins* (1846), 3 Jo. & Lat. 397.

(*j*) *Harris* v. *Coppinger* (1827), 1 Hog. 478.

(*k*) *Lewis* v. *Branthwaite* (1831), 2 B. & Ad. 437; *Keyse* v. *Powell* (1853), 2 E. & B. 132; *Milne* v. *Taylor* (1850), 16 L. T. (o. s.) 172.

(*l*) *Re Darnley* (*Earl*), *Clifton* v. *Darnley*, [1907] 1 Ch. 159; *Miller* v. *Miller*, *supra*; see *Wentworth* v. *Wentworth*, [1900] A. C. 163, P. C.; *Re Oliver*, *Wilson* v. *Oliver*, [1908] 2 Ch. 74, 78.

(*m*) *Thursby* v. *Thursby* (1875), L. R. 19 Eq. 395.

(*n*) *Re Bates*, *Hodgson* v. *Bates*, [1906] W. N. 191.

(*o*) The cases cited in notes (*m*) and (*n*), *supra*, were examples of enjoyment in specie.

(*p*) *Re Woods*, *Gabellini v. Woods*, [1904] 2 Ch. 4; *Re Chaytor*, *Chaytor* v. *Horn*, [1905] 1 Ch. 233. The rate of interest is 3 per cent. The income arising from the investments of the profits in excess of the interest is payable to the tenant for life. See also *Wightwick* v. *Lord* (1857), 6 H. L. Cas. 217; and see, generally, title WILLS.

(*q*) *Farrand* v. *Wilson* (1846), 15 L. J. (CH.) 41.

(*r*) *Campbell* v. *Wardlaw* (1883), 8 App. Cas. 641; *Re Ridge*, *Hellard* v. *Moody* (1886), 31 Ch. D. 504, C. A. But a limited owner, though dispunishable for waste, may not commit equitable waste (*London* (*Bishop*) v. *Web* (1719), 1 P. Wms. 527); see *Rowe* v. *Wood* (1822), 2 Jac. & W. 553. As to equitable waste, see title SETTLEMENTS.

(*s*) *Whitfield* v. *Bewit* (1724), 2 P. Wms. 240.

SECT. 1.

Rights Dependent on Extent of Owner's Interest.

1310. Similarly, the rights of a tenant for years may be varied by the lease under which he holds. If the lease expressly grants "all mines" he may work new mines; if it grants land with the mines therein, and the land contains both open and unopened mines, the lessee may only work the opened mines; if, however, there are no open mines, the lessee may open new mines (*t*). An exception of "all royalties" in a lease of land does not diminish the power of the tenant to work open mines (*a*). The rights of a tenant for years may be extended by custom (*b*).

Powers of tenant for years to work mines

Meliorating waste.

1311. A limited owner who exceeds his powers of working may be free from liability if his workings have in fact improved the land. A tenant for life may not, however, deliberately commit waste on the plea that improvement is his object (*c*).

Ownership of minerals improperly worked.

1312. If minerals are improperly worked by a limited owner, the minerals so severed, or their value, belong to the first person entitled to an estate of inheritance. If at the time of working there is a person in existence entitled to an estate of inheritance the severed minerals immediately become the property of such person (*d*), although his estate be defeasible (*e*), and although, between his estate and that of the person in possession, a life estate without impeachment of waste be interposed (*f*). If at the time of working there is no such person in existence, the proceeds of the severed minerals are invested and the income accumulated during the life of the wrongdoer, and after his death the income of the aggregate fund will be paid to the persons (if any) successively entitled, whether with or without impeachment of waste, to limited interests in the estate until some person becomes entitled to an estate of inheritance in possession (*g*).

Remedies for improper working.

1313. In case of improper working the owner of the severed minerals may bring an action of trover (*h*) or an action for an account (*i*). The latter action will lie, although the plaintiff is not

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(*t*) *Saunders's Case* (1599), 5 Co. Rep. 12 a; *Clegg* v. *Rowland* (1866), L. R. 2 Eq. 160; *Dashwood* v. *Magniac*, [1891] 3 Ch. 306, C. A.

(*a*) *Brown* v. *Chadwick* (1857), 7 I. C. L. R. 101; *Listowel* (*Countess*) v. *Gibbings* (1858), 9 I. C. L. R. 223.

(*b*) *Tucker* v. *Linger* (1883), 8 App. Cas. 508; see, generally, title CUSTOM AND USAGES, Vol. X., pp. 221 *et seq.*

(*c*) *Jesus College* v. *Bloom* (1745), 3 Amb. 54; *Coppinger* v. *Gubbins* (1846), 3 Jo. & Lat. 397; *Harris* v. *Ekins* (1872), 20 W. R. 999.

(*d*) *Whitfield* v. *Bewit*, *supra*; *Bewick* v. *Whitfield* (1734), 3 P. Wms. 227; *Bell* v. *Wilson* (1866), 1 Ch. App. 303; *Re Barrington*, *Gamlen* v. *Lyon* (1886), 33 Ch. D. 523.

(*e*) *Re Cavendish*, *Cavendish* v. *Mundy*, [1877] W. N. 198.

(*f*) *Pigot* v. *Bullock* (1792), 1 Ves. 479; *Re Barrington*, *Gamlen* v. *Lyon* (1886), 33 Ch. D. 523.

(*g*) *Bagot* v. *Bagot*, *Legge* v. *Legge* (1863), 32 Beav. 509; see *Gresley* v. *Mousley* (1862), 3 De G. F. & J. 433, C. A.

(*h*) *Clavering* v. *Clavering* (1729), Mos. 219; *Re Barrington*, *Gamlen* v. *Lyon*, *supra*; see title TROVER AND DETINUE.

(*i*) *Jesus College* v. *Bloom*, *supra*; *Garth* v. *Cotton* (1753), 3 Atk. 751; *Parrott* v. *Palmer* (1834), 3 My. & K. 632; *Bagot* v. *Bagot*, *Legge* v. *Legge*, *supra*; *Wright* v. *Pitt* (1870), L. R. 12 Eq. 408. Interest at the rate of 4 per cent. per annum is charged on the amount found due on taking the account. In the case of a deceased tenant for life interest will usually be charged from the date of death and not of the working; see *Bagot* v. *Bagot*, *Legge* v. *Legge*, *supra*.

SECT. 1. Rights Dependent on Extent of Owner's Interest.

entitled to an injunction (*k*), and is also available against the estate of a deceased wrongdoer (*l*). Further, if the plaintiff has not disentitled himself by his own conduct (*m*), the remedy by injunction is available (*n*), although the injury be only threatened (*o*). The same remedies are available in the case of equitable waste (*p*).

In case of collusion between a limited owner and a remainderman these remedies may be made use of by trustees to preserve contingent remainders and to protect the interests of persons not *in esse* entitled to intermediate estates (*q*).

Effect of lapse of time on remedies.

In the case of a person not under disability the lapse of six years operates to bar the remedy, but such bar does not give any right to continue wrongful workings (*r*).

SUB-SECT. 4.—*Owners having only Future Interests.*

Reversioners and remainderman.

1314. A reversioner or remainderman is not entitled to work mines (*s*). If he does in fact work them, the tenant for life is probably entitled to have the proceeds invested and to be paid the income arising therefrom (*t*): he may, however, by his conduct disentitle himself to any benefit (*t*).

SUB-SECT. 5.—*Owners having Fiduciary Interests.*

Trustees.

1315. If and as long as any person, who would, but for the provisions now stated, be beneficially entitled to the possession of any land, is an infant, and, being a woman, is also unmarried, the trustees appointed for that purpose by the settlement, or, if none, then the persons, if any, who are, for the time being under the settlement, trustees with power of sale of the settled land or of part thereof, or with power of consent to or approval of the exercise of such a power of sale, or, if none, then any persons appointed as trustees for the purpose by the court on the application of a guardian (*u*) or next friend of the infant, may enter into and continue in possession of the land, and may continue the workings of mines, minerals, and quarries which have usually been worked (*a*).

Statutory powers.

Apart from these provisions trustees are not entitled, except in the execution of powers conferred upon them by the document constituting the trust, to work mines or quarries.

(*k*) *Jesus College* v. *Bloom* (1745), Amb. 54.

(*l*) *Bagot* v. *Bagot*, *Legge* v. *Legge* (1863), 32 Beav. 509.

(*m*) *Burrowes* v. *Hayes* (1834), Hayes & Jo. 597.

(*n*) *Flamang's Case* (undated), cited 7 Ves. 308; *Viner* v. *Vaughan* (1839), 2 Beav. 466; *Ferrand* v. *Wilson* (1845), 4 Hare, 344, 388; and see title INJUNCTION, Vol. XVII., p. 233. The court is unwilling to grant an interlocutory injunction in the case of mines actually being worked (*Clavering* v. *Clavering* (1729), Mos. 219).

(*o*) *Gibson* v. *Smith* (1741), 2 Atk. 182.

(*p*) *London (Bishop)* v. *Web* (1719), 1 P. Wms. 527.

(*q*) *Garth* v. *Cotton* (1753), 3 Atk. 751.

(*r*) *Elias* v. *Griffith* (1877), 8 Ch. D. 521, C. A.; see title LIMITATION OF ACTIONS, Vol. XIX., pp. 41, 50.

(*s*) *Dickin* v. *Hamer* (1860), 1 Drew. & Sm. 284; see also *Doherty* v. *Allman* (1878), 3 App. Cas. 709, *per* Lord BLACKBURN, at p. 734. As to estates in reversion generally, see title REAL PROPERTY AND CHATTELS REAL.

(*t*) *Dickin* v. *Hamer*, *supra*, at p. 298.

(*u*) See title INFANTS AND CHILDREN, Vol. XVII., p. 131, note (*g*).

(*a*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 42;

SECT. 1. SUB-SECT. 6.—*Railway, Canal, and other Statutory Companies.*

Rights Dependent on Extent of Owner's Interest.

1316. Statutory companies, although they may be authorised to acquire mines, have no power to work them unless such power is expressly or impliedly conferred on them by the legislature (*b*).

Statutory companies.

SECT. 2.—*Rights Dependent on Nature of the Property.*

SUB-SECT. 1.—*Mortgaged Lands.*

Mortgagors.

1317. A mortgagor in possession may be restrained from committing waste if the security is insufficient (*c*), and if he open a new mine or quarry such opening will enure for the benefit of the mortgagee (*d*).

Mortgagees.

1318. A mortgagee in possession may work open mines (*d*), but is not bound to make any greater expenditure thereon than would be made by a prudent owner (*e*). If the security is insufficient he may open and work new mines, but not otherwise (*f*); and the burden of showing that the security is insufficient is on the mortgagee (*g*). If a mortgagee, who is not entitled to do so, works mines he will be charged with the gross receipts and disallowed his expenses (*h*), and he may be charged an occupation rent (*i*); and persons working by his authority may be jointly liable with him (*k*). If, on the other hand, the working is justified, the mortgagee is chargeable only with the net profits (*l*).

Working at a loss.

In any case a mortgagee who opens mines speculates at his

see, further, title INFANTS AND CHILDREN, Vol. XVII., p. 87; and see, especially, notes (*j*), (*l*), (*m*), (*o*), (*q*) thereto. As to the powers and duties of trustees generally, see title TRUSTS AND TRUSTEES.

(*b*) *Ecclesiastical Commissioners for England* v. *North Eastern Rail. Co.* (1877), 4 Ch. D. 845; *Glasgow (Lord Provost and Magistrates)* v. *Farie* (1888), 13 App. Cas. 657, 697; see also *A.-G.* v. *Great Northern Rail. Co.* (1860), 1 Drew. & Sm. 154; see title COMPANIES, Vol. V., p. 286; and as to limitation of a corporation's powers generally, see titles CORPORATIONS, Vol. VIII., pp. 359 *et seq.*; RAILWAYS AND CANALS.

(*c*) *Farrant* v. *Lovel* (1750), 3 Atk. 723; *King* v. *Smith* (1843), 2 Hare, 239; and see title MORTGAGE.

(*d*) *Elias* v. *Snowdon Slate Quarries Co.* (1879), 4 App. Cas. 454. If the mines are being worked at the time when the mortgagee takes possession, he is, it seems, bound to continue such workings in the ordinary course (*Rowe* v. *Wood* (1822), 2 Jac. & W. 553, 555, 556; *County of Gloucester Bank* v. *Rudry Merthyr Steam and House Coal Colliery Co.*, [1895] 1 Ch. 629, C. A.).

(*e*) *Rowe* v. *Wood* (1822), 2 Jac. & W. 553. As to his rights in respect of permanent improvements, see *Tipton Green Colliery Co.* v. *Tipton Moat Colliery Co.* (1877), 7 Ch. D. 192.

(*f*) *Millett* v. *Davey* (1862), 31 Beav. 470. A mortgagee may, of course, be expressly authorised to work by the mortgage deed (see, *e.g.*, *Norton* v. *Cooper* (1856), 5 De G. M. & G. 728).

(*g*) *Millett* v. *Davey*, *supra*. The fact that interest is in arrear is important in enabling the mortgagee to justify his working (*ibid.*, at p. 473).

(*h*) *Thorneycroft* v. *Crockett* (1848), 16 Sim. 445; *Hood* v. *Easton* (1856), 2 Giff. 692.

(*i*) *Thorneycroft* v. *Crockett*, *supra*.

(*k*) *Hood* v. *Easton*, *supra*.

(*l*) *Millett* v. *Davey*, *supra*.

own hazard, and cannot throw any part of a loss upon the mortgagor (*m*).

A mortgagee in possession, whether his security is or is not insufficient, will be restrained from working mines wastefully or improperly (*n*), and if definite mismanagement is proved, a receiver or manager may be appointed by the court (*o*), and the mortgagee may be made liable for damage caused by his improper working (*p*).

Waste.

SUB-SECT. 2.—*Lands Agreed to be Sold or Leased.*

1319. As the purchaser is in equity the owner of the property comprised in a contract for sale from the date of the contract, the vendor may not, after the date of the contract, do anything to diminish its value (*q*). Therefore, if a vendor delays completion and continues to work a mine or quarry for his own benefit, he is liable for so doing (*r*). If, however, the mine or quarry is open, the vendor may continue to work, or, if the property is leased, to receive the royalties, and to retain the proceeds of such working or the royalties, during the period between the date of the contract and that fixed for completion, as ordinary rents and profits (*s*).

Rights pending completion of sale or lease.

SUB-SECT. 3.—*Church Lands.*

1320. A bishop may work open mines beneath the lands of his see, but may not work new mines (*a*); but this right is practically obsolete, as the episcopal estates are vested in the Ecclesiastical Commissioners (*b*).

Bishop.

1321. A dean and chapter cannot work mines beneath the corporate lands, as, since the passing of the Restraining Acts (*c*), they may not commit waste (*d*).

Dean and chapter.

1322. An incumbent may work open mines (*e*) for his own benefit (*f*), but may not open new mines even with the consent of

Incumbent.

(*m*) *Hughes* v. *Williams* (1806), 12 Ves. 493; *Rowe* v. *Wood* (1822), 2 Jac. & W. 553.

(*n*) *Millett* v. *Davey* (1862), 31 Beav. 470.

(*o*) *Rowe* v. *Wood*, *supra*; see title RECEIVERS.

(*p*) *Taylor* v. *Mostyn* (1886), 33 Ch. D. 226, C. A. In this case the mortgagee was also lessee, and was held liable to be charged in the mortgage action for breaches of covenant under the lease.

(*q*) See title SALE OF LAND.

(*r*) *Nelson* v. *Bridges* (1839), 2 Beav. 239; *Brown* v. *Dibbs* (1877), 25 W. R. 776, P. C. In the first case the vendor was held liable for the damages sustained by the defendant in his business as a stone dealer; in the second, for the market value of the coal got, less the cost of severance and conveyance to the place of sale.

(*s*) *Leppington* v. *Freeman* (1891), 66 L. T. 357, C. A. As to the liability of a purchaser who works the minerals before completion, see p. 547, *post*.

(*a*) *Knight* v. *Mosely* (1753), Amb. 176.

(*b*) Ecclesiastical Commissioners Act, 1860 (23 & 24 Vict. c. 124); see title ECCLESIASTICAL LAW, Vol. XI., p. 406.

(*c*) Stat. (1571) 13 Eliz. c. 10; stat. (1571) 13 Eliz. c. 20; stat. (1572) 14 Eliz. c. 11; stat. (1572) 14 Eliz. c. 14.

(*d*) *Worcester's* (*Dean and Chapter*) *Case* (1605), 6 Co. Rep. 37 a; *Ross* v. *Adcock* (1868), L. R. 3 C. P. 655.

(*e*) *Ecclesiastical Commissioners* v. *Wodehouse*, [1895] 1 Ch. 552, 562.

(*f*) *Knight* v. *Mosely*, *supra*; *Huntley* v. *Russell* (1849), 13 Q. B. 572, 591;

SECT. 2. Rights Dependent on Nature of the Property.

the patron (*g*), except to get stone for the purpose of repairs (*h*). If an incumbent works minerals in excess of his rights the patron may obtain an injunction (*i*) and, according to the better opinion, is entitled to an account (*j*); and, in case of collusion between the incumbent and the patron, the ordinary may take proceedings (*k*). The Ecclesiastical Commissioners also may obtain an injunction (*l*). The Ecclesiastical Courts (*m*) may punish improper workings by deprivation (*n*). But the successor to a benefice cannot, in an action for dilapidations, recover anything against the estate of a former incumbent in respect of minerals improperly worked (*o*).

SECT. 3.—*Rights in the Nature of Profits à Prendre.*

Profits *à prendre* affecting minerals.

1323. The right to enter upon the soil of another and get minerals thereout, as distinguished from the ownership of a stratum of minerals in the soil of another (*p*), is a *profit à prendre* (*q*), and may be created by grant, statute, or prescription (*r*).

Mining rights in manorial waste.

A *profit à prendre* cannot be claimed by custom (*s*), except in the case of copyholders claiming the right to a *profit à prendre* in the waste of the manor of which they hold (*t*). Copyholders may, however, establish a right to a *profit à prendre* in the waste of another manor by prescribing in the name of their lord (*a*).

Nature of right.

A common case of a *profit à prendre* in respect of minerals is a right for freehold tenants of a manor to cut turf (*b*) and dig loam,

Marlborough (Duke) v. *St. John* (1852), 5 De G. & Sm. 174; *Bartlett* v. *Phillips* (1859), 4 De G. & J. 414, C. A.

(*g*) *Ecclesiastical Commissioners* v. *Wodehouse*, [1895], 1 Ch. 552. At common law the incumbent might, with the consent of the patron and the ordinary, open new mines, but this power was taken away by the Restraining Acts, referred to in note (*c*), p. 519, *ante* (*Holden* v. *Weekes* (1860), 1 John. & H. 278); see title ECCLESIASTICAL LAW, Vol. XI., pp. 767, 768.

(*h*) *Knight* v. *Mosely* (1753), Amb. 176. It is uncertain whether the stone may be sold and the proceeds applied in purchasing other stone more convenient for the purpose; see *Marlborough (Duke)* v. *St. John*, *supra*.

(*i*) *Knight* v. *Mosely*, *supra*; *Holden* v. *Weekes*, *supra*.

(*j*) *Sowerby* v. *Fryer* (1869), L. R. 8 Eq. 417; see, *contrà*, *Knight* v. *Mosely*, *supra*; *Holden* v. *Weekes*, *supra*.

(*k*) *Holden* v. *Weekes*, *supra*.

(*l*) *Ecclesiastical Commissioners* v. *Wodehouse*, *supra*.

(*m*) See title ECCLESIASTICAL LAW, Vol. XI., pp. 505 *et seq.*

(*n*) *Ross* v. *Adcock* (1868), L. R. 3 C. P. 655. As to deprivation, see title ECCLESIASTICAL LAW, Vol. XI., pp. 535—539.

(*o*) *Ross* v. *Adcock*, *supra*.

(*p*) *Wilkinson* v. *Proud* (1843), 12 L. J. (EX.) 227; *Sutherland (Duke)* v. *Heathcote*, [1892] 1 Ch. 475, 483, C. A.

(*q*) See title EASEMENTS AND PROFITS À PRENDRE, Vol. XI., pp. 238, 336, 342.

(*r*) See titles COMMONS AND RIGHTS OF COMMON, Vol. IV., p. 471; EASEMENTS AND PROFITS À PRENDRE, Vol. XI., pp. 341—346.

(*s*) See title CUSTOM AND USAGES, Vol. X., pp. 238, 239; *Goodman* v. *Saltash Corporation* (1882), 7 App. Cas. 633, 648; *Gateward's Case* (1607), 6 Co. Rep. 59 b; *A.-G.* v. *Mathias* (1858), 4 K. & J. 579. As to the support given to such a custom by acts of ownership, see p. 510, *ante*. As to customs in particular localities, see pp. 635 *et seq.*, *post*.

(*t*) See titles COMMONS AND RIGHTS OF COMMON, Vol. IV., pp. 446, 471; CUSTOM AND USAGES, Vol. X., p. 239; *Rogers* v. *Brenton* (1847), 17 L. J. (Q. B.) 34, 44; *Portland (Duke)* v. *Hill* (1866), L. R. 2 Eq. 765; and the text, *infra*.

(*a*) *Rogers* v. *Brenton*, *supra*.

(*b*) See title COMMONS AND RIGHTS OF COMMON, Vol. IV., pp. 464, 465.

sand, and gravel out of the waste (*c*). In such case a tenant may, in an action to establish the right, sue on behalf of himself and all other tenants, and any infringement may be restrained by injunction (*d*). Where the inhabitants have for a long period exercised the right in addition to the freehold tenants the court will, in order to establish a legal origin for the right, presume that the inhabitants claim through the freehold tenants (*e*). A person taking any part of the soil in professed exercise of such a right may only take what he has dug himself: he cannot take what has been dug by another, even though that person has not a similar right (*f*).

SECT. 3. Rights in the Nature of Profits à Prendre.

It is doubtful whether general evidence of reputation can be given in support of such a right (*g*). If the right claimed is a right to get minerals out of a particular part of a waste, evidence must be given to show that the right extends to that part (*h*).

Evidence.

A claim by prescription of a right to carry away the soil from the land of another without stint or limit is bad (*i*).

Limit of prescriptive claim.

SECT. 4.—*Customary Rights.*

1324. Apart from Cornwall, Derbyshire, and certain other mining districts (*k*), customary rights of working are mainly of importance in connection with manorial lands. If either lord or tenant is entitled to work mines or quarries in copyhold lands or in customary freehold lands strictly so called (*l*), it is by virtue of a special custom (*m*). The tenant may only work mines or quarries in the waste if so entitled by custom (*n*); and the right of the lord of a manor to work mines or quarries in the waste may be varied by custom from that which he would enjoy under the general law (*o*). If either lord (*p*) or tenant (*q*) exceeds his rights he may be restrained by injunction.

Customary rights affecting copyholds.

The customary right of a tenant to dig mines in his copyhold may be enjoyed without stint (*r*), but a custom to dig without stint in the waste would be bad (*s*).

1325. Customary rights in respect of minerals are proved in the same manner as other customary rights (*t*). Evidence of a custom

Proof.

(*c*) *Warrick* v. *Queen's College, Oxford* (1871), 6 Ch App. 716; *Betts* v. *Thompson* (1871), 6 Ch. App. 632, 739; *Heath* v. *Deane*, [1905] 2 Ch. 86.
(*d*) *Warrick* v. *Queen's College, Oxford, supra.*
(*e*) *Ibid.*
(*f*) *Stile* v. *Butts* (1595), Cro. Eliz. 434.
(*g*) *Morewood* v. *Wood* (1791), 14 East, 327, n.
(*h*) *Maxwell* v. *Martin* (1830), 8 L. J. (O. S.) (C. P.) 174; see title COMMONS AND RIGHTS OF COMMON, Vol IV., pp. 472, 473.
(*i*) *Clayton* v. *Corby* (1843), 14 L. J. (Q. B.) 364; *A.-G.* v. *Mathias* (1858), 4 K. & J. 579.
(*k*) As to these districts, see pp. 635 *et seq.*, *post.*
(*l*) *E.g.*, *Portland (Duke)* v. *Hill* (1866), L. R. 2 Eq. 765.
(*m*) See title COPYHOLDS, Vol. VIII., p. 23.
(*n*) See title COMMONS AND RIGHTS OF COMMON, Vol. IV., p. 471.
(*o*) See *ibid.*, p. 503, and *Hall* v. *Byron* (1877), 4 Ch. D. 667.
(*p*) *Place* v. *Jackson* (1824), 4 Dow. & Ry. (K. B.) 318.
(*q*) *Ely (Dean and Chapter)* v. *Warren* (1741), 2 Atk. 189.
(*r*) *Salisbury (Marquis)* v. *Gladstone* (1861), 9 H. L. Cas. 692.
(*s*) *Wilson* v. *Willes* (1806), 7 East, 121.
(*t*) See titles COPYHOLDS, Vol. VIII., pp. 9, 10; CUSTOM AND USAGES, Vol. X., pp. 236—238.

SECT. 4. **Customary Rights.**

in one manor cannot be given to establish the existence of a similar custom in another manor (*a*), except possibly in the case of manors whose physical characteristics are similar, such as manors situate in the fen country or in mining districts (*b*). Evidence of a custom to commit one sort of waste, such as cutting trees, is not evidence of a custom to commit another sort of waste, such as digging mines (*c*); although a custom to dig one sort of mineral may be evidence of a right to dig another (*d*).

SECT. 5.—*Right to Work to obtain Materials for Roads etc.*

Highway authorities.

1326. Public authorities responsible for repairing highways have the right to dig and gather materials for that purpose out of and from commons, and also in some cases from enclosed lands which are not of a strictly private nature (*e*).

Railway companies.

1327. A railway company may at any time before the expiration of the period limited for the construction of the railway, on giving three weeks' notice to the owners and occupiers, or, in case of accident requiring immediate repair, without notice, enter upon any lands within the prescribed limits, or, if no limits be prescribed, within two hundred yards distant from the centre of the railway, not being a garden or plantation attached to a house or a park, avenue, or ground ornamentally planted, and not being nearer than the prescribed distance or five hundred yards from the mansion of the owner, and dig and take thereout any clay, stone, sand, or gravel useful or proper for constructing the railway or roads from or by the side of the railway (*f*). No stone nor slate quarry, brickfield, or other like place, which, at the time of the passing of the special Act, is used for the getting of materials for sale, may be taken under the last-mentioned power (*g*). The owner may compel the company to purchase any lands entered upon (*h*). If the company is not required to purchase, it must make full compensation for both temporary and permanent damage, and also pay half-yearly occupation rent, to be fixed by two justices in case the parties differ (*i*).

A railway company is also entitled to dig and carry away such

(*a*) *Anglesey* (*Marquis*) v. *Hatherton* (*Lord*) (1842), 10 M. & W. 218.
(*b*) *Ely* (*Dean and Chapter*) v. *Warren* (1741), 2 Atk. 189.
(*c*) *Winchester* (*Bishop*) v. *Knight* (1718), 1 P. Wms. 406; *Parrott* v. *Palmer* (1834), 3 My. & K. 632.
(*d*) *Ibid.*
(*e*) As to main roads, see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI. pp. 110, 112. As to the powers of county councils, see *ibid.*, pp. 27, 79, note (*b*), 112. As to other roads, see *ibid.*, pp. 109, 110. As to the bodies in which the powers conferred upon the surveyor of highways is now vested, see *ibid.*, pp. 24, 25, note (*b*). As to commons, see title COMMONS AND RIGHTS OF COMMON, Vol. IV., pp. 595, 604.
(*f*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), ss. 32—44; see *Glasgow* (*Lord Provost and Magistrates*) v. *Farie* (1888), 13 App. Cas. 657, 694; *Loosemore* v. *Tiverton and North Devon Rail. Co.* (1862), 22 Ch. D. 25 *per* FRY, L.J., at pp. 42, 53; affirmed (1884), 9 App. Cas. 480. See, generally, title RAILWAYS AND CANALS.
(*g*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict c. 20), s. 32.
(*h*) *Ibid.*, s. 42.
(*i*) *Ibid.*, s. 43.

part of the minerals under any land purchased by it as may be necessary in the construction of the works (*k*).

SECT. 5. Right to Work to obtain Materials for Roads etc.

1328. Under the Waterworks Clauses Act, 1847 (*l*), the undertakers may, for the purpose of constructing the waterworks, enter upon the lands and other places described in the books of reference (*m*) and dig and break up the soil, and remove or use all stone, mines, minerals, or other things dug or gotten thereout (*m*).

Water companies.

Part IV.—Powers Incidental to Ownership.

SECT. 1.—*Powers of Absolute Disposition.*

SUB-SECT. 1.—*Absolute Owners.*

1329. A tenant in fee may, of course, dispose of his property as he pleases. It is only necessary to consider what powers of disposition are exercisable when the owner is under disability.

Absolute owners.

1330. Certain powers of disposition of the mineral properties of a lunatic are exercisable, with the sanction of the Court of Lunacy, by the lunatic's committee or *quasi*-committee (*n*), and in the case of an infant owner the trustees of the settlement under which the infant claims have powers of dealing with the infant's mineral properties (*o*).

Lunatics and infants.

SUB-SECT. 2.—*Limited Owners.*

1331. Under the Settled Estates Act, 1877 (*p*), the court may, on the application of any person entitled to the possession or to the receipt of the rents and profits of any settled estates for a term of years determinable on his death or for an estate for life or any greater estate (*q*), authorise the sale of any settled lands (*r*), and such sale may be made of the surface excepting the mines (*s*), or of the mines excepting the surface (*t*), and in the latter case with the grant of easements over the surface (*u*).

Settled Estates Acts.

The moneys arising from the sale must be held and applied upon and for the like trusts and purposes, and with and subject to the like provisions, as were applicable to the property sold, and may, if the

(*k*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 77; see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 50.

(*l*) 10 & 11 Vict. c. 17.

(*m*) Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 12; and see title WATER SUPPLY.

(*n*) See title LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., pp. 443 *et seq.*

(*o*) See title INFANTS AND CHILDREN, Vol. XVII., pp. 78, 94 *et seq.*

(*p*) 40 & 41 Vict. c. 18.

(*q*) *Ibid.*, s. 23.

(*r*) *Ibid.*, s. 16.

(*s*) *Ibid.*, s. 19.

(*t*) *Re Mallin's Settled Estates* (1861), 3 Giff. 126; *Re Gray's Settled Estates*, [1875] W. N. 106. These cases were decisions on the construction of the repealed Settled Estates Act of 1856 (19 & 20 Vict. c. 120), s. 11, but the words of that provision are similar to those of the Settled Estates Act, 1877 (40 & 41 Vict. c. 18), s. 16.

(*u*) *Re Milward's Estate* (1868), L. R. 6 Eq. 248.

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court thinks fit, be paid to any trustees of whom it may approve or into court (*v*).

The powers may be exercised from time to time, even although the settlement itself contains powers of sale, but not if the settlement excludes the court from exercising them (*a*).

Lands Clauses Acts.

1332. Limited owners may also sell and convey mines and minerals under the provisions of the Lands Clauses Consolidation Acts (*b*).

Settled Land Acts.

1333. Under the Settled Land Acts, 1882 to 1890 (*c*), a tenant for life may sell, exchange, or concur in partitioning the settled land (*d*). On such dealing the mines and minerals may be dealt with apart from the surface, or the surface apart from the mines and minerals (*e*); any restriction or reservation with respect to mines or minerals, or with a view to the more beneficial working thereof, may be imposed, reserved, and made binding on the tenant for life, and the settled land, or any part thereof, or any land sold or given in exchange or in partition (*f*), and, on an exchange or partition, any easement, right, or privilege of any kind, may be reserved or granted (*g*).

Reservation of mines on enfranchisement.

Where the settlement comprises a manor the tenant for life may, so as to effect an enfranchisement, sell the seignory of any freehold land or the freehold and inheritance of any copyhold land within the manor with or without the exception of any mines or minerals or any rights or powers relative to mining purposes (*h*).

Investment of capital moneys in purchase of mines.

The proceeds of sale are payable to the trustees of the settlement, appointed for the purposes of the Settled Land Acts (*i*), or into court, and are applicable, amongst other purposes, for the purchase of mines and minerals convenient to be held or worked with the settled land, or of any easement, right, or privilege convenient to be held with the settled land for mining purposes (*k*),

(*v*) Settled Estates Act, 1877 (40 & 41 Vict. c. 18), s. 34; see also Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 32.

(*a*) Settled Estates Act, 1877 (40 & 41 Vict. c. 18), s. 38; and see, generally, title SETTLEMENTS.

(*b*) See title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 50, 57. The limited owner is not entitled to any part of the capital of the purchase-money, although he might possibly have worked out the whole of the minerals during his life; see *Re Robinson's Settlement Trusts*, [1891] 3 Ch. 129. As to apportionment where the minerals are leased, see *Re Fullerton's Will*, [1906] 2 Ch. 138.

(*c*) Settled Land Act, 1882 (45 & 46 Vict. c. 38); Settled Land Act, 1884 (47 & 48 Vict. c. 18); Settled Land Acts (Amendment) Act, 1887 (50 & 51 Vict. c. 30); Settled Land Act, 1889 (52 & 53 Vict. c. 36); and Settled Land Act, 1890 (53 & 54 Vict. c. 69). For definition of "tenant for life," see Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 2 (5); and for the persons having the power of a tenant for life, see *ibid.*, s. 58, and title SETTLEMENTS.

(*d*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 3.

(*e*) *Ibid.*, s. 17.

(*f*) *Ibid.*, s. 4.

(*g*) Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 5. As to partition generally, see title PARTITION.

(*h*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 3. For definitions of "mines" and "minerals" and "mining purposes," see *ibid.*, s. 2 (10) (iv.). As to such enfranchisement, see title COPYHOLDS, Vol. VIII., p 130.

(*i*) See note (*c*), *supra*.

(*k*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 21.

and also for the execution, reconstruction, and improvement of certain works connected with the development and working of mines and minerals (*l*).

SUB-SECT. 3.—*Fiduciary Owners.*

Trustees.

1334. Trustees have no power of disposition, except such as is conferred on them by the trust instrument (*m*). A power to sell land does not authorise a sale of the land with an exception of the minerals (*n*). Where, however, a trustee is for the time authorised to dispose of land by way of sale, exchange, partition, or enfranchisement, the court may sanction his so disposing of the land with an exception or reservation of any minerals, and with or without rights or powers of or incidental to the working, getting, or carrying away of the minerals, or his so disposing of the minerals with or without the said rights or powers separately from the residue of the land (*o*). Once the sanction of the court is obtained the land or minerals may be so disposed of from time to time without any further application, unless the trust instrument otherwise provides (*p*).

SUB-SECT. 4.—*Mortgagees.*

Mortgagees.

1335. A mortgagee selling mortgaged land under a power of sale is not, in the absence of express provision, entitled to sever the minerals and the surface (*q*). The court has, however, power to sanction sales by mortgagees of the minerals apart from the surface, and of the surface with an exception of the minerals, similar to that already stated (*r*) with regard to trustees (*a*).

SUB-SECT. 5.—*Co-owners.*

Co-owners.

1336. In the case of persons who are mere co-owners of a

(*l*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 25 (xvi.), (xviii.), (xix.), (xx.); see title LAND IMPROVEMENT, Vol. XVIII., pp. 284, note (*f*), 286, 288.

(*m*) See title TRUSTS AND TRUSTEES. As to their power to work mines or quarries, see p. 517, *ante*.

(*n*) *Buckley* v. *Howell* (1861), 29 Beav. 546; *Cholmeley* v. *Paxton* (1825), 3 Bing. 207; see *Re Gladstone, Gladstone* v. *Gladstone*, [1900] 2 Ch. 101, 105, C. A.

(*o*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 44 (1). The application is made by petition (R. S. C., Ord. 54B, r. 2), and may be made by the trustees (*ibid*, r. 3). If the power is a power to sell with the consent of the tenant for life, the remainderman need not be served with the petition; see *Re Pryse's Estates* (1870), L. R. 10 Eq. 531; *Re Nagle's Trusts* (1877), 6 Ch. D. 104. In any other case the remainderman should be served; see *Re Brown's Trust Estate* (1862), 32 L. J. (CH.) 275; *Re Palmer's Will* (1872), L. R. 13 Eq. 408; *Re Hardstaff*, [1899] W. N. 256. Service on a remainderman out of the jurisdiction may be dispensed with (*Re Skinner*, [1896] W. N. 68).

(*p*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 44 (2). The court can give its sanction without reference to any particular sale (*Re Willway's Trust* (1863), 32 L. J. (CH.) 226; *Re Wynn's Devised Estates* (1874), L. R. 16 Eq. 237).

(*q*) *Dayrell* v. *Hoare* (1840), 12 Ad. & El. 356; and see, generally, title MORTGAGE.

(*r*) See the text, *supra*.

(*a*) Trustee Act, 1893, Amendment Act, 1894 (57 & 58 Vict. c. 10), s. 3; *Re Beaumont's Mortgage Trusts* (1871), L. R. 12 Eq. 86. The petition must be served on the mortgagor, but not on puisne mortgagees; see *Re Wilkinson's Mortgaged Estates* (1872), L. R. 13 Eq. 634; *Re Hirst's Mortgage* (1890), 45 Ch D. 263

SECT. 1. Powers of Absolute Disposition.

mine (*b*), any one of the co-owners (*c*) may call for a partition of the property (*d*), but not for a sale of the entirety (*e*), except in so far as he may be entitled to call for a sale in the course of proceedings under the Partition Acts, 1868 and 1876 (*f*).

Co-owners and partners in working.

1337. In the case of persons who are co-owners of the mine and partners in the working (*g*), a sale by one owner of his share, without the consent of the others (*h*), would probably be a ground of dissolution of the partnership in working (*i*). Upon a dissolution of the partnership any owner is entitled to call for a partition of the mine, but not for a sale (*k*).

Partners.

1338. In the case of a mine owned and worked by partners (*l*), a partner may assign his share in the partnership, but cannot assign any specific share in the property. Upon dissolution of the partnership any one partner can insist upon a sale (*m*), unless it has been one of the terms of the partnership that the property shall not be sold upon a dissolution (*n*). No partner or partners can, in the absence of special provisions to that effect, insist on taking over the share of the other or others of them at a valuation (*o*).

SUB-SECT. 6.—*The Crown.*

Crown.

1339. The Commissioners of Woods, Forests, and Land Revenues have certain powers of sale or exchange over any mines or minerals the property of the Crown (*p*).

(*b*) See p. 511, *ante*.

(*c*) He may assign his share without reference to the other co-owners (*Bentley* v. *Bates* (1840), 4 Y. & C. (EX.) 182), see p. 512, *ante*.

(*d*) *Crawshay* v. *Maule* (1818), 1 Swan. 495, 518; and see, generally, title PARTITION.

(*e*) *Steward* v. *Blakeway* (1869), 4 Ch. App. 603.

(*f*) 31 & 32 Vict. c. 40; 39 & 40 Vict. c. 17.

(*g*) See p. 512, *ante*.

(*h*) He may assign his share without reference to the other co-owners (*Bentley* v. *Bates*, *supra*); see p. 512, *ante*.

(*i*) See title PARTNERSHIP.

(*k*) *Steward* v. *Blakeway*, *supra*.

(*l*) See p. 512, *ante*, and title PARTNERSHIP.

(*m*) *Crawshay* v. *Maule*, *supra*; *Lees* v. *Jones* (1857), 3 Jur. (N. S.) 354; *Wild* v. *Milne* (1859), 26 Beav. 504; see *Perens* v. *Johnson*, *Johnson* v. *Perens* (1857), 3 Sm. & G. 419. In special circumstances, as when there is a heavy loss, a sale may be ordered even before dissolution (*Heath* v. *Fisher* (1868), 38 L. J. (CH.) 14), or on an interlocutory application, but is usually ordered after the accounts have been taken (see *Crawshay* v. *Maule*, *supra*). The sale, as a rule, is made by auction, and may be directed to be conducted by an uninterested person and the parties given leave to bid (*Rowlands* v. *Evans*, *Williams* v. *Rowlands* (1861), 30 Beav. 302). If necessary an inquiry will be directed as to the proper mode of sale, and a sale at a valuation to one of the partners may be sanctioned (*Crawshay* v. *Maule*, *supra*). A sale by private contract may be necessary, as where the property is leasehold and the lease contains a covenant against assignment without consent; see *Lees* v. *Jones*, *supra*. If property is valuable but unsaleable, it may be retained unsold, in which case the partners become co-owners merely; see *Lees* v. *Jones*, *supra*; title PARTNERSHIP.

Tatam v. *Williams* (1844), 3 Hare, 347.

(*o*) *Hart* v. *Clarke* (1854), 6 De G. M. & G. 232, C. A.

(*p*) See title CONSTITUTIONAL LAW, Vol. VII., p. 203.

Mines and minerals which form part of the private estates of the Crown may, subject to certain formalities, be disposed of by sale, gift, or by will or other testamentary disposition, as freely in all respects as by an ordinary subject (*q*).

SUB-SECT. 7.—*The Duchy of Cornwall.*

Duchy of Cornwall.

1340. The Duke of Cornwall may, either by way of absolute sale or for a limited period or for enfranchisement, sell any mines, minerals, or rights of entry or other rights in respect of mines and minerals forming part of the possessions of the Duchy (*r*). The sale may be made subject to any reservations or exceptions. He may also, under the provisions of the Inclosure Acts (*s*), exchange any mines or minerals (*t*).

SUB-SECT. 8.—*Ecclesiastical Corporations.*

Ecclesiastical corporations.

1341. With certain exceptions (*a*), all ecclesiastical corporations, both aggregate and sole, may, with the consent of the Ecclesiastical Commissioners (*b*), sell, exchange, partition, or otherwise dispose of any mines or minerals the property of such corporation (*c*).

(*q*) See title CONSTITUTIONAL LAW, Vol. VII., pp. 274, 275.

(*r*) *Ibid.*, pp. 242—247.

(*s*) For those Acts, see title COMMONS AND RIGHTS OF COMMON, Vol. IV., pp. 535 *et seq.*

(*t*) See title CONSTITUTIONAL LAW, Vol. VII., p. 256.

(*a*) For the exceptions, see Ecclesiastical Leasing Act, 1842 (5 & 6 Vict. c. 108), s. 1, incorporated by reference in Ecclesiastical Leasing Act, 1858 (21 & 22 Vict. c. 57), s. 1; and see title ECCLESIASTICAL LAW, Vol. XI., p. 762, note (*m*).

(*b*) See title ECCLESIASTICAL LAW, Vol. XI., pp. 794 *et seq.*

(*c*) Ecclesiastical Leasing Act, 1858 (21 & 22 Vict. c. 57), s. 1. No sale, exchange, nor partition can be made under this Act if the lands can be sold, exchanged, or partitioned under the provisions of the Episcopal and Capitular Estates Act, 1851 (14 & 15 Vict. c. 104); see, further, title ECCLESIASTICAL LAW, Vol. XI., p. 764. Sales of mines and minerals may also be made under the Acts giving power to ecclesiastical corporations to sell lands for certain purposes. Thus, under the Episcopal and Capitular Estates Act, 1851 (14 & 15 Vict. c. 104), ecclesiastical corporations, aggregate or sole, may, with the consent of the Church Estates Commissioners (see title ECCLESIASTICAL LAW, Vol. XI., p. 795), sell the reversion on any lease or copyhold grant to the tenant, and by the Episcopal and Capitular Estates Act, 1854 (17 & 18 Vict. c. 116), sale may be made of the reversion on any part of the land comprised in a lease or grant. The power was originally exercisable only by bishops, deans, and other dignitaries, but was by the Ecclesiastical Leases Act, 1861 (24 & 25 Vict. c. 105), s. 3, extended to rectors, vicars, and perpetual curates. As to episcopal estates, see Ecclesiastical Commissioners Act, 1860 (23 & 24 Vict. c. 124); and as to estates of deans and chapters, see Ecclesiastical Commission Act, 1868 (31 & 32 Vict. c. 114), s. 11. As to sales of land by authority of the Ecclesiastical Commissioners, see Ecclesiastical Commissioners Acts, 1840 (3 & 4 Vict. c. 113), s. 68, and 1841 (4 & 5 Vict. c. 39), s. 21. In sales under the Glebe Lands Act, 1888 (51 & 52 Vict. c. 20), sale cannot be made of mines and minerals which are or may become of considerable value (see *ibid.*, s. 5 (2); see, further, title ECCLESIASTICAL LAW, Vol. XI., pp. 763, 766). No mines or minerals or seams or veins of coal, metals, or other profits of the like nature belonging to any hereditaments sold by any bishop or other ecclesiastical corporation for the redemption of land tax (see title LAND TAX, Vol. XVIII., p. 328), whether opened or unopened (see p. 505, *ante*), or any right, title, or claim to open or work the same, pass either by

SECT. 1. SUB-SECT. 9.—*Highway Authorities.*

Powers of Absolute Disposition.

Highway authorities.

1342. Lands, vested in a parish or authority acting as surveyor of highways for the purpose of obtaining materials for the repair of roads, may, when the materials are exhausted, be sold subject to certain restrictions (*d*).

SECT. 2.—*Powers to grant Leases and Licences.*

SUB-SECT. 1.—*Absolute Owners under Disability.*

Infants.

1343. The court may, if it appears that a lease of an infant's land (*e*) for mining would be for his benefit, authorise the grant of such lease (*f*).

Leases of mines belonging to an infant may also be made under the Settled Estates Act, 1877 (*g*), and under the Settled Land Acts, 1882 to 1890 (*h*).

Lunatics.

1344. The committee of a lunatic may, with the authority or by the direction of the judge, grant leases of minerals to which the lunatic is entitled either for an estate in fee simple or fee tail, whether already worked or not, and either with or without the surface or other land. The committee may also accept a surrender and grant a new lease (*i*). The lease may be for such number of lives or term of years, at such rents and royalties and subject to such reservations, covenants, and conditions, as the judge approves (*k*). Money received under any lease of unopened mines is, subject to the application thereof for any of the purposes authorised by the Lunacy Act, 1890 (*l*), as between the representatives of the real and personal estate of the lunatic, to be considered as real estate (*m*). In the case of a person of unsound mind not so found by inquisition

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express or general words in a conveyance of such hereditaments (Land Tax Redemption Act, 1802 (42 Geo. 3, c. 116), s. 80); see, further, title LAND TAX, Vol. XVIII., p. 328, note (*g*).

(*d*) See title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVII., pp. 107, 108.

(*e*) "Land" includes manor, messuage, tenement, hereditament, and real property of whatsoever tenure (Infants Property Act, 1830, s. 2).

(*f*) Infants Property Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 65), s. 17, see, further, title INFANTS AND CHILDREN, Vol. XVII., p. 101. Approval by the judge was substituted for approval by the master by the Court of Chancery Act, 1852 (15 & 16 Vict. c. 80), s. 36. An infant entitled in remainder or reversion (*Re Spenser's Estates* (1867), 37 L. J. (CH.) 18) is within the Act, but the other persons interested must be before the court. The application is made in the Chancery Division by petition, except in cases where the infant is a ward of court, or his maintenance or the administration of his estate is under the order of the court (R. S. C., Ord. 55, r. 2 (9)).

(*g*) 40 & 41 Vict. c. 18; see, further, titles INFANTS AND CHILDREN, Vol. XVII., pp. 100, 132; LANDLORD AND TENANT, Vol. XVIII., pp. 351, 355, note (*o*), 359, 365.

(*h*) As to these Acts, see note (c), p. 524, *ante*; see, further, titles INFANTS AND CHILDREN, Vol. XVII., pp. 94, 100, 132; LANDLORD AND TENANT, Vol. XVIII., pp. 350, 358.

(*i*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), ss. 120, 122; and see title LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., pp. 446 *et seq.*

(*k*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 122.

(*l*) 53 & 54 Vict. c. 5.

(*m*) *Ibid.*, s. 123.

these powers may be exercised by such person in such manner as the judge may direct (*n*).

SECT. 2. Powers to grant Leases and Licences.

SUB-SECT. 2.—*Limited Owners.*

Limited owners.

1345. Under his common law power a limited owner may make a demise for a term not exceeding the duration of his own estate and confer upon the lessee powers not exceeding those which he might himself exercise (*o*). A tenant for life impeachable for waste may consequently make a lease of an open mine, and a tenant for life dispunishable for waste may make a lease of a new mine. A lease for any greater term or interest can only be made in exercise of a power given either by the instrument under which the estate arises or by statute.

Power to lease at common law.

Express power of leasing.

1346. A general power to lease will not authorise a lease of wayleave or other liberties (*p*). A provision requiring the best rent to be reserved will be satisfied by the reservation of a rent in kind (*q*), or of a rent varying with the selling price of the mineral where that is the custom of the district (*r*). Probably a power to lease, which does not specify any term for the duration of the lease, authorises a grant of a lease for any reasonable term (*s*). A power to lease with all necessary and usual liberties authorises the grant of liberty to erect cottages (*t*), and powers to lease for building purposes and to lease mines with or without the surface authorise the grant of a lease for building purposes with a reservation of mines and minerals (*a*).

Under which of several powers lease takes effect.

1347. Where a lease is made in exercise of all powers enabling the grantor, the power which is first in point of time is generally that by virtue of which the lease takes effect, but in some cases it may be proper to consider the exercise of which power is most advantageous to the limited owner (*b*).

Unauthorised leases.

1348. If a limited owner contracts to grant a lease in excess of his power he is liable to be ordered specifically to perform his contract and to pay damages for the part he is unable to perform (*c*). If a lease in excess of the powers of the lessor is actually granted, the lessee will not be restrained from working at the instance of the lessor (*d*).

(*n*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 116; and see title LUNATICS AND PERSONS OF UNSOUND MIND, Vol XIX., p. 446.

(*o*) See as to these powers, pp. 514, 523, *ante*. As to powers generally, see title POWERS. As to relief against defective execution of powers of leasing, see title LANDLORD AND TENANT, Vol. XVIII, pp. 363, 364.

(*p*) *Ricketts* v. *Bell* (1847), 1 De G. & Sm. 335. As to the nature of the mines, the lease of which such a power will authorise, see title LANDLORD AND TENANT, Vol. XVIII., p. 362; *Campbell* v. *Leach* (1775), Amb. 740.

(*q*) *Campbell* v. *Leach*, *supra*; see, further, title LANDLORD AND TENANT, Vol. XVIII., p. 363.

(*r*) *Lonsdale* (*Earl*) v. *Lowther*, [1900] 2 Ch. 687.

(*s*) *Vivian* v. *Jegon* (1868), L. R. 3 H. L. 285; see title LANDLORD AND TENANT, Vol. XVIII., p. 363.

(*t*) *Morris* v. *Rhydydefel Colliery Co.* (1858), 4 H. & N. 473, 885, Ex. Ch.

(*a*) *Re Rutland's* (*Duke*) *Settled Estates*, *Rutland* (*Duke*) v. *Bristol* (*Marquis*), [1900] 2 Ch. 206.

(*b*) *Lonsdale* (*Earl*) v. *Lowther*, *supra*; see title POWERS.

(*c*) *Cleaton* v. *Gower* (1674), Cas. *temp.* Finch, 164.

(*d*) *Wentworth* v. *Turner* (1795), 3 Ves. 3. As to the estoppel existing

SECT. 2. **Powers to grant Leases and Licences.**

Power is a usual power.

1349. A power for a tenant for life to grant mining leases appears to be a power which may be inserted in a settlement of real estate in pursuance of an agreement that the settlement shall contain usual powers (*e*). A power to lease given to a limited owner may be exercised by the donee after he has parted with his estate if he does not thereby derogate from his own grant (*f*). Money paid as the consideration for accepting a surrender of a lease granted under an express power may be retained by the tenant for life (*g*).

Incidents of power.

Leases under Settled Estates Act, 1877.

1350. A tenant for life may, under the Settled Estates Act, 1877 (*h*), grant a lease of open mines or quarries for a term of twenty-one years (*i*). Any person entitled to the possession or to the receipt of the rents and profits of settled estates for a term determinable on death or for an estate for life or any greater estate (*k*) may apply to the court to authorise the leasing of mines (*l*). The court may exercise its jurisdiction either by approving a particular lease or by giving general leasing powers to trustees (*m*). The lease may be of either new or open mines (*n*), and may grant wayleaves, waterleaves, and other easements (*n*) connected or not with a demise of any mines (*o*), and may comprise so much of the surface as is necessary for the purpose of working the mines (*p*). The term of the lease will ordinarily not exceed forty years, but may be a longer period if the court is satisfied that it is usual in the district and beneficial (*q*).

Rent.

The rent must be the best rent that can be obtained without taking a fine, but need not be uniform, and a peppercorn rent may be reserved during the first five years of the term (*r*). If the limited owner is not entitled to work the mines leased, three-fourths of the rents, and if he is entitled to work, one-fourth, must be capitalised (*s*).

Form of lease.

Every lease must be by deed and contain a power to re-enter on

between landlord and tenant generally, see titles ESTOPPEL, Vol. XIII, pp. 402 *et seq.*; LANDLORD AND TENANT, Vol. XVIII., p. 336.

(*e*) *Hill* v. *Hill* (1834), 6 Sim. 136, 145; see *Scott* v. *Steward* (1859), 27 Beav. 367.

(*f*) *Lonsdale* (*Earl*) v. *Lowther*, [1900] 2 Ch. 687.

(*g*) *Re Hunloke's Settled Estates*, *Fitzroy* v. *Hunloke*, [1902] 1 Ch. 941. Money paid on the surrender of a lease granted under the Settled Land Acts 1882 to 1890 (see note (*c*), p. 524, *ante*), is capital money (*Re Rodes*, *Sanders* v. *Hobson*, [1909] 1 Ch. 815).

(*h*) 40 & 41 Vict. c. 18. As to this Act generally, see title SETTLEMENTS.

(*i*) Settled Estates Act, 1877 (40 & 41 Vict. c. 18), s. 46.

(*k*) *Ibid.*, s. 23.

(*l*) *Ibid.*, s. 4.

(*m*) *Ibid.*, ss. 10—13.

(*n*) *Ibid.*, s. 4.

(*o*) *Re Wallace's* (*Lord*) *Settled Estates*, [1869] W. N. 66.

(*p*) *Re Reveley's Settled Estates* (1863), 11 W. R. 744.

(*q*) Settled Estates Act, 1877 (40 & 41 Vict. c. 18), s. 4.

(*r*) *Ibid.*

(*s*) Settled Estates Act, 1877 (40 & 41 Vict. c. 18), ss. 4, 34—36. Where mines were severed from the surface under a demise the accumulated rents devolved with the surface (*Re Scarth* (1879), 10 Ch. D. 499). The leases which involve capitalisation of the rents are those of "earth, stone, coal or mineral." Brine pumped from beneath the surface is not included under any of these heads (see *Re Dudley's Settled Estates* (1882), 26 Sol. Jo. 359).

non-payment of rent for a period of twenty-eight days or a less period (*t*), and such covenants and conditions as to the court may seem expedient (*u*). The lessee must execute a counterpart of the lease (*v*).

Leases under Settled Land Acts, 1882—1890.

1351. Under the Settled Land Acts (*w*) larger powers are conferred. A tenant for life or person having the powers of a tenant for life (*a*) may grant mining leases (*b*) of mines, opened or new, for a term not exceeding sixty years (*c*). The tenant for life must give notice of his intention to exercise his power to the trustees of the settlement not less than one month before the grant of the lease (*d*), but such notice may be notice of a general intention in that behalf, and any trustee may, in writing, waive the notice or accept a shorter notice (*e*). The lease must be by deed and take effect not more than twelve months after its date, and the lessee must execute a counterpart (*f*).

Rent.

The best rent must be reserved (*g*), but, in estimating the rent, regard must be had to any fine taken (*h*) and to the circumstances generally (*i*), and the lease may be granted partly in consideration of the lessee having executed or agreed to execute on the land an improvement (*j*) authorised for or in connection with mining purposes (*k*). The rent (*l*) may be ascertained or vary according to the acreage or quantity worked or the price of the minerals, and a minimum rent may be reserved subject to an average clause (*m*). The rent need not be uniform (*n*).

(*t*) Settled Estates Act, 1877 (40 & 41 Vict. c. 18), s. 4.

(*u*) *Ibid.*, s. 5.

(*v*) *Ibid*, s. 4.

(*w*) See note (*c*), p. 524, *ante*.

(*a*) For definition of "tenant for life," see Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 2 (5), and for persons having powers of tenant for life, see *ibid.*, s. 58, and, generally, title SETTLEMENTS.

(*b*) A mining lease is a lease for any mining purpose, and includes a licence. Mining purposes includes sinking, searching for, winning, working, getting, making merchantable, smelting, converting for the purposes of any manufacture, carrying away and disposing of mines and minerals under the settled land or any other land, and the erection of buildings and the execution of engineering and other works suitable for those purposes; see Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 2 (10) (iv.).

(*c*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 6.

(*d*) *Ibid.*, s. 45.

(*e*) Settled Land Act, 1884 (47 & 48 Vict. c. 18), s. 5.

(*f*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 7.

(*g*) *Ibid.*, s. 7.

(*h*) A fine is capital money (Settled Land Act, 1884 (47 & 48 Vict. c. 18), s. 4).

(*i*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 7.

(*j*) *Ibid.*, s. 25. As to the authorised improvements, see title LAND IMPROVEMENT, Vol. XVIII., pp. 283, 284.

(*k*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 9 (2).

(*l*) *Ibid.*, s. 2 (10) (ii.), defines rent as yearly or other rent, and toll duty, royalty, or other reservation, by the acre, or the ton, or otherwise.

(*m*) *Ibid.*, s. 9; Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 8. The last-mentioned section also provides that the price may be the saleable value or quotation in a trade, market, or other price list, or may be ascertained by arbitration or other method prescribed by the lease, or be an average of any such values over a specified period.

(*n*) *Re Aldam's Settled Estate*, [1902] 2 Ch. 46, C. A.

SECT. 2. **Powers to grant Leases and Licences.**

Form of lease

The lease must contain a covenant for payment of the rent and a power of re-entry on default in payment for a period not exceeding thirty days (*o*); and it may contain such covenants and stipulations as are usual in the district. It may authorise the lessee to let down the surface (*p*) and grant a right of wayleave for minerals got from lands other than the settled land (*q*).

Court may authorise special leases.

In cases where it is difficult to make leases for the term and on the statutory conditions, or where it is usual in the district to grant leases for longer terms or on other conditions, the court may either generally, or in a particular instance, authorise the tenant for life to grant leases for a longer term or on other conditions (*r*).

Rent to be set aside as capital moneys.

1352. Unless a contrary intention (*s*) is expressed in the settlement, a tenant for life who is impeachable for waste in respect of minerals (*t*) must set aside three-fourths of the rent as capital money under the Act (*a*), and a tenant for life who is not so impeachable (*b*) must set aside one-fourth (*c*).

Nature of leases which tenant for life may make.

1353. A tenant for life may make a lease for giving effect to a contract, binding the inheritance, and entered into by a predecessor in title, a lease for giving effect to a contract for renewal enforceable against him, and also, subject to certain limitations, a lease for confirming a previous void or voidable lease (*d*); and he may, in a lease of the surface, reserve the minerals (*e*).

(*o*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 7 (3).

(*p*) *Sutwell* v. *Londesborough* (*Earl*), [1905] 1 Ch. 460.

(*q*) *Re Aldam's Settled Estate*, [1902] 2 Ch. 46, C. A.

(*r*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 10. If the approval is general the order will not, except in special circumstances, require any particular lease or grant to be settled or approved by the judge. If the approval is given in a particular case the order may either approve of a grant or lease already prepared or direct that the lease or grant shall contain conditions specified in the order or to be approved at chambers (Settled Land Act Rules, 1882, r. 9).

(*s*) Where in the case of an infant tenant in tail the whole rents were disposed of by the settlement, a contrary intention was held to be expressed (*Re Newcastle's* (*Duke*) *Estates* (1883), 24 Ch. D. 129). For another instance of a contrary intention being expressed, see *Re Bagot's Settlement*, *Bagot* v. *Kittoe*, [1894] 1 Ch. 177.

(*t*) A person entitled until sale to the income of lands held upon trust for sale is in the position of tenant for life impeachable for waste (*Re Ridge*, *Hellard* v. *Moody* (1886), 31 Ch. D. 504, C. A.).

(*a*) Settled Land Act, 1882 (45 & 46 Vict. c. 48), s. 2 (9).

(*b*) It is not necessary that a tenant for life should be expressly made unimpeachable for waste to come within this provision (*Re Chaytor*, [1900] 2 Ch. 804).

(*c*) Settled Land Act, 1882 (45 & 46 Vict. c. 48), s. 11, which does not include a tenant for life who grants a lease in pursuance of a contract made by his predecessor in title who was absolutely entitled (*Re Kemeys-Tynte*, *Kemeys-Tynte* v. *Kemeys-Tynte*, [1892] 2 Ch. 211), nor a tenant for life who grants a lease under an express power (*Lonsdale* (*Earl*) v. *Lowther*, [1900] 2 Ch. 687).

(*d*) Settled Land Act, 1882 (45 & 46 Vict. c. 48), s. 12. A tenant for life may not in exercise of this power confer a gratuitous benefit upon the holder of a void lease (*Re Newell and Nevill's Contract*, [1900] 1 Ch. 90).

(*e*) *Re Gladstone*, *Gladstone* v. *Gladstone*, [1900] 2 Ch. 101, C. A.

SUB-SECT. 3.—*Fiduciary Owners.*

SECT. 2. Powers to grant Leases and Licences.

Trustees.

1354. Unless expressly authorised to grant mining leases, trustees have no power to grant such leases, and, apart from statute, the court cannot assist them (*f*). A trust for sale does not authorise trustees to grant mining leases (*g*); nor does a general power to lease authorise the grant of a lease of unopened mines (*h*), although it is not necessary that a power to authorise such grant should expressly refer to unopened mines (*i*). It is a question of construction in each case.

Trustees, if authorised to grant leases of separate properties held upon different trusts, may not grant one lease of both properties (*j*).

Trustees may be authorised by the court to grant mining leases under the jurisdiction conferred by the Settled Estates Act, 1877 (*k*).

SUB-SECT. 4.—*Ecclesiastical Corporations.*

Ecclesiastical corporations.

1355. Ecclesiastical corporations aggregate or sole (with certain exceptions (*l*)) may, with the approval of the Ecclesiastical Commissioners (*m*) testified by deed, make leases of any mines, minerals, or quarries of which they are the owners, together with suitable surface land and all such powers of working, getting, and carrying away the produce, and of working adjoining mines, as are expedient for such terms and considerations, whether by way of premium or otherwise, and subject to such stipulations, conditions, and agreements on the part of the lessee, and generally in such manner as the Commissioners (*m*) in each case think proper and advisable (*n*). Leases may also be made, on similar conditions, of liberties to take water, and also of wayleaves, waterleaves, canals, watercourses, tramroads, railways or other ways, paths or passages, either subterraneous or over the surface, or other easements or privileges in, upon, out of, or over any lands of the corporations (*o*).

(*f*) *Wood* v. *Patteson* (1847), 10 Beav. 541; and see title TRUSTS AND TRUSTEES.

(*g*) *Jervoise* v. *Clarke* (1821), Madd. & G. 96.

(*h*) *Clegg* v. *Rowland* (1866), L. R. 2 Eq. 160; *Re Baskerville, Baskerville* v. *Baskerville*, [1910] 2 Ch. 329.

(*i*) *Daly* v. *Beckett* (1857), 24 Beav. 114 (power to lease hereditaments and premises or any part thereof and minerals within or under the same together with or separately therefrom); *Re Barker, Wallis* v. *Barker* (1903), 88 L. T. 685 (power to lease any portion of estates subject to such provisions, conditions, and stipulations as the trustees should in their discretion think proper and beneficial). For a case of construction regarding the existence of a power and in whom it was vested, see *Leigh* v. *Balcarres* (*Earl*) (1848), 6 C. B. 847; and see, further, title LANDLORD AND TENANT, Vol. XVIII., p. 361.

(*j*) *Tolson* v. *Sheard* (1876), 5 Ch. D. 19, C. A.

(*k*) 40 & 41 Vict. c. 18, s. 23; *Ex parte Puxley* (1868), 2 I. R. Eq. 237. As to the terms upon which leases may thus be granted, see pp. 530—532, *ante*.

(*l*) For these exceptions, see title ECCLESIASTICAL LAW, Vol. XI., p. 762, note (*m*).

(*m*) See *ibid.*, pp. 794 *et seq.*

(*n*) Ecclesiastical Leasing Act, 1842 (5 & 6 Vict. c. 108), s. 6; Ecclesiastical Leasing Act, 1858 (21 & 22 Vict. c. 57), s. 1; see, further, title ECCLESIASTICAL LAW, Vol. XI., pp. 763, 764. Without the consent of the Commissioners a lease has no effect (*Ecclesiastical Commissioners* v. *Wodehouse*, [1895] 1 Ch. 552). In the case of an incumbent the consent of the patron of the living is also required, and in the case of copyhold lands the consent of the lord (Ecclesiastical Leasing Act, 1842 (5 & 6 Vict. c. 108), s. 20).

(*o*) Ecclesiastical Leasing Act, 1842 (5 & 6 Vict. c. 108), s. 4. As to the

SECT. 2. Powers to grant Leases and Licences.

SUB-SECT. 5.—*University and College Estates.*

Universities and colleges.

1356. The Universities of Oxford, Cambridge, and Durham, and every college therein, and the Colleges of Winchester and Eton (*p*), may exercise such powers (*q*) of making leases for mining purposes as are conferred upon a tenant for life by the Settled Land Acts, 1882 to 1890 (*r*), the Board of Agriculture and Fisheries being substituted for the trustees of the settlement and the court (*s*).

SUB-SECT. 6.—*Charities.*

Charities.

1357. The Charity Commissioners may authorise the trustees or administrators of a charity to grant mining leases of any part of the charity estates if they consider that such leases will be for the benefit of the charity (*t*).

SUB-SECT. 7.—*The Crown etc.*

Crown and Duchy of Cornwall.

1358. Leases of minerals in and under the Crown lands (except mines royal (*u*)) are granted by the Commissioners of Woods, Forests, and Land Revenues (*v*), and leases of mines belonging to the Duchy of Cornwall by the Duke (*a*).

Admiralty.

The Commissioners for executing the office of the Lord High Admiral, as the body in which the lands of Greenwich Hospital are vested (*b*), may make mining leases of such lands for terms not exceeding forty-two years, and such leases must take effect in possession, reserve the best rent without fine, and contain a condition for re-entry on non-payment of rent, but the rent may be reserved by toll, duty, royalty, or reservation by the acre, ton, or otherwise. The lessee must execute a counterpart (*c*).

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power of an archbishop or bishop to grant mining leases of the lands of the see with the approval of the Estates Committee of the Ecclesiastical Commissioners, see Ecclesiastical Commissioners Act, 1860 (23 & 24 Vict. c. 124), s. 8; and see p. 527, *ante*, and title ECCLESIASTICAL LAW, Vol. XI., p. 798.

(*p*) Universities and College Estates Act, 1858 (21 & 22 Vict. c. 44); Universities and College Estates Act, 1898 (61 & 62 Vict. c. 55), s. 7; see titles EDUCATION, Vol. XII., pp. 93, 94, 95, 98; LANDLORD AND TENANT, Vol. XVIII., p. 366.

(*q*) Universities and College Estates Act, 1898 (61 & 62 Vict. c. 55), s. 1.

(*r*) For a list of these Acts, see note (*c*), p. 524, *ante*. As to such powers, see p. 531, *ante*.

(*s*) Universities and College Estates Act, 1898 (61 & 62 Vict. c. 55), Sched. I., Part II.

(*t*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 21; see title CHARITIES, Vol. IV., p. 229.

(*u*) See p. 507, *ante*.

(*v*) For full details regarding these leases, see title CONSTITUTIONAL LAW, Vol. VII., p. 203.

(*a*) See *ibid.*, p. 251.

(*b*) Greenwich Hospital Act, 1865 (28 & 29 Vict. c. 89), s. 22; see title CONSTITUTIONAL LAW, Vol. VII., p. 90.

(*c*) Greenwich Hospital Act, 1865 (28 & 29 Vict. c. 89), s. 29.

Part V.—Rights Incidental to Ownership.

SECT. 1.—*Possession.*

SUB-SECT. 1.—*Right to Exclusive Possession.*

Recovery of possession.

1359. Proceedings may be instituted by the owner for recovery of possession if a trespasser is in possession of a mine. The action may be for recovery of possession of the surface and the mines beneath (*d*), or for the mines alone. Thus a coal mine or a salt pit (*e*), a mine under a tinbound, though not the tinbound (*f*), a stratum of coal (*g*), and liberties appurtenant to land with the land may be the subject of such proceedings (*h*); but such action cannot be brought in respect of a liberty to get minerals alone, for this is an incorporeal hereditament (*i*). If a tenant works a quarry when the right to the stone is reserved by the lease, the landlord may maintain trover (*k*).

SUB-SECT. 2.—*Loss of Right to Recover Possession by Lapse of Time.*

Effect of Statutes of Limitations.

Possession of surface.

1360. The Real Property Limitation Acts, 1833 and 1874 (*l*), apply to mines and unsevered minerals, and under these Acts (*l*) a title to the fee simple of mines may be acquired by possession of the surface, if the right to the surface and mines has not been severed (*m*). Inclosure is the best evidence of possession of the surface of land, but cultivation of the surface without inclosure has been held sufficient to prove possession (*n*).

Possession of mine, or vein or seam.

A title may also be acquired by entry and possession of a mine (*o*) or vein of coal (*p*). The title acquired will usually be limited

(*d*) *Crocker* v. *Fothergill* (1819), 2 B. & Ald. 652; *Harebottle* v. *Placock* (1604), Cro. Jac. 21. As to actions for recovery of possession, see titles LANDLORD AND TENANT, Vol. XVIII., pp. 558 *et seq.*; TRESPASS; see also titles ACTION, Vol. I., pp. 34, 36; EXECUTION, Vol. XIV., p. 76.

(*e*) *Comyn* v. *Kyneto* (1607), Cro. Jac. 150; *Andrews* v. *Whittingham* (1693), Carth. 277; S. C., *sub nom. Whittinyham* v. *Andrews*, 1 Salk. 255.

(*f*) *Doe* d. *Falmouth* (*Earl*) v. *Alderson* (1836), 1 M. & W. 210. As to tinbounds, see p. 637, *post*.

(*g*) *Dartmouth* (*Earl*) v. *Spittle* (1871), 19 W. R. 444, *per* KELLY, C.B., at p. 445.

(*h*) *Crocker* v. *Fothergill* (1819), 2 B. & Ald. 652, *per* HOLROYD, J., at p. 661.

(*i*) *Crocker* v. *Fothergill*, *supra*; *Doe* d. *Hanley* v. *Wood* (1819), 2 B. & Ald. 724, 738; *Low Moor Co.* v. *Stanley Coal Co.* (1876), 34 L. T. 186, 189, C. A. As to how far an action to recover possession lies in respect of open mines, see *Low Moor Co.* v. *Stanley Coal Co.*, *supra*; *Sayer* v. *Pierce* (1749), 1 Ves. Sen. 232, 233; *Wilkinson* v. *Proud* (1843), 11 M. & W. 33; Shep. Touch., ed. Preston, 96. As to incorporeal hereditaments, see titles EASEMENTS AND PROFITS À PRENDRE, Vol. XI., p. 238; REAL PROPERTY AND CHATTELS REAL.

(*k*) *Brown* v. *Chadwick* (1857), 7 I. C. L. R. 101, 108.

(*l*) 3 & 4 Will. 4, c. 27; 37 & 38 Vict. c. 57; see title LIMITATION OF ACTIONS, Vol. XIX., pp. 104 *et seq.*

(*m*) *Thew* v. *Wingate* (1862), 10 B. & S. 714; *Seddon* v. *Smith* (1877), 36 L. T. 168, C. A.

(*n*) *Seddon* v. *Smith*, *supra*.

(*o*) *Low Moor Co.* v. *Stanley Coal Co.*, *supra*; *Dartmouth* (*Earl*) v. *Spittle*, *supra*, *per* KELLY, C.B., at p. 445.

(*p*) *Low Moor Co.* v. *Stanley Coal Co.*, *supra*, at p. 189; *Ashton* v. *Stock* (1877), 6 Ch. D. 719, 726; *Glyn* v. *Howell*, [1909] 1 Ch. 666.

SECT. 1. Possession.

to the area actually occupied (*q*); but if the grantee of all the seams of coal under a defined surface enters upon one seam he will be taken to be in possession of all the seams included in the grant (*r*). It is a question of fact whether possession has been taken of a whole mine (*s*), but it seems that possession may be acquired of the whole mine or seam by the mode of driving the levels and opening a certain area of coal (*t*). It will not, however, be assumed that possession of a seam is possession of the seams which lie beneath it (*a*).

Trespass from adjoining mine.

A trespasser who wrongfully works a vein of coal from an adjoining mine usually acquires possession only of the coal worked, and does not acquire title to the mine itself though more than twelve years have elapsed since the first act of trespass was committed (*b*).

Tenant in common.

If a mine is held by tenants in common, and one of them enters and works without licence from his co-tenants, he may acquire a statutory title (*c*) to the area occupied by him (*d*).

Duchy of Cornwall.

The rights of the Duke of Cornwall to mines and minerals in the county of Cornwall are dealt with by a special enactment under which they may be barred by lapse of time (*e*).

Prescription.

1361. The right to get coal in another man's land may be acquired by prescription (*f*).

SUB-SECT. 3.—*Effect of Non-user.*

Non-user of right to get minerals.

1362. If mines and minerals are excepted upon a grant of land with liberty for the grantor to enter and get the minerals, the grantor's title is not barred by the simple omission to exercise his rights (*g*).

Ceasing to work mine.

Similarly, the right to work a mine is not lost by simply ceasing to work it (*h*). Moreover, if a trespasser abandons possession before he has acquired a title, time does not continue to run in his favour though there is no new act of ownership by the rightful owner (*i*). The customary right of tenants of a

(*q*) As to the extent to which possession will be inferred, see p. 510, *ante*, and title LIMITATION OF ACTIONS, Vol. XIX., p. 112.

(*r*) *Low Moor Co.* v. *Stanley Coal Co.* (1875), 33 L. T. 436; affirmed (1876), 34 L. T. 186, C. A.; and see *Davis* v. *Shepherd* (1866), 1 Ch. App. 410, 415.

(*s*) *M'Donnell* v. *M'Kinty* (1847), 10 I. L. R. 514, 526; *Thew* v. *Wingate* (1862), 10 B. & S. 711, 721.

(*t*) *Ashton* v. *Stock* (1877), 6 Ch. D. 719, 726.

(*a*) *Low Moor Co.* v. *Stanley Coal Co., Ltd.* (1876), 34 L. T. 186, 189.

(*b*) *Thompson* v. *Hickman*, [1907] 1 Ch. 550, 562; *Ashton* v. *Stock*, *supra*; *Dartmouth (Earl)* v. *Spittle* (1871), 19 W. R. 444.

(*c*) See note (*l*), p. 535, *ante*.

(*d*) *Glyn* v. *Howell*, [1909] 1 Ch. 666; Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 12.

(*e*) Duchy of Cornwall Act, 1844 (7 & 8 Vict. c. 105), ss. 73, 74.

(*f*) *Wilkinson* v. *Proud* (1843), 11 M. & W. 33. As to prescription, see title EASEMENTS AND PROFITS À PRENDRE, Vol. XI., pp. 256 *et seq.*

(*g*) *M'Donnell* v. *M'Kinty*, *supra*; *Smith* v. *Lloyd* (1854), 9 Exch. 562; *Agency Co.* v. *Short* (1888), 13 App. Cas. 793, 799, P. C.; see, further, title LIMITATION OF ACTIONS, Vol. XIX., pp. 110, 111.

(*h*) *Low Moor Co.* v. *Stanley Coal Co.* (1876), 34 L. T. 186, C. A.

(*i*) *Agency Co.* v. *Short*, *supra*; see title LIMITATION OF ACTIONS, Vol. XIX., pp. 111, 157, 158. It has been stated that when a lease of mines has been

manor to take stone from a quarry is not barred by non-user, if there is no evidence of possession inconsistent with the exercise of their right (*k*).

Abandonment of right to minerals.

1363. If the right to mines and minerals is expressly reserved no inference of abandonment arises from not exercising it (*l*): a grant will not be presumed against the reservation (*m*). If the right to work minerals is granted for a term of years, the right is not waived nor abandoned during the term, though the grantee has ceased working for many years (*n*). A presumption of right arises from possession (*o*) apart from the Real Property Limitation Acts (*p*); but the title to a gravel pit and the road to it will be extinguished if possession is abandoned by the owner and another has actual possession for the statutory period (*q*).

SECT. 2.—*Rights against Persons wrongfully taking Minerals.*

SUB-SECT. 1.—*Nature of the Right.*

Nature of right to abstracted minerals.

1364. By a technical rule of law, when part of the realty is severed and converted into a chattel, it instantly becomes the property of the person who was the owner of the fee in the land whilst it remained a portion of the land (*a*). Though admitted by courts of law, this doctrine is not applied in granting redress to the owner of the chattel (*b*), the principle adopted being that the proper value is what the owner has lost, which is the value of the thing as it existed unhewn in the pit (*c*).

SUB-SECT. 2.—*Nature of the Remedy.*

Remedies for wrongful abstraction.

1365. An action may be maintained for an account of minerals wrongfully abstracted (*d*), and such action is available not only

granted and there is no entry by the grantee within the time of limitation, the rights of the grantee against the lessor are barred at the expiration of the statutory period (*Keyse* v. *Powell* (1853), 2 E. & B. 132, 147). But this seems not to be the case when the lessor is not in actual possession; see title LIMITATION OF ACTIONS, Vol. XIX., pp. 112, 115, note (*e*).

(*k*) *Heath* v. *Deane*, [1905] 2 Ch. 86, 93.

(*l*) *Seaman* v. *Vawdrey* (1810), 16 Ves. 390, 392; *Jamieson* v. *Harvey*, [1876] W. N. 277, H. L.

(*m*) *Adair* v. *Shafto* (undated), cited 19 Ves. 156.

(*n*) *Crany* v. *Adams* (1776), 5 Bro. Parl. Cas. 588.

(*o*) *Hodgkinson* v. *Fletcher* (1781), 3 Doug. (K. B.) 31, 33.

(*p*) As to those Acts, see title LIMITATION OF ACTIONS, Vol. XIX., p. 37, note (*a*).

(*q*) *Smith* v. *Stocks* (1869), 10 B. & S. 701.

(*a*) *Livingstone* v. *Rawyards Coal Co.* (1880), 5 App. Cas. 25, *per* Lord BLACKBURN, at p. 39.

(*b*) *Peruvian Guano Co.* v. *Dreyfus Brothers & Co.* (1887), [1892] A. C. 170, n., 175; *Livingstone* v. *Rawyards Coal Co.*, *supra*, at p. 40.

(*c*) See *Jegon* v. *Vivian* (1871), 6 Ch. App. 742, *per* Lord HATHERLEY, at p. 760; *Livingstone* v. *Rawyards Coal Co.*, *supra*, at p. 40; and see pp. 540, 541, *post*.

(*d*) *Phillips* v. *Homfray*, [1892] 1 Ch. 465, 470, C. A.; *Joicey* v. *Dickinson* (1881), 45 L. T. 643, C. A.; *Trotter* v. *Maclean* (1879), 13 Ch. D. 574, 584; *Ashton* v. *Stock* (1877), 6 Ch. D. 719, 727; *Ecclesiastical Commissioners for England* v. *North Eastern Rail. Co.* (1877), 4 Ch. D. 845, 868; *Job* v. *Potton* (1875), L. R. 20 Eq. 84, 99; *Jegon* v. *Vivian*, *supra*, at p. 762; *Llynvi Co.* v. *Brogden* (1870), L. R. 11 Eq. 188; *Dean* v. *Thwaite* (1855), 21 Beav. 621.

SECT. 2. Rights against Persons wrongfully taking Minerals.

against the wrongdoer, but also, after his death, against his personal representatives (*e*). In such action the defendant is required to account for the value of the coal raised—that is to say, the market price or value after making just allowances (*f*). When a mine is held by tenants in common, one of the co-tenants who has not consented to the grant by the others of a licence to work may have an account against the licensee (*g*).

Action for account. Injunction.

1366. An injunction may be obtained to restrain future working (*h*). This jurisdiction was first exercised on account of the irreparable injury to the property, as a mine; and upon the principle that a mine is regarded as a species of trade (*i*).

Actions for trover and money had and received.

1367. The owner of minerals which have been wrongfully abstracted may also bring an action of trover against the wrongdoer (*j*), or, if the wrongdoer has sold the minerals, the owner may bring an action for money had and received (*k*), but not for use and occupation (*l*). The action for money had and received will also lie against the legal personal representatives of the wrongdoer, in respect of the proceeds of minerals raised prior to his death (*m*). No direct evidence of the actual sum received is necessary (*n*).

Damages for trespass.

An action for damages for trespass may also be maintained (*o*); but, in this form of action, damages can only be recovered from

(*e*) *Winchester* (*Bishop*) v. *Knight* (1718), 1 P. Wms. 406; *Phillips* v. *Homfray*, [1892] 1 Ch. 465, 470, C. A.

(*f*) See *Phillips* v *Homfray*, *supra*, *per* LINDLEY, L.J., at p. 470

(*g*) *Job* v. *Potton* (1875), L. R. 20 Eq. 84, 89, considered in *Glyn* v. *Howell*, [1909] 1 Ch. 666, 677; see also *Denys* v. *Shuckburgh* (1840), 4 Y. & C. (EX.) 42. As to the rights of co-owners, see pp. 511, 512, 525, 526, *ante*. As to licences, see pp. 567 *et seq.*, *post*.

(*h*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (8); *Trinidad Asphalt Co.* v. *Ambard*, [1899] A. C. 594, P. C.; *Ashton* v. *Stock* (1877), 6 Ch. D. 719, 725; *Phillips* v *Homfray*, *Fothergill* v. *Phillips*, (1871), 6 Ch. App. 770; *Wright* v. *Pitt* (1870), L. R. 12 Eq. 408; *Hilton* v. *Woods* (1867), L. R. 4 Eq. 432, 440; *Wilson* v. *Grey* (1866), L. R. 3 Eq. 117, 121; *Ackroyd* v. *Briggs* (1865), 13 L. T. 521; *Hunt* v. *Peake* (1860), John. 705, 713; 1 Seton, Judgments and Orders (6th ed., 1901), pp. 574, 576; see *Thomas* v. *Jones* (1842), 1 Y. & C. Ch. Cas. 510, and *Grey* v. *Northumberland* (*Duke*) (1809), 17 Ves. 281, as to former practice in granting injunctions where the right had not been established at law; and see title INJUNCTIONS, Vol. XVII., pp. 197 *et seq.*

(*i*) *Flamany's Case* (undated), cited 7 Ves. 308. As to the extension of the remedy by injunction applicable in case of waste to trespass, see *Mitchell* v. *Dors* (1801), 6 Ves. 147; *Crockford* v. *Alexander* (1808), 15 Ves. 138; *Cowper* (*Earl*) v. *Baker* (1810), 16 Ves. 128; *Thomas* v. *Oakley* (1811), 18 Ves. 184.

(*j*) *Martin* v. *Porter* (1839), 5 M. & W. 351; *Wood* v. *Morewood* (1841), 3 Q. B. 440, n.; *Attersoll* v. *Stevens* (1808), 1 Taunt. 183, 199; and see title TROVER AND DETINUE. A remedy of this nature is available to the lord of the manor against a copyholder who wrongfully abstracts minerals (*Eardley* v. *Granville* (1876), 3 Ch. D. 826, 833).

(*k*) See *Powell* v. *Rees* (1837), 7 Ad. & El. 426, *per* Lord DENMAN, C.J., at p. 428; and see title CONTRACT, Vol. VII., p. 184.

(*l*) *Phillips* v. *Homfray*, *supra*, at p. 472.

(*m*) *Powell* v. *Rees*, *supra*.

(*n*) *Ibid.*

(*o*) See title TRESPASS; *Martin* v. *Porter*, *supra*; *Morgan* v. *Powell* (1842), 3 Q. B. 278; *Clegg* v. *Dearden* (1848), 12 Q. B. 576; *Brain* v. *Harris* (1855), 10 Exch. 908; *Hunter* v. *Gibbons* (1856), 1 H. & N. 459; *Dartmouth* (*Earl*) v. *Spittle* (1871), 19 W. R. 444; *Eardley* v. *Granville*, *supra*.

personal representatives of the trespasser in respect of minerals worked within six months before his death (*p*). Actual possession is necessary to maintain this form of action (*q*). Thus a person having only an *interesse termini* cannot maintain trespass (*r*) without entry (*s*). If a tenant is in possession the landlord may sue for injury to the reversion (*t*), but not for a trespass which is not shown to injure the reversion (*u*). A person in possession with an exclusive right to take coal (*w*), a person entitled under the Statutes of Limitation (*x*), and a copyhold tenant in possession can maintain an action of trespass (*y*). No action is maintainable after the death of the tortfeasor for damage to the land by working the minerals, or for compensation for the use of roads and passages (*z*).

Liability of mortgagee.

1368. A mortgagee of leaseholds in possession may be accountable for the wrongful working of pillars by a sub-lessee (*a*), and a mortgagee, though not in possession, who authorises the working, is accountable in a redemption action (*b*). But if the mortgagor is in possession the mortgagee is not liable for wrongful working by the mortgagor, though he receives the proceeds, unless he knows that the working is wrongful (*c*).

Access to and inspection of mine.

1369. Liberty of access may be obtained for the purpose of stopping up passages into the mine (*d*).

If a *primâ facie* case of trespass is made out, an order for inspection of the defendant's mine through his pits may be obtained on interlocutory application (*e*). Inspection is usually only authorised for the purpose of ascertaining the boundary of the plaintiff's mine (*f*), and the extent of the trespass (*g*). Removal of barriers

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(*p*) Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), s. 2; and see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 314.

(*q*) *Cox* v. *Glue* (1848), 5 C. B. 533, *per* WILDE, C.J., at pp. 549, 550.

(*r*) *Wallis* v. *Hands*, [1893] 2 Ch. 75, 85, 86.

(*s*) *Ocean Accident and Guarantee Corporation* v. *Ilford Gas Co.*, [1905] 2 K. B. 493, 497, 498, C. A.

(*t*) *Raine* v. *Alderson* (1838), 6 Scott, 691; *Harker* v. *Birkbeck* (1764), 3 Burr. (4th ed.) 1556, 1560, n. (where it was held that an action on the case was maintainable); see also *Wood* v. *Morewood* (1841), 3 Q. B. 440, n.

(*u*) *Cooper* v. *Crabtree* (1882), 20 Ch. D. 589, C. A.

(*w*) *Low Moor Co.* v. *Stanley Coal Co.* (1875), 33 L. T. 436; affirmed (1876), 34 L. T. 186, C. A.

(*x*) *Ibid.*

(*y*) *Eardley* v. *Granville* (1876), 3 Ch. D. 826, 833.

(*z*) *Phillips* v. *Homfray* (1883), 24 Ch. D. 439, C. A.; *Phillips* v. *Homfray* (1890), 44 Ch. D. 694; affirmed, [1892] 1 Ch. 465, C. A.

(*a*) *Taylor* v. *Mostyn* (1886), 33 Ch. D. 226, C. A.

(*b*) *Hood* v. *Easton* (1856), 2 Giff. 692, 701.

(*c*) *Powell* v. *Aiken* (1858), 4 K. & J. 343; *Elias* v. *Griffith* (1878), 8 Ch. D. 521, 528, C. A.

(*d*) *Phillips* v. *Homfray*, *Fothergill* v. *Phillips* (1871), 6 Ch. App. 770, 776; see also *Plant* v. *Stott* (1869), 21 L. T. 106, 107; *Clegg* v. *Dearden* (1848), 12 Q. B. 576.

(*e*) R. S. C., Ord. 50, r. 3; *Cooper* v. *Ince Hall Co.*, [1876] W. N. 24; *Whaley* v. *Braucker* (1864), 10 Jur. (N. S.) 535; *Bennitt* v. *Whitehouse* (1860), 28 Beav. 119, 122; see also *Bradford Corporation* v. *Ferrand* (1902), 86 L. T. 497; *Lumb* v. *Beaumont* (1884), 27 Ch. D. 356, 358.

(*f*) *Lewis* v. *Marsh* (1849), 8 Hare, 97, 100; *Cooper* v. *Ince Hall Co.*, *supra*.

(*g*) *Bennitt* v. *Whitehouse*, *supra*, at p. 123; *Cooper* v. *Ince Hall Co.*, *supra*.

SECT. 4. **Rights against Persons wrongfully taking Minerals.**

and obstructions is also ordered when necessary for inspection (*h*). The order provides for notice of inspection to be given to the defendant (*i*), and in some cases for his being supplied with the names of the persons appointed by the plaintiff to inspect the mine (*k*). Security has been ordered to be given before inspection for the purpose of indemnifying the defendant from loss and damage sustained thereby (*l*). The costs are in the discretion of the judge (*m*).

Discovery of documents.

1370. Production and inspection of the defendant's title deeds for the purpose of ascertaining boundaries may be obtained, liberty being given to seal up all but the parcels and plans (*n*). In an action for an account of coals, in which the defendant denies the plaintiff's title without pleading his own, an interrogatory as to the defendant's title may be allowed (*o*).

Criminal proceedings.

1371. Criminal proceedings may be instituted against a person who has stolen minerals from a mine (*p*), or who commits malicious injuries to a mine (*q*), or who, being employed in a mine, has removed or concealed minerals with intent to defraud (*b*).

SUB-SECT. 3.—*Damages Recoverable.*

Measure of damages.

1372. By the rules of equity in actions of account, which are now applicable in all courts (*c*), the plaintiff is entitled to the

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(*h*) *Lonsdale* (*Earl*) v *Curwen* (1799), 3 Bli. 168, n., 171; *Walker* v. *Fletcher* (1804), 3 Bli. 172, 178

(*i*) *Cooper* v. *Ince Hall Co.*, [1876] W. N. 24; *Ennor* v. *Barwell* (1860), 1 De G. F. & J. 529, 531, C. A.; *Bennitt* v. *Whitehouse* (1860), 28 Beav. 119, 122; *A.-G.* v. *Chambers* (1849), 12 Beav. 159, 160; *Lewis* v. *Marsh* (1849), 8 Hare, 97, 100, *Walker* v *Fletcher*, *supra*.

(*k*) *Walker* v. *Fletcher*, *supra*; *Lewis* v. *Marsh*, *supra*; *Ennor* v. *Barwell*, *supra*.

(*l*) *Bennett* v. *Griffiths* (1861), 3 E. & E. 467; see also *Bennitt* v. *Whitehouse*, *supra*; *Ennor* v. *Barwell*, *supra*.

(*m*) *Mitchell* v. *Darley Main Colliery Co.* (1883), 10 Q. B D. 457.

(*n*) *Wayne's Merthyr Co* v. *Powell's Dyffryn Steam Coal Co.*, [1880] W. N. 141, 159, C. A.; *Ponsonby* v. *Hartley*, [1883] W. N. 13, 44, C. A.; *Jenkins* v. *Bushby* (1866), 35 L. J. (CH.) 400.

(*o*) *Cayley* v. *Sandycroft Brick, Tile, and Colliery Co.* (1885), 33 W. R. 577; see title DISCOVERY, INSPECTION, AND INTERROGATORIES, Vol. XI., p. 104.

(*p*) Larceny Act, 1861 (24 & 25 Vict. c 96), s. 38.

(*q*) See title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 783.

(*b*) See *ibid.*, pp. 638, 639.

(*c*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (11); *Peruvian Guano Co.* v. *Dreyfus Brothers & Co.*, [1892] A.C., 170, *per* Lord MACNAGHTEN, at p. 175. Before 1873, the damages recoverable for wrongfully working minerals depended upon the form of action adopted. In an action of trespass, the value of the coal when gotten, without allowance for hewing, but deducting the cost of bringing the coal to the surface, was recoverable (*Peruvian Guano Co.* v. *Dreyfus Brothers & Co.*, *supra*, at p. 175; *Wild* v. *Holt* (1842), 9 M & W. 672; *Morgan* v. *Powell* (1842), 3 Q. B. 278; *Martin* v. *Porter* (1839), 5 M. & W. 351; but see *Wood* v. *Morewood* (1841), 3 Q. B. 440, n.). In trover the value of the coal at the place of demand without deduction was considered to be recoverable (*Martin* v. *Porter*, *supra*, at pp. 353, 354; *Peruvian Guano Co.* v. *Dreyfus Brothers & Co.*, *supra*). Damages were assessed under Lord Cairns' Act, the Chancery Amendment Act, 1858 (21 & 22 Vict. c. 27), as if the defendant had purchased the mine at a fair price (*Jegon* v. *Vivian* (1871), 6 Ch. App. 742, 761, 762; *Livingstone* v. *Rawyards Coal Co.* (1880), 5 App. Cas. 25, 40); but in an action of trover a defendant who had acted honestly was liable only for the value of the coal as if he had purchased the coalfield from the plaintiff (*Peruvian Guano Co.* v. *Dreyfus Brothers & Co.*, *supra*;

market value of the minerals at the pit's mouth subject to certain allowances.

Allowances.

The defendant may be allowed the cost of hewing and bringing to bank if he has acted inadvertently (*d*), or under a *bonâ fide* belief of title (*e*), or fairly and honestly (*f*), or in cases of mere mistake (*g*), and when the coal was worked under a *bonâ fide* expectation of a contract which the coal-owner knew would be acted on at once (*h*). This rule is applicable to cases when the coal-owner stands by and sees the coal worked without interfering (*i*). But the cost of bringing to bank only is allowed when the defendant has acted fraudulently (*k*), or negligently (*l*), or wilfully (*m*), or in a manner wholly unauthorised and unlawful (*n*), and this measure of damages has been applied in a case of inadvertent working (*o*). In neither class of cases is the defendant deprived of the cost of bringing the coal to bank (*p*). These principles apply to claims in the winding up of a company (*q*). The measure of damages is not affected by a covenant which binds the plaintiff to use any coal gotten upon the premises (*r*). Where the coal could only have been worked by the trespasser damages have been assessed in accordance with the value of the royalty paid for the surrounding coalfield (*s*), but a trespasser who is allowed disbursements for hewing and bringing to bank is not entitled to any profit or trade allowance (*t*).

Damages as interest.

1373. Damages in the nature of interest may be given in an action of trover or trespass (*a*); and, it seems, may be allowed in an equitable action for an account against the trespasser or his personal representative (*b*).

Livingstone v. *Rawyards Coal Co.* (1880), 5 App. Cas. 25, 40; *Wood* v. *Morewood* (1841), 3 Q. B. 440, n.).

(*d*) *Hilton* v. *Woods* (1867), L. R. 4 Eq. 432; and see title CONTRACT, Vol. VII., p. 485.

(*e*) *Hilton* v *Woods, supra; Jegon* v. *Vivian* (1871), 6 Ch. App. 742, 761; *Elias* v. *Griffith* (1878), 8 Ch. D. 521, 529, C. A.; *Ashton* v. *Stock* (1877), 6 Ch. D. 719.

(*f*) *Wood* v. *Morewood, supra*

(*g*) *Re United Merthyr Collieries Co.* (1872), L. R. 15 Eq. 46. See title MISTAKE.

(*h*) *Trotter* v. *Maclean* (1879), 13 Ch. D. 574, 587.

(*i*) *Jegon* v. *Vivian, supra*, at p. 762; *Trotter* v. *Maclean, supra*, at p. 587.

(*k*) *Ecclesiastical Commissioners for England* v. *North Eastern Rail. Co.* (1877), 4 Ch. D. 845; *Joicey* v. *Dickinson* (1881), 45 L. T. 643, C. A.; *Bulli Coal Mining Co.* v. *Osborne*, [1899] A. C. 351, 352, P. C.

(*l*) *Wood* v. *Morewood, supra.*

(*m*) *Martin* v. *Porter* (1839), 5 M. & W. 351; *Trotter* v. *Maclean, supra*, at p. 588; *Phillips* v. *Homfray* (1890), 44 Ch. D. 694, 701, 702.

(*n*) *Llynvi Co.* v. *Brogden* (1870), L. R. 11 Eq. 188.

(*o*) *Ecclesiastical Commissioners for England* v. *North Eastern Rail. Co., supra.*

(*p*) *Trotter* v. *Maclean, supra*, at p. 586; *Joicey* v. *Dickinson, supra*, at p. 644; but see *Livingstone* v. *Rawyards Coal Co., supra*, at pp. 34, 39; *Job* v. *Potton* (1875), L. R. 20 Eq. 84, 91, 97; *Plant* v. *Stott* (1869), 21 L. T. 106.

(*q*) *Re United Merthyr Collieries Co., supra; Bulli Coal Mining Co.* v. *Osborn* (1872), L. R. 15 Eq. 46.

(*r*) *Ashton* v. *Stock* (1877), 6 Ch. D. 719, 726.

(*s*) *Livingstone* v. *Rawyards Coal Co., supra.*

(*t*) *Re United Merthyr Collieries Co., supra.*

(*a*) Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), s. 29; and see titles TRESPASS; TROVER AND DETINUE.

(*b*) *Phillips* v. *Homfray*, [1892] 1 Ch. 465, C. A. Where an inquiry as to

SECT. 2. **Rights against Persons wrongfully taking Minerals.**

1374. If a railway company, after giving notice to treat, removes minerals not included in the notice, and such removal is not necessary for making the railway, damages can be recovered, and the landowner is not obliged to take compensation (*c*).

1375. It is uncertain what is the measure of damages recoverable by a copyholder from the lord of the manor who has granted a licence to a third party to get minerals without the consent of the copyholder (*d*).

Railway companies

Copyholders.

Nature of injuries giving damages.

1376. Damages are recoverable for injury resulting from the wrongful working of minerals; for injury caused to houses on the surface (*e*); for causing subsidence of the surface by removal of lateral support (*f*); for coal rendered unworkable (*g*), and for letting in water (*h*). If damages are recovered for letting in water there is no further liability for continuing damage from flooding through the same aperture (*i*). Damages are recoverable for the loss of pitch which the defendant, by removing lateral supports, has caused to flow upon his land and appropriated (*j*). This principle does not apply when the defendant has pumped brine upon his own land which in part results from dissolution of the plaintiff's rock (*k*). An inquiry has been directed as to damages beyond the removal of the coal occasioned by working the mines (*l*), as to damages by reason of the manner in which the wrongdoers worked the coal (*m*), and as to damage by reason of the wrongdoers having broken through the boundary (*n*); and compensation may be obtained as for a wayleave when the trespasser has wrongfully carried minerals through the mine (*o*).

SUB-SECT. 4.—*Application of Damages recovered as between Limited Owners.*

To whom damages belong.

1377. If a lease with liberty to dig for minerals amounts to an absolute sale of all the minerals, the lessee is entitled as between

Lessee.

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damages is directed and the order does not contain a direction for payment, the order is not one within the Judgments Act, 1838 (1 & 2 Vict. c. 110), s. 18, so as to render interest on the damages payable from the date of the order (*Ashover Fluor Spar Mines, Ltd.* v. *Jackson*, [1911] 2 Ch. 355); see title JUDGMENTS AND ORDERS, Vol. XVIII., p. 209.

(*c*) Under the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 6; *Taverton and North Devon Rail. Co.* v. *Loosemore* (1884), 9 App. Cas. 480.

(*d*) *A.-G.* v. *Tomline* (1880), 15 Ch. D. 150, 153, C. A.

(*e*) *Livingstone* v. *Rawyards Coal Co.* (1880), 5 App. Cas. 25; *Hunt* v. *Peake* (1860), John. 705; see pp. 570 *et seq.*, *post*.

(*f*) *Trinidad Asphalt Co.* v. *Ambard*, [1899] A. C. 594, P. C.; see pp. 570 *et seq.*, *post*.

(*g*) *Williams* v. *Rayyett* (1877), 25 W. R. 874.

(*h*) *Phillips* v *Homfray*, *Fothergill* v. *Phillips* (1871), 6 Ch. App. 770; *Taylor* v. *Mostyn* (1886), 33 Ch. D. 226, C. A.; *Plant* v. *Stolt* (1869), 21 L. T. 106; see p. 590, *post*.

(*i*) *Clegg* v. *Dearden* (1848), 12 Q. B. 576; see pp. 590, 591, *post*.

(*j*) *Trinidad Asphalt Co.* v. *Ambard*, *supra*.

(*k*) *Salt Union, Ltd.* v. *Brunner, Mond & Co.*, [1906] 2 K. B. 822, 831.

(*l*) *Jegon* v. *Vivian* (1871), 6 Ch. App. 762.

(*m*) *Phillips* v. *Homfray*, *Fothergill* v. *Phillips*, *supra*.

(*n*) *Llynvi Co.* v. *Brogden* (1870), L. R. 11 Eq. 188, 192.

(*o*) *Martin* v. *Porter* (1839), 5 M. & W. 351; *Jegon* v. *Vivian*, *supra*, at p. 762; *Phillips* v. *Homfray*, *Fothergill* v. *Phillips*, *supra*, at p. 770; see pp. 587, 588, *post*.

himself and the lessor to retain the whole damages recovered by him from a trespasser who has worked the minerals (*p*).

If a tenant for life is not impeachable for waste he is entitled to compensation recovered from a trespasser in respect of minerals worked during the life tenancy (*q*). If on the other hand the tenant for life is impeachable for waste, damages recovered are the property of the owner of the first estate of inheritance *in esse* (*r*). If such owner is an infant the amount will be invested for his benefit (*s*).

Tenant for life.

SUB-SECT. 5.—*Loss of Remedy.*

1378. The period of six years is imposed by statute as the period of limitation in actions of trespass and trover (*t*), and is applied in respect of the wrongful abstraction of minerals (*a*). As the statute runs from the date of the trespass (*b*), an account of minerals wrongfully abstracted is not carried back for more than six years except upon equitable grounds (*c*), the onus being upon the defendant to show what portion of the coals found to have been abstracted was taken prior to the six years (*d*). As, however, fraudulent concealment (*e*) of an intentional trespass is recognised by all courts as a ground for excluding the application of the statute (*f*), the account will be carried back beyond the six years in cases of this nature (*g*).

Loss of right of action for trespass, trover, and account.

1379. Though, in the case of lawful working, the statute runs

Period of limitation in case of subsidence.

(*p*) *Attersoll* v *Stevens* (1808), 1 Taunt. 183 As to the respective rights of lessor and lessee, see p. 539, *ante*.

(*q*) *Re Barrington, Gamlen* v. *Lyon* (1886), 33 Ch. D 523. As to the powers of a tenant for life, see pp. 514, 515, 523, 529, *ante*.

(*r*) *Re Barrington, Gamlen* v. *Lyon, supra*, at p. 527.

(*s*) *Bewick* v. *Whitfield* (1734), 3 P. Wms. 267.

(*t*) Limitation Act, 1623 (21 Jac. 1, c. 16), s. 3; see title LIMITATION OF ACTIONS, Vol. XIX., p. 37.

(*a*) *Denys* v. *Shuckburgh* (1840), 4 Y. & C. (EX.) 12; *Hood* v. *Easton* (1856), 2 Jur. (N. S.) 917, C. A.; *Dawes* v. *Bagnall* (1875), 23 W. R. 690; *Trotter* v. *Maclean* (1879), 13 Ch. D. 574, 584.

(*b*) As to the time when the remedy will be barred, see title LIMITATION OF ACTIONS, Vol. XIX., pp. 50, 138, 173.

(*c*) *Deane* v. *Thwaite* (1855), 21 Beav. 621; *Ashton* v. *Stock* (1877), 6 Ch. D. 719, 726; *Thomas* v. *Atherton* (1878), 10 Ch. D. 185, 202, C. A.; *Trotter* v. *Maclean, supra*, at p. 585; *Glyn* v. *Howell*, [1909] 1 Ch. 666, 679.

(*d*) *Deane* v. *Thwaite, supra*; *Trotter* v. *Maclean, supra*, at p. 585.

(*e*) As to whether tortious underground working without active concealment is alone sufficient to take the case out of the statute, see *Bulli Coal Mining Co.* v. *Osborne*, [1899] A. C. 351, P. C. (where it was held that active concealment was not essential); but consider *Re Astley and Tyldesley Coal and Salt Co. and Tyldesley Coal Co.* (1899), 68 L. J. (Q. B.) 252, 254; *Gibbs* v. *Guild* (1882), 9 Q. B. D. 59, C. A.; *Trotter* v. *Maclean, supra*; *Dawes* v. *Bagnall, supra*; *Hunter* v. *Gibbons* (1856), 1 H. & N. 459; *Deane* v. *Thwaite, supra*; *Denys* v. *Shuckburgh, supra*; and see, generally, title LIMITATION OF ACTIONS, Vol. XIX., p. 49.

(*f*) *Re Astley and Tyldesley Coal and Salt Co. and Tyldesley Coal Co., supra*; *Gibbs* v. *Guild, supra*, at p. 67. The rule was different in courts of law prior to the Judicature Act, 1873 (36 & 37 Vict. c. 66); see title LIMITATION OF ACTIONS, Vol. XIX., p. 49, note (*a*).

(*g*) *Deane* v. *Thwaite, supra, per* ROMILLY, M.R., at p. 623; *Ecclesiastical Commissioners for England* v. *North Eastern Rail. Co.* (1877), 4 Ch. D. 845; *Bulli Coal Mining Co.* v. *Osborne, supra*.

SECT. 2. Rights against Persons wrongfully taking Minerals.

from the date of the subsidence (*h*), when subsidence results from the act of a trespasser, the cause of action is the trespass and time runs from that. All consequential damages must be sued for once and for all (*i*).

Effect of release.

1380. A release does not extend to wrongful abstraction carried on during negotiations for the release and after the boundaries have been settled (*k*).

Part VI.—Contracts.

SECT. 1.—*Application of General Rules of Law.*

General rules as to contracts.

1381. The rules of law applicable to contracts for sale or demise of land (*l*) apply generally to contracts concerning mines, quarries, and unsevered minerals; for the mines and minerals are part and parcel of the land (*m*).

SECT. 2.—*Contracts of Sale.*

Application of Statute of Frauds.

1382. The requirements, in relation to contracts, as to writing and signature imposed by the Statute of Frauds (*n*), apply to a contract for the sale of a mine, or a share of a mine (*o*), but not to an agreement relating to a mine unless it concerns an interest in the mine itself (*p*), nor, as a rule, to a partnership agreement (*q*), unless it amounts to a contract for the sale of an interest in the land (*r*), nor to an agreement for the sale of shares in a cost-book mine (*s*), unless the shareholder has a direct interest in the land (*t*).

Contracts under which mines and minerals pass.

1383. A contract for the sale of freehold land (*u*) includes the mines and minerals under that land unless expressly excepted (*a*);

(*h*) *Darley Main Colliery Co.* v. *Mitchell* (1886), 11 App. Cas. 127, *West Leigh Colliery Co., Ltd.* v. *Tunnicliffe and Hampson, Ltd*, [1908] A. C. 27.

(*i*) Compare *Darley Main Colliery Co.* v. *Mitchell*, *supra*, at pp. 133, 144.

(*k*) *Ecclesiastical Commissioners for England* v. *North Eastern Rail. Co.* (1877), 4 Ch. D. 845.

(*l*) See titles LANDLORD AND TENANT, Vol. XVIII., pp. 366 *et seq.*; SALE OF LAND.

(*m*) See *Wilkinson* v. *Proud* (1843), 11 M. & W. 33; *Williamson* v. *Wootton* (1855), 3 Drew. 210, 213; *Kerr* v. *Pawson* (1858), 25 Beav. 394, 406.

(*n*) 29 Car. 2, c. 3, s. 4; see title CONTRACT, Vol. VII., p. 361.

(*o*) *Boyce* v. *Green* (1826), Batt. 608.

(*p*) *Cheadle* v. *Proctor* (1868), 19 L. T. 289.

(*q*) *Forster* v. *Hale* (1800), 5 Ves. 308, 314.

(*r*) *Caddick* v. *Skidmore* (1857), 2 De G. & J. 52.

(*s*) As to the constitution of cost-book companies, see title COMPANIES, Vol. V., pp. 651 *et seq.*, and note (*n*), p. 635, *post*.

(*t*) *Powell* v. *Jessopp* (1856), 18 C. B. 336; *Walker* v. *Bartlett* (1856), 18 C. B. 845; *Hayter* v. *Tucker* (1858), 4 K. & J. 243, 249; *Watson* v. *Spratley* (1854), 10 Exch. 222; see the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 4. As to part performance of a contract relating to mines, see *Pollard* v. *Clayton* (1855), 1 K. & J. 462; *Burdon* v. *Barkus* (1862), 4 De G. F. & J. 42, 47, C. A; title SPECIFIC PERFORMANCE. See p. 547, *post*.

(*u*) See title SALE OF LAND.

(*a*) *Williamson* v. *Wootton*, *supra*, at p. 213; *Hayford* v. *Criddle* (1855), 22 Beav. 477, 480; *Kerr* v. *Pawson*, *supra*, at p. 406.

but if land is taken compulsorily by a railway company (*b*), or for waterworks (*c*), or for support of sewers in mining districts (*d*), the mines and minerals are not acquired unless expressly purchased and conveyed. A railway company need not acquire the surface and minerals at the same time (*e*).

Effect of absence of title to minerals.

1384. If the vendor, under a contract for the sale of freehold land, has no title to the mines and minerals, he cannot enforce the contract (*f*), even if he is willing to compensate the purchaser (*g*); and this is so although no evidence is given of the existence in the land of minerals of any value (*h*), for the objection to the title is valid unless it is shown that there is no subject-matter for the reservation to act upon, or that all legal right to exercise it has ceased (*i*). If the vendor cannot make a title by the date for completion he cannot maintain an action for damages for breach of contract, although he has subsequently acquired the right to the minerals for a nominal sum (*k*).

Effect of vendor's knowledge of absence of title.

1385. A vendor, who contracts to sell land by a description which includes minerals, knowing that he has no title to the minerals, cannot avoid the contract under a power to rescind if an objection to the title is insisted on which he is unable or, on the ground of expense, declines to remove or comply with; for the court will consider his conduct in applying the condition (*l*). But a vendor has been allowed to rescind when the title to minerals under part of the land was doubtful, though the land was sold as containing minerals (*m*).

Compensation where vendor has no title.

1386. If a vendor has no title to the mines and minerals a purchaser of land may be entitled to compensation under a clause in the contract providing that errors in the particulars shall be

(*b*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 77; *Re Metropolitan District Rail. Co. and Cotton's Trustees* (1881), 45 L. T. 103, C. A.; and see, generally, title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI, p. 5.

(*c*) Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 18.

(*d*) Public Health Act, 1875 (Support of Sewers) Amendment Act, 1883 (46 & 47 Vict. c. 37), s. 3.

(*e*) *Errington* v. *Metropolitan District Rail. Co.* (1882), 19 Ch. D. 559, C. A.

(*f*) *Upperton* v. *Nickolson* (1871), 6 Ch. App. 436; *Pretty* v. *Solly* (1859), 26 Beav. 606; *Bellamy* v. *Debenham*, [1891] 1 Ch. 412, C. A. But a purchaser of shares in a mining company is not entitled to investigate the company's title to the mines (*Curling* v. *Flight* (1848), 2 Ph. 613).

(*g*) *Re Hargreaves and Thompson's Contract* (1886), 32 Ch. D. 454, 455, C. A. As to compensation, see, further, p. 573, *post*.

(*h*) *Barton* v. *Downes* (1842), Fl. & K. 505, 506; *Martin* v. *Cotter* (1846), 3 Jo. & Lat. 496, 510. As to *Lyddal* v. *Weston* (1740), 2 Atk. 19, see *Martin* v. *Cotter*, *supra*, at p. 509.

(*i*) *Martin* v. *Cotter*, *supra*, at p. 509; *Ramsden* v. *Hurst* (1858), 27 L. J. (CH.) 482. As to cesser of right to work minerals, see pp. 506, 536, 537, *ante*; *Seaman* v. *Vawdrey* (1810), 16 Ves. 390, 392.

(*k*) *Bellamy* v. *Debenham*, *supra*.

(*l*) *Re Jackson and Haden's Contract*, [1906] 1 Ch. 412, C. A.; see title SALE OF LAND.

(*m*) *Mawson* v. *Fletcher* (1870), 6 Ch. App. 91.

SECT. 2. Contracts of Sale.

the subject of compensation (*n*); and compensation has been obtained by purchasers in cases in which a provision of the contract was not relied on (*o*); but a purchaser cannot obtain compensation if he has gone into possession and has not objected to the title within the time named by the contract (*p*). Compensation may be given to a purchaser by reason of misrepresentation on the part of the vendor (*q*).

Purchasers should ascertain existence of minerals.

1387. Mining contracts, whether by way of sale or demise, do not usually import any guarantee of the existence or value of minerals (*r*), and if land is sold as containing coal, and the purchaser enters into the contract with knowledge that the coal has been partly worked, it is his business to ascertain the extent of the working (*s*). Further, when mines are not in the occupation of the vendor, a purchaser of land takes with notice of the rights of those in possession (*t*); and if the contract is for the sale of copyholds the purchaser cannot object to the title on the ground that the right to minerals is in the lord, without whose consent they cannot be worked (*a*); but notice that the land sold is enfranchised copyhold is not sufficient to affect a purchaser with notice that the vendor has no title to the mines and minerals (*b*). A contract to procure enfranchisement and sell when freehold does not entitle the purchaser to the minerals unless this is shown upon the construction of the contract to have been intended (*c*).

How far purchaser affected with notice of mining rights.

Terms which may be implied or imposed.

1388. A vendor of minerals at a royalty which varies with the amount of minerals worked is entitled without express provision to the insertion of a clause in the conveyance enabling him to enter and measure the quantity of minerals worked (*d*), and, if the contract contains provisions as to the manner of working, of a clause giving a right to enter and view the working (*e*).

In a contract for a lease for working a mine time is of the essence of the contract though not expressly stated to be so (*f*). Notice may therefore be given fixing a reasonable time for completion if no time is named in the contract (*g*).

(*n*) *Mawson* v. *Fletcher* (1870), 6 Ch. App. 91; *Re Jackson and Haden's Contract*, [1906] 1 Ch. 412, C. A.; and see title SALE OF LAND.

(*o*) *Seaman* v. *Vawdrey* (1810), 16 Ves. 390; *Ramsden* v. *Hurst* (1858), 27 L. J. (CH.) 482; compare *Smithson* v. *Powell*, *Powell* v. *Smithson* (1852), 20 L. T. (O. S.) 105; *Re Bunbury's Estate* (1867), 1 I. R. Eq. 458.

(*p*) *Smithson* v. *Powell*, *Powell* v. *Smithson*, *supra*.

(*q*) *Powell* v. *Elliot* (1875), 10 Ch. App. 424.

(*r*) *Jefferys* v. *Fairs* (1876), 4 Ch. D 448, 452.

(*s*) *Colby* v. *Gadsden* (1865), 34 Beav. 416, 421.

(*t*) *Holmes* v. *Powell* (1856), 8 De G. M. & G. 572, C. A.

(*a*) *Hayford* v. *Criddle* (1855), 22 Beav. 477, 480.

(*b*) *Bellamy* v. *Debenham*, [1891] 1 Ch. 412, 420, C. A.

(*c*) See *Kerr* v. *Pawson* (1858), 25 Beav. 394. As to a sale of enfranchised copyholds, see pp. 524, 525, *ante*; and, as to enfranchisement, see p. 509, *ante*, and title COPYHOLDS, Vol. VIII., pp. 126, 127.

(*d*) *Blakesley* v. *Whieldon* (1841), 1 Hare, 176; compare *Lewis* v. *Marsh* (1849), 8 Hare 97.

(*e*) *Blakesley* v. *Whieldon*, *supra*, at pp. 181, 182.

(*f*) *Macbryde* v. *Weekes* (1856), 22 Beav. 533; *Green* v. *Sevin* (1879), 13 Ch. D 589, 594.

(*g*) *Macbryde* v. *Weekes*, *supra*.

A colliery is regarded as a trade the profits of which accrue from day to day. Therefore, if the profits are taken monthly and the contract does not provide when possession shall be taken, the purchaser is entitled to receipt of the profits from the commencement of the month in which he paid his purchase-money (*h*).

A purchaser who goes into possession, and works a mine before conveyance, may be ordered on motion to pay into court the purchase-money (*i*), or the amount of royalties due in respect of minerals raised (*k*).

Purchaser's duty to disclose.

1389. A purchaser of land need not disclose to the vendor his knowledge of the existence (*l*) or value (*m*) of minerals in the land, unless he is in a fiduciary position towards the vendor (*n*); but if a purchaser has wrongfully worked coal under the land he must disclose the working to the vendor before contracting (*o*). It is uncertain whether a tenant for life buying from the trustees of the settlement is bound to make disclosure (*p*). Any attempt by the purchaser to mislead or hurry the vendor may be a ground for refusing specific performance of the contract (*q*).

Specific performance

1390. A contract for sale or lease of a mine will be specifically enforced if fairly entered into though the mine is worthless (*r*); but the court will not decree specific performance of a contract for the sale or demise of mineral property if its terms (*s*) or the subject-matter (*t*) are insufficiently defined. A description is, however, sufficient if the subject-matter is ascertainable though the boundaries of the property are not defined in the contract (*u*). When possession has been taken under the contract less certainty of description will suffice (*v*).

A contract to demise an undivided moiety of mineral property may be specifically enforced (*a*); but if the contract is entered

(*h*) *Wren* v. *Kirton* (1803), 8 Ves. 502; *Williams* v. *Attenborough* (1823), Turn. & R 70, 73.

(*i*) *Buck* v. *Lodge* (1812), 18 Ves. 450 As to how far taking possession is an acceptance by the purchaser of the vendor's title, see title SALE OF LAND.

(*k*) *Lewis* v. *James* (1886), 32 Ch. D. 326, C. A.

(*l*) *Fox* v. *Mackreth* (1788), 2 Bro. C. C. 400, 420; *Turner* v. *Harvey* (1821), Jac. 169, 178.

(*m*) *Walters* v. *Morgan* (1861), 3 De G. F. & J 718; *Phillips* v. *Homfray*, *Fothergill* v. *Phillips* (1871), 6 Ch. App 770, 779

(*n*) *Luddy's Trustee* v. *Peard* (1886), 33 Ch D. 500, 520. A sale under an execution of an insolvent partner's share in a mine to his co-partners will be set aside if the purchasers have concealed matters affecting the value of the property (*Perens* v. *Johnson*, *Johnson* v. *Perens* (1857), 3 Sm. & G. 419).

(*o*) *Phillips* v. *Homfray*, *Fothergill* v. *Phillips*, *supra*.

(*p*) *Dicconson* v. *Talbot* (1870), 6 Ch. App. 32.

(*q*) *Walters* v. *Morgan*, *supra*, at p. 723.

(*r*) *Haywood* v. *Cope* (1858), 25 Beav. 140, *Jefferys* v. *Fairs* (1876), 4 Ch. D. 448. Pending the hearing of an action for specific performance there is jurisdiction to restrain a defendant in possession from allowing the mine to be drowned out (*Strelley* v. *Pearson* (1880), 15 Ch. D. 113; R. S. C., Ord. 50, r. 3).

(*s*) *Williamson* v. *Wootton* (1855), 3 Drew. 210.

(*t*) *Price* v. *Griffith* (1852), 1 De G. M. & G. 80, C. A.; *Lancaster* v *De Trafford* (1862), 31 L. J. (CH.) 554; *Davis* v. *Shepherd* (1866), 1 Ch. App. 410.

(*u*) *Haywood* v. *Cope*, *supra*.

(*v*) *Parker* v. *Taswell* (1858), 2 De G. & J. 559, 571.

(*a*) *Hexter* v. *Pearce*, [1900] 1 Ch. 341.

SECT. 2. Contracts of Sale.

into as to the whole property it will not be enforced as to a moiety only (*b*).

The court will also specifically enforce a contract to grant a way-leave (*c*); but if the grant would be useless to the defendant (*d*), or the contract has been entered into by the defendant under a mistake which is material (*e*), the plaintiff will be left to his remedy in damages. If the contract is made by a tenant for life and is *ultra vires*, a remainderman cannot enforce it (*f*).

Contracts not specifically enforceable.

1391. The court will not specifically enforce a contract to sell minerals to be obtained from a mine (*g*), for this is a contract for the sale of chattels (*h*); and would involve the superintendence by the court of the working of the mine (*i*); nor will the breach of such a contract be restrained by injunction (*k*). For the same reasons a contract to work a quarry will not be specifically enforced (*l*).

Bar to remedy.

The right of specific performance of the contract may be barred by laches (*m*). Delay is not a bar while both parties are insisting on the performance of the contract (*n*), but after they are at arm's length a short delay may be sufficient (*o*). The purchaser should give notice of repudiation and abandonment if he has been in possession of the mine and intends to rely on delay as a defence (*p*).

Misrepresentation (*q*) or concealment (*r*) by the vendor may be a ground for refusing specific performance: but if the purchaser, with knowledge of the misrepresentation, gives notice to the vendor requiring him to complete he cannot afterwards avail himself of this defence (*s*).

Grounds for setting aside contract.

1392. The contract will be set aside if induced by fraud (*a*) or

(*b*) *Hexter* v. *Pearce*, [1900] 1 Ch. 341, 345; *Price* v. *Griffith* (1852), 1 De G. M. & G. 80, C. A.

(*c*) *Anon.* v. *White* (1706-13), 3 Swan. 108 n.; *Ricketts* v. *Bell* (1847), 1 De G. & Sm. 335.

(*d*) *Anon.* v. *White*, *supra*.

(*e*) *Ricketts* v. *Bell*, *supra*.

(*f*) *Ibid.*

(*g*) *Pollard* v. *Clayton* (1855), 1 K. & J. 462; see, generally, title SPECIFIC PERFORMANCE.

(*h*) *Fothergill* v. *Rowland* (1873), L. R. 17 Eq. 132, 139.

(*i*) *Pollard* v. *Clayton*, *supra*; *Wheatley* v. *Westminster Brymbo Coal Co.* (1869), L. R. 9 Eq 538, 551, 552.

(*k*) *Fothergill* v. *Rowland*, *supra*.

(*l*) *Booth* v. *Pollard* (1840), 4 Y. & C. (EX.) 61.

(*m*) *Walker* v. *Jeffreys* (1842), 1 Hare, 341; *Eads* v. *Williams* (1854), 4 De G. M. & G. 674, 691; *Sharp* v. *Wright* (1859), 28 Beav. 150; *Huxham* v. *Llewellyn* (1873), 21 W. R. 570; *Glasbrook* v. *Richardson* (1874), 23 W. R. 51.

(*n*) *Colby* v. *Gadsden* (1865), 34 Beav. 416, 418.

(*o*) *Huxham* v. *Llewellyn*, *supra*; *Glasbrook* v. *Richardson*, *supra*.

(*p*) *Haywood* v. *Cope* (1858), 25 Beav. 140, 150.

(*q*) *Higgins* v. *Samels* (1862), 2 John. & H. 460; see also title MISREPRESENTATION AND FRAUD, p. 658, *post*.

(*r*) *Haywood* v. *Cope*, *supra*, at p. 147. As to setting aside the contract, see p. 549, *post*.

(*s*) *Macbryde* v. *Weekes* (1856), 22 Beav. 553, 538.

(*a*) *Attwood* v. *Small* (1838), 6 Cl. & Fin. 232, H. L.; *Phosphate Sewage Co.* v. *Hartmont* (1877), 5 Ch. D. 394, C. A.; *Erlanger* v. *New Sombrero Phosphate Co.* (1878), 3 App. Cas. 1218; and see title MISREPRESENTATION AND FRAUD, p 738, *post*. When a mine is sold by the court the biddings will not be opened except on the ground of fraud or improper conduct in the management of the

Fraud etc.

material misrepresentation (*b*); but if the purchaser has tested the accuracy of the vendor's statements he cannot avoid the contract (*c*), and, even though induced by misrepresentation, a contract will not be set aside if the position of the parties has been so altered that they cannot be restored to their former position (*d*).

Mistake.

Mutual mistake is a good ground for a claim for rescission of the contract (*e*), but the mere existence of faults in the mine is not a good ground (*f*), nor is an exaggerated account of its prospects, for mining property is of a speculative character (*g*).

The burden of proof in an action for rescission of a contract relating to mines is on the party claiming it (*h*), and he should institute proceedings at once, for his right to relief is easily barred by laches (*i*).

A receiver and manager of a colliery may be appointed till the hearing of an action for rescission (*k*).

Part VII.—Absolute Dispositions.

SECT. 1.—*Sale.*

How far conveyance of land includes minerals.

1393. All mines and minerals, whether the ownership thereof is severed from the ownership of the surface of the land or not, lie in grant (*l*), and are conveyed by deed. Unless they are expressly excepted or circumstances exist to rebut the presumption, a conveyance of land passes the mines and minerals therein (*m*). If, however, the ownership of the mines and minerals has been previously

sale (Sale of Land by Auction Act, 1867 (30 & 31 Vict. c. 48), s. 7; *Delves* v. *Delves* (1875), L. R. 20 Eq. 77); and see titles MISREPRESENTATION AND FRAUD, pp. 653 *et seq.*, *post*; SALE OF LAND.

(*b*) *Jennings* v. *Broughton* (1853), 17 Beav. 234, 238; affirmed (1854), 5 De G. M & G. 126, C. A., *Lagunas Nitrate Co.* v. *Lagunas Syndicate*, [1899] 2 Ch. 392, C. A.

(*c*) *Attwood* v. *Small* (1838), 6 Cl. & Fin. 232, H. L.; *Jennings* v. *Broughton*, *supra*; *Haywood* v. *Cope* (1858), 25 Beav. 140, 148.

(*d*) *Lagunas Nitrate Co.* v. *Lagunas Syndicate*, *supra*, at pp. 423, 433, C. A.

(*e*) *Davis* v. *Shepherd* (1866), 1 Ch. App. 410, *per* TURNER, L.J., at p. 419; see title MISTAKE

(*f*) *Ridgway* v. *Sneyd* (1854), Kay, 627, 635.

(*g*) *Jennings* v. *Broughton*, *supra*.

(*h*) *Ibid.*

(*i*) *Ernest* v. *Vivian* (1863), 33 L. J. (CH.) 513; *Erlanger* v. *New Sombrero Phosphate Co.* (1878), 3 App. Cas. 1218; *Lagunas Nitrate Co.* v. *Lagunas Syndicate*, *supra*.

(*k*) *Gibbs* v. *David* (1875), L. R. 20 Eq. 373.

(*l*) Real Property Act, 1845 (8 & 9 Vict. c. 106), s. 2; see title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 362. Under the old law open mines were corporeal hereditaments and lay in livery (Shep. Touch. 96, ed. Preston). There was some doubt whether unopened mines were corporeal or incorporeal hereditaments (see *ibid.*); *Wilkinson* v. *Proud* (1843), 11 M. & W. 33; *Carlyon* v. *Lovering* (1857), 1 H. & N. 784. For forms of descriptions and conveyance of mines and minerals, see Encyclopædia of Forms and Precedents, Vol. IX., p. 126; Vol. XII., p. 761.

(*m*) *Harris* v. *Ryding* (1839), 5 M. & W. 60, *per* ALDERSON, B., at p. 73; *Spoor* v. *Green* (1874), L. R. 9 Exch. 99, 107; *Jersey* (*Earl*) v. *Neath Poor Law Union Guardians* (1889), 22 Q. B. D. 555, 558, C. A.

SECT. 1. Sale.

severed from the ownership of the land, the title to them remains unaffected by such conveyance (*n*), and probably the result is the same where the person conveying is only entitled to an undivided share of the minerals (*o*). In various cases conveyances of land taken in the exercise of compulsory powers (*p*) are deemed not to include the minerals, except such parts thereof as are necessary to be dug or carried away or used in the construction of the works, unless the minerals are expressly conveyed (*a*). The purchaser, however, in such cases, acquires the whole soil except the minerals (*b*).

Conveyance of manor.

A conveyance of a manor passes mines, minerals, or quarries reputed or known as part, parcel, or member thereof (*c*). A conveyance by the Crown as lord of a manor of coal mines found within the commons, wastes, or marshes within the manor passes coal under the foreshore of a river (*d*).

Land adjoining railway or canal.

A conveyance of land adjoining a railway or a canal does not pass any part of the minerals under the railway (*e*) or the canal (*f*), although such minerals are vested in the person conveying.

Exception of mines from conveyance.

1394. Mines and minerals may be excepted from a grant of land, and are properly the subject of an exception and not of a reservation (*g*), and consequently, as the property in the mines and minerals remains in the grantor, words of limitation are unnecessary (*h*). It is a question of construction whether in any particular case the words used amount to an exception of mines or minerals (*i*)

(*n*) *Denison* v. *Holiday* (1858), 3 H. & N. 670, Ex. Ch.

(*o*) *Wright* v. *Leigh* (1890), cited in MacSwinney, Law of Mines, Quarries, and Minerals, 3rd ed., p. 201.

(*p*) If a railway company purchases by agreement lands over which it has compulsory powers, the statement in the text, *supra*, holds good (*Elliot* v. *North Eastern Rail. Co.* (1863), 10 H. L. Cas. 333).

(*a*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 77; Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 18; Public Health Act, 1875 (Support of Sewers) Amendment Act, 1883 (46 & 47 Vict. c. 37), s. 3. The purchaser may become entitled to a conveyance of the minerals, if they are expressly named in the notice to treat (*Errington* v. *Metropolitan District Rail. Co.* (1882), 19 Ch. D. 559, C. A.). As to the construction of a conveyance to a railway company expressly excepting mines and minerals, see *Midland Rail. Co. and Kettering, Thrapston, and Huntingdon Rail. Co.* v. *Robinson* (1889), 15 App. Cas. 19. See, generally, title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 50, 51.

(*b*) *Pountney* v. *Clayton* (1883), 11 Q. B. D. 820, C. A., *per* BRETT, M.R., at p. 833; *Ruabon Brick and Terra Cotta Co.* v. *Great Western Rail. Co.*, [1893] 1 Ch. 427, C. A.; *Re Gerard (Lord) and London and North Western Rail. Co.*, [1895] 1 Q. B. 459, C. A.

(*c*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 6.; and see title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 470. As to the effect of general words, apart from the Act, see *A.-G.* v. *Ewelme Hospital* (1853), 17 Beav. 366, 386. Mines severed from a manor cannot be reunited so as to become parcel of it (*Revell* v. *Jodrell* (1788), 2 Term Rep. 415).

(*d*) *A.-G.* v. *Hanmer* (1858), 27 L. J. (CH.) 837.

(*e*) *Thompson* v. *Hickman*, [1907] 1 Ch. 550.

(*f*) *Chamber Colliery Co.* v. *Rochdale Canal Co.*, [1895] A. C. 564.

(*g*) *Cardigan (Earl)* v. *Armitage* (1823), 2 B. & C. 197; *Doe* d. *Douglas* v. *Lock* (1835), 2 Ad. & El. 705; *Proud* v. *Bates* (1865), 34 L. J. (CH.) 406; *Hamilton (Duke)* v. *Graham* (1871), L. R. 2 Sc. & Div. 166; *Eardley* v. *Granville* (1876), 3 Ch. D. 826, 834; *Batten Pooll* v. *Kennedy*, [1907] 1 Ch. 256.

(*h*) Shep Touch. (ed. Preston) 100.

(*i*) *Hamilton (Duke)* v. *Dunlop* (1885), 10 App. Cas. 813.

or to a regrant of a right to work (*k*). If land is sold for a specific purpose and minerals are expressly excepted in the conveyance, the minerals may nevertheless be removed so far as may be necessary to enable the land to be employed for the purpose for which it was sold (*l*).

Construction of covenants in conveyance.

1395. Where a conveyance contained a covenant to pay, for all coal found, £40 per acre, and to pay a yearly sum of £40 until the total amount was paid, "found" was construed to mean "ascertained to be" (*m*).

A covenant for quiet enjoyment contained in a conveyance of land not excepting mines and minerals, is not broken if the surface of the land subsides owing to the minerals having been worked out prior to the date of the grant (*n*).

Reservation of rentcharge in respect of minerals.

1396. A rentcharge reserved in respect of coal raised from the property is not void as a perpetuity (*o*).

SECT. 2.—*Enfranchisement.*

Enfranchisement.

1397. In the case of a common law enfranchisement (*p*) the mines and minerals, unless expressly excepted, pass to the tenant as part of the freehold. In the case of an enfranchisement under the Copyhold Act, 1894 (*q*), the rights of the lord or tenant in any mines or minerals in or under the enfranchised lands are not affected by the enfranchisement unless with the express consent in writing of the lord or tenant entitled thereto (*r*).

SECT. 3.—*Inclosure.*

Ownership of mine under waste of a manor.

1398. The minerals under the waste of a manor are the property of the lord by virtue of his ownership of the soil. His power of dealing with the minerals under the waste is, however, restricted by the rights enjoyed by the commoners over the surface (*s*). The rights of the commoners are extinguished by inclosure (*t*), and the

(*k*) *Sutherland (Duke)* v. *Heathcote*, [1892] 1 Ch. 475, C. A.; *Chetham* v. *Williamson* (1804), 4 East, 469; *Mountjoy (Lord)* v. *Huntington (Earl)* (1583), Godb. 17.

(*l*) *Robinson* v. *Milne* (1884), 53 L. J. (CH.) 1070; see also *Jersey (Earl)* v. *Neath Poor Law Union Guardians* (1889), 22 Q. B. D. 555, C. A.; *Glasgow (Lord Provost and Magistrates)* v. *Farie* (1889), 13 App. Cas. 657.

(*m*) *Jowett* v. *Spencer* (1847), 1 Exch. 647, Ex. Ch.

(*n*) *Spoor* v. *Green* (1874), L. R. 9 Exch. 99. A covenant for quiet enjoyment contained in a grant of land excepting the minerals with power to work is broken if the surface of the land subsides owing to workings subsequent to the grant under a lease, giving power to let down the surface, made prior to the grant (*Taylor* v. *Shafto* (1867), 8 B. & S. 228, Ex Ch.; see also *Dennett* v. *Atherton* (1872), L. R. 7 Q. B. 316, Ex. Ch.). As to the operation of this covenant, see, generally, titles DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 480, 481; LANDLORD AND TENANT, Vol. XVIII., pp. 527 *et seq.*

(*o*) *Morgan* v. *Davey* (1883), Cab. & El. 114; see title PERPETUITIES.

(*p*) See title COPYHOLDS, Vol. VIII., pp. 111 *et seq.*

(*q*) 57 & 58 Vict. c. 46.

(*r*) See title COPYHOLDS, Vol. VIII., p. 127. As to enfranchisement by promoters on compulsory purchase, see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 137.

(*s*) As to the lord's right of working, see p. 509, *ante*.

(*t*) As to inclosure generally, see title COMMONS AND RIGHTS OF COMMON, Vol. IV., pp. 535 *et seq.*

SECT. 3. Inclosure.

lord, unless his rights in the soil have been interfered with by the method of inclosure, may then sell, lease, or deal with the minerals as he pleases.

Inclosure by the lord.

1399. The lord, as owner of the soil (*a*), may under the Statutes of Merton (*b*) and Westminster the Second (*c*), but subject to the necessity of giving certain notices (*d*) and obtaining the consent of the Board of Agriculture and Fisheries (*e*), inclose as against common of pasture, but, except by virtue of a special custom (*f*), which to be reasonable must involve leaving a sufficiency for the commoners (*g*), he may not inclose against common of turbary or estovers (*h*), or a right to dig sand or gravel (*i*) or to get stone (*j*), unless the place inclosed is such that the right of the commoner is incapable of exercise therein (*k*).

Inclosure under private Inclosure Acts.

1400. As under the statutes referred to in the preceding paragraph (*l*) the whole of a waste could not be inclosed, and such procedure is inapplicable to common fields, recourse was formerly had for that purpose to private Acts of Parliament, whereunder the land to be inclosed was allotted to the persons having interests therein in severalty. Under such Acts, in the absence of provisions as to the mines and minerals, these *primâ facie* pass to the allottees as part of the soil (*m*). The mines and minerals may, however, be reserved to the lord either expressly (*n*) or by implication (*o*). Whether any and what minerals (*p*), under what lands (*q*), and

(*a*) *Folkard* v. *Hemmett* (1776), 5 Term Rep. 417, n.

(*b*) (1235-6) 20 Hen. 3, c. 4.

(*c*) (1285) 13 Edw. 1, c. 46.

(*d*) Commons Act, 1876 (39 & 40 Vict. c. 56), s. 31; see title COMMONS AND RIGHTS OF COMMON, Vol. IV., p. 509.

(*e*) Law of Commons Amendment Act, 1893 (56 & 57 Vict. c. 57), s. 2.

(*f*) *Arlett* v. *Ellis* (1827), 7 B. & C. 346; *Lascelles* v. *Onslow* (*Lord*) (1877), 2 Q. B. D. 433.

(*g*) *Lascelles* v. *Onslow* (*Lord*), *supra*; see *Bateson* v. *Green* (1793), 5 Term Rep. 411.

(*h*) *Lascelles* v. *Onslow* (*Lord*), *supra*.

(*i*) *Duberley* v. *Paye* (1788), 2 Term Rep. 391; *Grant* v. *Gunner* (1809), 1 Taunt. 435.

(*j*) *Heath* v. *Deane*, [1905] 2 Ch. 86.

(*k*) *Peardon* v. *Underhill* (1850), 16 Q. B. 120; see title COMMONS AND RIGHTS OF COMMON, Vol. IV., p. 508.

(*l*) See notes (*b*) and (*c*), *supra*.

(*m*) *Townley* v. *Gibson* (1788), 2 Term Rep. **701** (where an exception of royalties and manorial rights was held insufficient to prevent the minerals passing to the allottees).

(*n*) See, *e.g.*, the Acts referred to in *Ewart* v. *Graham* (1859), 7 H. L. Cas. 331; *Robinson* v. *Wray* (1866), L. R. 1 C. P. 490; *Butterknowle Colliery Co., Ltd.* v. *Bishop Auckland Industrial Co-operative Co.*, [1906] A. C. 305, see title COMMONS AND RIGHTS OF COMMON, Vol. IV., p. 573.

(*o*) *Micklethwait* v. *Winter* (1851), 6 Exch. 644.

(*p*) As to the meaning of an exception of mines and minerals in an Inclosure Act, see *Rosse* (*Earl*) v. *Wainman* (1845), 14 M. & W. 859; *Micklethwait* v. *Winter*, *supra*; *A.-G.* v. *Welsh Granite Co.* (1887), 35 W. R. 617, C. A.; compare *North British Railway* v. *Budhill Coal and Sandstone Co.*, [1910] A. C. 116, and see pp. 506, 507, *ante*.

(*q*) *Pretty* v. *Solly* (1859), 26 Beav. 606; *Wakefield* v. *Buccleuch* (*Duke*) (1867), L. R. 4 Eq. 613; *Buccleuch* (*Duke*) v. *Wakefield* (1870), L. R. 4 H. L. 377 (mines under allotments).

with what powers of working (*r*) are reserved are questions depending for their solution upon the true construction of the particular Act under which the inclosure is made.

Inclosure by Board of Agriculture

1401. An application to the Board of Agriculture and Fisheries for a provisional order for the inclosure or regulation of a common must comprise a statement as to the mines, minerals, and valuable strata (if any) under the same (*a*). The provisional order itself, among other matters relating to rights in the soil and minerals (*b*), will contain provisions as to entry on the surface of lands to be allotted for the purpose of working, and as to compensation for surface damage (*c*) where the minerals are reserved to the lord (*d*).

Reservation of rights of working.

If the provisional order states that the right and interest of the lord has been estimated exclusively of his right and interest in the mines, minerals, stone, and other substrata, the lord is entitled, on making request in writing, to have reserved or awarded to him reasonable rights of working, and such rights may be awarded either subject or not to compensation for damage occasioned to the surface (*e*). The rights of working may be made exercisable in respect of minerals belonging to the lord situated under lands other than the lands allotted, whether within or without the manor (*f*).

Minerals in regulated pasture.

1402. If any part of the land dealt with on inclosure be converted into regulated pasture, the mines under the part so converted may with the consent of the lord and a majority in value of the other persons interested be reserved to the lord, and the mines under the parts allotted in severalty become the property of the persons entitled to the allotments (*g*). If not so dealt with, the mines beneath the regulated pasture vest in the persons having rights therein in proportion to their shares (*h*).

When minerals not affected by inclosure.

1403. The property in mines and minerals which have been severed from the surface before the inclosure, and all incidental rights, remain unaffected by the inclosure if not compensated for

(*r*) *Midgley* v. *Richardson* (1845), 14 M. & W. 595; *Bowes* v. *Ravensworth (Lord)* (1855), 15 C. B. 512; *Hayles* v. *Pease and Partners, Ltd*, [1899] 1 Ch. 567. As to leaving support, see title COMMONS AND RIGHTS OF COMMON, Vol. IV., pp. 573, 574.

(*a*) Commons Act, 1876 (39 & 40 Vict. c. 56), s. 10; see as to the procedure for inclosure and regulation, title COMMONS AND RIGHTS OF COMMON, Vol. IV., pp. 540 *et seq.*

(*b*) See title COMMONS AND RIGHTS OF COMMON, Vol. IV., pp. 545, 546, and see *ibid.*, 546, note (*l*).

(*c*) See *Allaway* v. *Waystaff* (1859), 4 H. & N. 681, decided on the construction of the Dean Forest (Mines) Act, 1838 (1 & 2 Vict. c. 43).

(*d*) Inclosure Act, 1859 (22 & 23 Vict. c. 43), s. 1. The compensation may be payable wholly by the lord or other owner of minerals or wholly by the owners of allotments, or partly by one and partly by the others (*ibid.*, s. 2). For the powers which may be made exercisable by the mineral owners, see *ibid.*, s. 3.

(*e*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 76; see title COMMONS AND RIGHTS OF COMMON, Vol. IV., p. 572.

(*f*) Inclosure Commissioners Act, 1851 (14 & 15 Vict. c. 53), s. 9.

(*g*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 97.

(*h*) *Ibid.*, s. 116; and see title COMMONS AND RIGHTS OF COMMON, Vol. IV., p. 568

SECT. 3. Inclosure.

Mines leased before the inclosure are also unaffected (*i*). Mines and minerals under inclosures of more than twenty years' standing are not to be adversely affected by any inclosure proceedings (*k*).

Repair of roads.

1404. Allotments may be made for the purpose of supplying stone gravel and other materials for repairing roads and ways (*l*).

SECT. 4.—*Where the Title is Registered.*

Registration of title to

1405. The title to mines and minerals, the ownership of which is severed from that of the land in which they are situated, may be registered (*m*), but registration is not compulsory (*n*). Mines and minerals may also be registered as parcel of the land under which they are situated, either by implication as included in the expression "land" (*o*), or by express entry on the register (*p*). Mines and minerals under registered land may be severed from the surface either by registered transfer (*q*) or by an unregistered instrument (*r*).

(*i*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 98.

(*k*) Inclosure Act, 1847 (10 & 11 Vict. c. 111), s. 3.

(*l*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 73; and see title COMMONS AND RIGHTS OF COMMON, Vol IV., pp 595 *et seq.*

(*m*) Land Transfer Act, 1875 (38 & 39 Vict. c 87), ss 17, 82. As to registration of title to land, see, generally, title REAL PROPERTY AND CHATTELS REAL.

(*n*) Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 24 (1). It has been suggested that the owner of severed mines and minerals must register his title for his own protection, as the Land Transfer Act, 1875 (38 & 39 Vict c 87), s. 18, amended by the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), Sched. I., no longer provides that rights to mines and minerals and subsidiary rights shall be deemed not to be incumbrances if created after the date of first registration or the commencement of the Act. But the word "land" in the Land Transfer Act, 1875 (38 & 39 Vict. c. 87), ss. 30—33, 35—38, (the transfer sections), as amended by the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), Sched. I., only comprises mines and minerals if they are parcel of the land. If severed they would, therefore, not be affected by a transfer of the land. But see the Land Transfer Act, 1875 (38 & 39 Vict. c. 87), s. 7, as to the effect of first registration.

(*o*) Land Transfer Act, 1875 (38 & 39 Vict. c. 87), s. 7.

(*p*) *Ibid.*, s. 18. The express entry will be made if the mines have been opened and worked by the proprietor or his predecessors in title or any person claiming under him or them, and if it does not appear from the title or otherwise that the minerals are vested in some other person, or in any other case, if it is proved to the satisfaction of the registrar that the mines and minerals are vested in the proprietor (Land Transfer Rules, 1903, r. 213) [Stat. R. & O. Rev., Vol. VII, Land (Registration) England, pp. 33 *et seq.*]. The expression "mines and minerals" in the rules includes rights of entry, search and user, and other rights and reservations incidental to or required for the purpose of giving effect to the enjoyment of rights to or property in mines and minerals (*ibid.*, r. 1). Where it is proved to the satisfaction of the registrar that land registered or about to be registered is subject to rights as to mines and minerals, he must enter notice of such rights on the register (Land Transfer Act, 1875 (38 & 39 Vict. c. 87), s. 18, as amended by the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), Sched. I.; see also Land Transfer Rules, 1903, r. 214). Notes as to the ownership of minerals are made in the property register (*ibid.*, r. 3).

(*q*) Land Transfer Act, 1875 (38 & 39 Vict. c. 87), s. 18; Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 24 (1). If the severance is effected by a transfer of land without the mines and minerals or any of them, the transferor will be registered as proprietor of the excepted mines or minerals (Land Transfer Rules, 1903, r. 134).

(*r*) Land Transfer Act, 1875 (38 & 39 Vict. c. 87), s. 49. As to the effect of

Application for the registration of mines and minerals severed from the land is made and proceeded with in like manner as in the case of other hereditaments, subject to such modifications as the nature of the case may require and the registrar approve (*s*). SECT. 4. Where the Title is Registered.

The conveyance of mines and minerals the title to which is registered is effected by the use of transfers in the specified form (*t*). Form of conveyance.

Part VIII.—Mortgages.

SECT. 1.—*Provisions usually Inserted.*

1406. Mortgages (*a*) of mineral property generally contain provisions similar to those inserted in mortgages of other descriptions of property of the like tenure. Owing, however, to the wasting nature of the property, it is usual to provide for the repayment by instalments of the sum advanced (*b*), or by the creation of a sinking fund (*c*). It is also desirable to provide that, in case of default, the mortgagee may enter upon the property and work the mine and make all proper expenditure for that purpose (*d*). Form of mortgage of mines.

SECT. 2.—*Mortgagee's Remedies.*

1407. A mortgagee (*e*) of an open mine and of the fixed plant used for the working thereof may obtain the appointment of a receiver and manager, although the business carried on is not in terms comprised in his security (*f*). Receiver and manager.

this provision generally, see *Capital and Counties Bank, Ltd.* v. *Rhodes*, [1903] 1 Ch. 631, C. A.

(*s*) Land Transfer Rules, 1903, r. 71. On registration a plan of the surface and such other plans and sections and such descriptions as the registrar may deem necessary for the purpose of identifying the mines and minerals, and full particulars of existing rights of access and working intended to be entered in the register, must be deposited in the registry (*ibid*, r. 74)

(*t*) *Ibid.*, rr. 135, 136.

(*a*) For the general law of mortgage, see title MORTGAGE

(*b*) For a form, see Encyclopædia of Forms and Precedents, Vol. VIII., p. 533.

(*c*) For a form, see Encyclopædia of Forms and Precedents, Vol. VIII., p. 646; or similar provision may be made by means of a sinking fund policy

(*d*) In such case the mortgagee will on taking an account be allowed all proper expenditure, and, in a redemption action, will not be deprived of costs if he has refused to furnish an account at his own expense (*Norton* v. *Cooper* (1854), 5 De G. M. & G. 728, C. A.). As to the rights of a mortgagee in possession of a mine, see pp. 518, 525, *ante*.

(*e*) For a general statement as to the remedies of a mortgagee, see title MORTGAGE: only a few points special to mortgages of mineral property are here dealt with

(*f*) *Campbell* v. *Lloyd's, Barnett's and Bosanquet's Bank, Ltd.* (1889), [1891] 1 Ch. 136, n.; *County of Gloucester Bank* v. *Rudry Merthyr Steam and House Coal Colliery Co.*, [1895] 1 Ch. 629, C. A.; see also *Peek* v. *Trinsmaran Iron Co.* (1876), 2 Ch. D. 115 (a debenture-holders' case); and see title RECEIVERS. Where a mining property held for a short term was subject to several mortgages, only one time to redeem was allowed to the successive incumbrancers (*Lewis* v. *Aberdare and Plymouth Co.* (1884), 53 L. J. (CH.) 741).

SECT. 2. **Mortgagee's Remedies.**

Special order for foreclosure.

A mortgagee of land containing minerals which have been leased may obtain a foreclosure order entitling him to apply for payment of rents arising under the lease received subsequently to the date of the order without any further certificate, and without allowing any further period for redemption (*g*).

Mortgage of undivided share in mine.

A mortgagee of an undivided share in a mine is entitled to the same remedy in account against the owners of the other shares as his mortgagor (*h*).

Part IX.—Leases.

SECT. 1.—*Agreements for Leases.*

Parcels must be defined.

1408. The minerals intended to be included in an agreement for a lease (*i*) must be properly defined in it, otherwise the agreement will be unenforceable. Uncertainty may arise either from an imperfect enumeration of the minerals to be dealt with (*k*), or an indefinite description of the area under which they are situated (*l*). A description by name of the area is sufficient if the boundaries can be ascertained (*m*), and an agreement for the lease of a particular vein is not void merely because the vein cannot be found (*n*).

Dead rents and royalties.

1409. An agreement for a lease usually contains stipulations as to the dead rents and other rents and royalties to be reserved by, and the covenants and provisions to be inserted in, the lease; but the omission to provide for the payment of a dead rent does not render the agreement so unequal as to be unenforceable (*o*).

Usual provisions.

1410. Sometimes, instead of enumerating the clauses to be inserted, the agreement provides that the lease shall contain all usual clauses. Under such an agreement the parties are entitled to have inserted any provisions incidental to the matters comprised in the agreement (*p*); thus, where the agreement contains stipulations as to working, the lessor is entitled to have inserted a covenant allowing

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(*g*) *Coleman* v. *Llewellin* (1886), 34 Ch. D. 143, C. A.

(*h*) *Bentley* v. *Bates* (1840), 4 Y. & C. (EX.) 182. As to the rights of co-owners, see pp. 511, 512, 525, 526, *ante*.

(*i*) As to leases and agreements for leases generally, see title LANDLORD AND TENANT, Vol. XVIII., pp. 366 *et seq.*; and as to the cost of leases and agreements for leases and preliminary negotiations, see *ibid.*, pp. 402, 403. For forms of agreements for mining leases, see Encyclopædia of Forms and Precedents, Vol. VIII., pp. 256 *et seq.*

(*k*) *Price* v. *Griffith* (1851), 1 De G. M. & G. 80, C. A. (agreement to lease coals etc.).

(*l*) *Lancaster* v. *De Trafford* (1862), 31 L. J. (CH.) 554 (description of ironstone as situate under lands at Patricroft; Patricroft being a district without defined boundaries). In *Davis* v. *Shepherd* (1866), 1 Ch. App. 410, the agreement in question defined the minerals by reference to the supposed line of a fault and approximate acreage, but the fault did not run in the direction supposed, and would have included a larger area. The agreement was held to be unenforceable.

(*m*) *Haywood* v. *Cope* (1858), 25 Beav. 140.

(*n*) *Jefferys* v. *Fairs* (1876), 4 Ch. D. 448.

(*o*) *Walters* v. *Morgan* (1861), 3 De G. F. & J. 718

(*p*) *Blakesley* v. *Whieldon* (1841), 1 Hare, 176.

him to enter and inspect the mine (*q*). Under such an agreement a lessor is entitled to have inserted a proviso for re-entry on non-payment of rent, but such an agreement does not authorise the insertion of a proviso for re-entry on breach of any other provision (*r*), nor of a provision for forfeiture if the lessee shall become bankrupt or make an arrangement with his creditors (*s*), nor of a covenant not to assign without licence (*t*), nor a power for the lessee to determine the lease if the mine cannot be properly worked (*a*).

SECT. 2.—*Construction of Leases.*

SUB-SECT. 1.—*Parcels.*

Description of parcels.

1411. Mines and minerals included in a demise are usually described by reference to the surface under which they lie. When a plan is indorsed on or annexed to the lease and referred to therein the plan ought to be looked at as part of the description (*b*). If there is any discrepancy between the plan and description, the description, if clear, will prevail (*c*), but endeavour should be made to reconcile any apparent discrepancy (*d*). Where the superficial limits of demised mines are ascertained it is sometimes a question of construction what seams or veins are included in the demise (*e*).

SUB-SECT. 2.—*Rights of Working.*

Rights of working.

1412. A lease of mines or minerals includes by implication a right to get them (*f*). The incidental power, however, warrants nothing beyond what is strictly necessary for the convenient working of the minerals (*g*), and it is usual in a mining lease to grant express liberty to work and to do such other things as, in the particular instance, are contemplated as being desirable for that purpose (*h*). The grant of express powers does not limit the powers implied by the demise (*i*). Express powers must be exercised *bonâ fide* in a reasonable course of working (*k*).

(*q*) *Blakesley* v. *Whielden* (1841), 1 Hare, 176.

(*r*) *Hodgkinson* v. *Crowe* (1875), 10 Ch. App. 622; see title LANDLORD AND TENANT, Vol. XVIII., pp. 388, 389.

(*s*) *Hodgkinson* v. *Crowe* (1875), L. R. 19 Eq. 591.

(*t*) *Ibid.*

(*a*) *Strelley* v. *Pearson* (1880), 15 Ch. D. 113.

(*b*) *Lyle* v. *Richards* (1866), L. R. 1 H. L. 222; see also title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 467.

(*c*) *Taylor* v. *Parry* (1840), 9 L. J. (C. P.) 298.

(*d*) *Brain* v. *Harris* (1855), 10 Exch. 908.

(*e*) *Carr* v. *Benson* (1868), 3 Ch. App. 524; *Dugdale* v. *Robertson* (1857), 3 K. & J. 695.

(*f*) *Rowbotham* v. *Wilson* (1860), 8 H. L. Cas. 348, 360; *Ramsay* v. *Blair* (1876), 1 App. Cas. 701, 703; *Doe* d. *Rogers* v. *Price* (1849), 8 C. B. 894. As to powers of working where mines are included in leases of land, see pp. 515, 516, *ante*. As to surface rights generally, see pp. 506-510, *ante*.

(*g*) *Cardigan* (*Earl*) v. *Armitage* (1823), 2 B. & C. 197, 211; *Darcy* (*Lord*) v. *Askwith* (1618), Hob. 234; *Marshall* v. *Borrowdale Plumbago Mines and Manufacturing Co.* (1892), 8 T. L. R. 275.

(*h*) For forms of mining agreements and leases showing grants of liberties and other usual provisions, see Encyclopædia of Forms and Precedents, Vol. VIII., pp. 274 *et seq.*

(*i*) *Cardigan* (*Earl*) v. *Armitage*, *supra*; *Hodgson* v *Field* (1806), 7 East, 613; see *Whidborne* v. *Ecclesiastical Commissioners for England* (1877), 3 Ch. D. 375.

(*k*) *Honeywell Cotton Spinning Co.* v. *Marland*, [1875] W. N. 46. For forms

SECT. 2. Construction of Leases.

1413. If minerals cannot be got otherwise, the owner or lessee may in a reasonable way bore through land and minerals not included in the demise in order to reach them (*l*).

Power to sink shafts.

Obligation to sink shaft.

The grant of an express liberty to sink pits or shafts (*m*) imposes no obligation on the lessee to sink, even though at the time the lease was granted he did not own any adjoining mines (*n*), or although it appears from the lease that all parties contemplated that a shaft would be sunk (*o*), or that working by instroke is less advantageous (*p*), or that the lease contains a covenant that the mines will be delivered up at the end of the term in such a state that the working may be continued by the reversioner (*q*). If, however, the lease contains a covenant to work, and the mine cannot be worked otherwise, the lessee is bound to sink a shaft (*r*); and, in some cases, a covenant to work in a proper and workmanlike manner may impose a similar liability (*s*). If the lessee enters into an absolute covenant to sink a shaft, performance will not be excused because it would be useless or unprofitable (*t*). It is, of course, otherwise if the covenant be made subject to a contingency which happens (*a*). The measure of damages for breach of a covenant to sink a shaft is the sum which the lessor must expend in sinking (*b*).

Effect of liberty to sink shafts.

Liberty to sink a pit creates an interest in the land in respect of which compensation is payable if the surface is taken in the exercise of compulsory powers (*c*).

Duty to fence shafts.

A lessee, who sinks a shaft in land of which the surface is occupied by another, must keep the shaft properly fenced (*d*).

Instroke.

1414. Liberty to work a demised mine from an adjoining mine is called instroke. In the absence of express stipulation a lessee is not bound to sink a shaft from the surface, but may work by instroke (*e*), and may make use, for that purpose, of apertures lawfully made in any barrier which he has covenanted to leave between the demised mine and adjoining mines (*f*).

1415. Liberty to work an adjoining mine from the demised mine is called outstroke. Whether or not a lessee may work by outstroke

of leases containing liberties of working minerals, see Encyclopædia of Forms and Precedents, Vol VIII., pp. 274 *et seq.*

(*l*) *Re Gerard (Lord) and London and North Western Rail. Co.*, [1895] 1 Q. B. 459, 466, C. A.; compare *Gould* v *Great Western Deep Coal Co.* (1865), 2 De G. J. & Sm 600; see also *Harris* v. *Ryding* (1839), 5 M. & W. 60.

(*m*) As to what this power impliedly includes, see p. 584, *post*.

(*n*) *Jegon* v. *Vivian* (1871), 6 Ch. App. 742.

(*o*) *James* v. *Cochrane* (1853), 8 Exch. 556, Ex. Ch, *Jegon* v. *Vivian*, *supra*.

(*p*) *Wheatley* v. *Westminster Brymbo Coal Co.* (1869), L. R. 9 Eq. 538. As to instroke, see the text, *infra*.

(*q*) *Lewis* v. *Fothergill* (1869), 5 Ch. App. 103.

(*r*) *James* v. *Cochrane* (1852), 7 Exch. 170, *per* PARKE, B., at p. 178.

(*s*) *Lewis* v. *Fothergill*, *supra*.

(*t*) *Jervis* v. *Tomkinson* (1856), 1 H. & N. 195.

(*a*) *Hanson* v. *Boothman* (1810), 13 East, 22.

(*b*) *Pell* v. *Shearman* (1855), 10 Exch. 766, 769.

(*c*) *Re Masters and Great Western Railway*, [1901] 2 K. B. 84, C. A.

(*d*) *Williams* v. *Groucott* (1863), 4 B. & S. 149, and see pp. 585, 617, *post*.

(*e*) *Whalley* v. *Ramage* (1862), 10 W. R. 315; *Lewis* v. *Fothergill*, *supra*; *Jegon* v. *Vivian*, *supra*; and see the text, *supra*.

(*f*) *James* v. *Cochrane* (1853), 8 Exch. 556, Ex. Ch

depends on the extent of the demise. If access to the adjoining mine, sufficient for the purpose of working, can be obtained without entry on property not included in the lease, or without unwarranted user of any rights of way, the lessee may work by outstroke without express liberty to do so. In many cases the lease only grants to the lessee rights of way over the surface and through the shaft for the purpose of working the demised mine, and in such cases the lessee cannot work by outstroke, as he cannot use rights of way for purposes other than those for which they are granted (*g*).

Right to let down surface.

1416. If it is intended that the lessee shall be entitled to work so as to withdraw support from the surface, the lease should grant express liberty so to work (*h*). The mere fact of giving a right to sink pits and to work and get minerals is not sufficient to deprive the surface owner of his common law right of support (*i*). To displace this common law right permission to withdraw support must be given expressly or by implication (*k*). Cases of express permission present no difficulty; but the question whether or not permission is given by implication must be decided by consideration of the whole of the lease and of the state of knowledge at the time when, and the circumstances in which it was made, as to whether according to the local practice the minerals could be got without subsidence, of which parol evidence may be given (*l*). The test is whether the introduction of a clause to the effect that the mines must be worked so as not to let down the surface would or would not be inconsistent with the actual demise: if it would not, then the surface cannot be let down (*m*). A tenant for life may in exercise of his statutory powers grant a lease of the right to let down the surface (*n*).

SUB-SECT. 3.—*Consideration.*

Dead rent.

1417. It is usual in mining leases to reserve both a fixed annual rent (otherwise known as a dead rent or minimum rent) and royalties varying with the amount of minerals worked. The object of the fixed rent is to insure that the lessee will work the mine (*o*).

(*g*) As to the rights of the lessee in the cubical space occupied or formerly occupied by minerals, see pp. 508, 515, *ante*, and as to user of rights of way, see pp. 585 *et seq.*, *post*.

(*h*) But see note (*b*), p. 575, *post*.

(*i*) *Davis* v. *Treharne* (1881), 6 App. Cas. 460; *Butterknowle Colliery Co.* v. *Bishop Auckland Industrial Co-operative Co.*, [1906] A. C. 305, *per* LORD MACNAGHTEN, at p. 313. For the law prior to *Davis* v. *Treharne*, *supra*, see *Hadon* v. *Jeffcock* (1872), L. R. 7 Exch. 379. As to the right of support, see, further, pp. 570-583, *post*.

(*k*) *Davis* v. *Treharne*, *supra*; *Butterley Co., Ltd.* v. *New Hucknall Colliery Co., Ltd.*, [1910] A. C. 381.

(*l*) *Butterley Co., Ltd.* v. *New Hucknall Colliery Co., Ltd.*, *supra*; *Locker-Lampson* v. *Staveley Coal and Iron Co.* (1908), 25 T. L. R. 136.

(*m*) *Butterknowle Colliery Co.* v. *Bishop Auckland Industrial Co-operative Co.*, *supra*, *per* LORD LOREBURN, L.C., at p. 309. For cases in which it has been held that an implied right is granted, see *Butterley Co., Ltd.* v. *New Hucknall Colliery Co., Ltd.*, *supra*; *Locker-Lampson* v. *Staveley Coal and Iron Co.*, *supra* (overlying seams); *Smith* v *Darby* (1873), L. R. 7 Q.B. 716; *Shafto* v. *Johnson* (1863), 8 B. & S. 252, n.; *Brewer* v. *Rhymney Iron Co.*, [1910] 1 Ch. 766. Little reliance can be placed on the cases decided prior to *Davis* v. *Treharne*, *supra*.

(*n*) *Sitwell* v. *Londesborough* (*Earl*), [1905] 1 Ch. 460.

(*o*) *Re Aldam's Settled Estate*, [1902] 2 Ch. 46, 60, C. A.

SECT. 2. Construction of Leases.

If a fixed rent is reserved it is payable until the expiration of the term although the mine is not worked (*p*), or is exhausted during the currency of the term (*q*), or is not worth working (*r*), or is difficult or unprofitable to work owing to faults (*s*) or accidents (*t*), or even if the demised seam proves to be non-existent (*a*). Where a fixed rent is reserved to commence from the time when a certain quantity of minerals has been got and the lessee covenants to get that quantity without delay, the commencement of the payment will not be delayed should the lessee fraudulently avoid to complete the getting of the quantity (*b*).

Royalties.

1418. A royalty, in the sense in which the word is used in connection with mining leases, is a payment to the lessor proportionate to the amount of the demised mineral worked within a certain period. Usually the royalties are made to merge in the fixed rent by means of a provision that the lessee may, without any additional payment, work, in each period for which a payment of fixed rent is made, so much of the minerals as would, at the royalties reserved, produce a sum equal to the fixed rent. Mining is necessarily speculative, and by the reservation of royalties the lessor benefits proportionately to the success of the return.

Forms of reservation of royalties.

Reservations of royalties take different forms. Sometimes a reservation is made of a share of the mineral worked, with or without an option to the lessor to require instead an equivalent in money. This form of reservation is most frequently adopted in leases of metallic minerals (*c*). Sometimes the reservation is made of a sum in respect of a unit of mineral. Three different units are commonly made use of for this purpose, and the respective royalties are correspondingly known as acreage royalties, footage royalties, and tonnage royalties. In the case of an acreage royalty the unit is a superficial acre of the seam worked without regard to thickness (*d*). A footage rent is a species of acreage royalty, the unit being a superficial acre one foot in thickness (*e*). In the case of a tonnage royalty the unit is a ton weight (*f*). As a lessor may

(*p*) *Jegon* v. *Vivian* (1871), 6 Ch. App. 742, 747; *Jones* v. *Reynolds* (1836), 7 C. & P. 335.

(*q*) *R.* v. *Bedworth* (*Inhabitants*) (1807), 8 East, 387; *Bute* (*Marquis*) v. *Thompson* (1844), 13 M. & W. 487.

(*r*) *Haywood* v. *Cope* (1858), 25 Beav. 140, 149; *Strelley* v. *Pearson* (1880), 15 Ch. D. 113.

(*s*) *Mellers* v. *Devonshire* (*Duke*) (1852), 16 Beav. 252; *Ridgway* v. *Sneyd* (1854), Kay, 627.

(*t*) *Phillips* v. *Jones* (1839), 9 Sim. 519.

(*a*) *Jefferys* v. *Fairs* (1876), 4 Ch. D. 448. Possibly if the seam demised were found to have been previously worked out it would be treated as a case of mutual mistake (*Ridgway* v. *Sneyd*, *supra*); see title MISTAKE; but, as to the validity of an agreement for lease of a particular vein, although it cannot be found, see p. 556, *ante*.

(*b*) *Green* v. *Sparrow* (1725), 3 Swan. 408, n.

(*c*) For a lease containing this form of reservation, see Encyclopædia of Forms and Precedents, Vol. VIII., p. 376; and for forms of notice substituting payment in money for render in kind and *vice versâ*, where power to make such substitution is reserved, see *ibid.*, pp. 436, 437.

(*d*) For a form of lease reserving acreage royalty, see *ibid.*, p. 324.

(*e*) For a form of lease reserving footage royalty, see *ibid.*, p. 274.

(*f*) For a form of lease reserving tonnage royalty, see *ibid.*, p. 302.

SECT. 2. Construction of Leases.

reserve royalties in such form as he may consider most suitable or advantageous in any particular case, the questions which arise are questions of construction and the decided cases cannot be reduced to any principle generally applicable (*g*). Sometimes in colliery leases coal consumed in working is freed from royalty (*h*).

Average clause.

1419. Clauses are frequently inserted in leases whereby over-payments by the lessee in years in which the workings are less than those covered by the minimum or fixed rent are permitted to be recouped in subsequent years in which the workings are sufficient to produce royalties in excess of the minimum rent. Such clauses are known as average clauses (*i*).

Royalties on wayleaves.

1420. Royalties estimated in manner similar to royalties on demised minerals are often reserved in respect of minerals worked by way of outstroke from and brought through the demised mine (*k*) or over surface lands (*l*). If a wayleave is used without authority, the measure of damages is the sum which would properly have been payable in royalty if the right of wayleave had been granted (*m*).

SECT. 3.—*Covenants by Lessee.*

SUB-SECT. 1.—*Payment of Rent and Royalties* (*n*).

Action on covenant for rent and royalties.

1421. An action on a personal covenant in respect of the payment of royalties (*n*) may be brought at any time within twenty years (*o*). In an action to recover rents and royalties, interest at the rate of 4 per cent. from the date of the writ may also be claimed (*p*). An action for an account does not lie against a person entitled in

(*g*) *Clifton* v. *Walmesley* (1794), 5 Term Rep 564 (royalty payable on sums for which coal should sell at pit's mouth; construction of covenant held not affected by mistaken conduct of parties); see also *Gerrard* v. *Clifton* (1798), 7 Term Rep. 676; *Shrewsbury* (*Earl*) v. *Gould* (1819), 2 B. & Ald. 487 (as to duty of lessee to burn lime); *Edwards* v. *Rees* (1836), 7 C. & P. 340 (royalty payable on moneys which should arise from sales, no allowance for bad debts); *Bishop* v. *Goodwin* (1845), 14 M. & W. 260 (covenant to pay royalties quarterly, no average over other quarters of same year); see also *Buckley* v. *Kenyon* (1808), 10 East, 139; *Cartwright* v. *Forman* (1866), 7 B. & S. 243 (delivery of coal for lessor's use when mine not workable at a profit); *Morley* v. *Yorkshire Lead Mines*, [1890] W. N. 47 (royalty payable on dressed or undressed ore); *Elliot* (*Sir George*) v. *Rokeby* (*Lord*) (1881), 7 App. Cas. 43 (as to deduction allowed for expenses of winning where several seams).

(*h*) *Senhouse* v. *Harris* (1862), 5 L. T. 635.

(*i*) *Clayton* v. *Penson*, [1878] W. N. 158, H. L. (construction of an average clause). For forms of average clauses, see Encyclopædia of Forms and Precedents, Vol. VIII., pp. 312, 352, 365.

(*k*) *Senhouse* v. *Harris*, *supra*.

(*l*) *Great Western Rail. Co.* (*Directors etc.*) v. *Rous* (1870), L. R. 4 H. L. 650.

(*m*) *Jeyon* v. *Vivian* (1871), 6 Ch. App. 742; *Livingstone* v. *Rawyards Coal Co.* (1880), 5 App. Cas. 25; *Whitwham* v. *Westminster Brymbo Coal and Coke Co.*, [1896] 2 Ch. 538, C. A.

(*n*) As to the rights of a lessor on bankruptcy of the lessee, see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 199, 209, 269, and as to the lessor's rights where the lessee is a limited company in liquidation, see title COMPANIES, Vol. V., p. 514.

(*o*) *Darley* v. *Tennant* (1885), 53 L. T. 257; see title LIMITATION OF ACTIONS, Vol. XIX., pp. 97, 98.

(*p*) *Newton* v. *Nock* (1880), 43 L. T. 197.

SECT. 3. Covenants by Lessee.

equity who is in possession of the demised property, nor is he liable upon the covenants in the lease (*q*).

Indemnity against rents.

Where the assignee of a lease covenants with his assignor to pay the rents reserved by the lease so long as he shall be in possession, and at all times thereafter to indemnify his assignor against the rent payable under the lease, the covenant for indemnity is not restricted to the rents during the period while the assignee is in possession (*r*).

SUB-SECT. 2.—*As to Workings.*

Objects of covenants as to working.

1422. Covenants as to working are inserted in a mining lease either to ensure that the demised mine shall be worked continuously, or that it shall be worked in a particular manner, or in some cases to effect both objects. A lessee is not bound to work continuously or at all unless he undertakes to do so (*s*), and it is often a difficult question of construction into which of the above-mentioned classes a particular covenant falls (*t*).

Covenant to work continuously.

If a lessee covenants to work the demised mine continuously he is liable for breach of covenant though the working should prove difficult and unprofitable, or even impossible (*a*), and although the dead rent is paid (*b*); but a covenant to work continuously or at a certain rate may in some cases be construed to apply only to the minerals found, so that if none be discovered there is nothing to which the covenant can apply (*c*). Sometimes covenants to work are qualified so as to save the lessee from useless expense The extent of such qualification is a question of construction (*d*)

(*q*) *Walters* v. *Northern Coal Mining Co.* (1855), 5 De G. M. & G. 629; *Cox* v. *Bishop* (1857), 8 De G. M. & G. 815. *Clavering* v. *Westley* (1735), 3 P. Wms. 402, and *Wright* v. *Pitt* (1870), L. R. 12 Eq. 408, *contra*, cannot be relied on (see *Ramage* v. *Womack*, [1900] 1 Q. B. 116); and see title LANDLORD AND TENANT, Vol. XVIII., p. 588. As to the right to an account in equity, see *Parrott* v. *Palmer* (1834), 3 My & K. 632

(*r*) *Crossfield* v. *Morrison* (1849), 7 C. B. 286; and see title LANDLORD AND TENANT, Vol. XVIII., p. 594.

(*s*) *Quarrington* v. *Arthur* (1842), 10 M. & W. 335; *Wheatley* v. *Westminster Brymbo Coal Co.* (1869), L. R. 9 Eq. 538; *Jegon* v. *Vivian* (1871), 6 Ch. App. 742. A lessee who has not covenanted to work may by agreement with a third party limit his workings to a specified amount (*Forrest* v. *Merry and Cuninghame, Ltd.*, [1909] A. C. 417). For a form of notice requiring a map of workings, see Encyclopædia of Forms and Precedents, Vol. VIII., p. 438.

(*t*) *Walker* v. *Jeffreys* (1842), 1 Hare, 341; *Wheatley* v. *Westminster Brymbo Coal Co.*, *supra*; *Abinger* (*Lord*) v. *Ashton* (1873), L. R. 17 Eq. 358; *Charlesworth* v. *Watson*, [1906] A. C. 11.

(*a*) *Foley* v. *Addenbrooke* (1844), 13 M. & W. 174; *Jervis* v. *Tomkinson* (1856), 1 H. & N. 195; *Clifford* v. *Watts* (1870), L. R. 5 C. P. 577, 588; *Jegon* v. *Vivian* *supra*; *Charlesworth* v. *Watson*, *supra*; *Wigan Coal and Iron Co.* v. *Eckersley* (1910), 103 L. T. 468, H. L.; see *Kinsman* v. *Jackson* (1880), 42 L. T. 80, 558, C. A., where the question was one of construction. Possibly where the mine is drowned without the default of the lessee, the lessee may not be liable for not working; see *Walker* v. *Jeffreys*, *supra*. For a form of notice to determine lease in such a case, see Encyclopædia of Forms and Precedents, Vol. VIII., p. 440.

(*b*) *Whitehead* v. *Bennett* (1861), 9 W. R. 626; *Sampson* v. *Ingleby* (1872), 20 W. R. 587.

(*c*) *Clifford* v. *Watts*, *supra*.

(*d*) *Jones* v. *Shears* (1836), 7 C. & P. 346; *Foley* v. *Addenbrooke*, *supra*; *Griffiths* v. *Rigby* (1856), 1 H. & N. 237; *Newton* v. *Nock* (1880), 43 L. T

extrinsic evidence being admissible to explain the accepted meaning of the terms used (*e*).

Remedies on breach.

Specific performance of a covenant to work continuously cannot be obtained, as the court refuses to supervise the working of a mine (*f*). The measure of damages for breach of a covenant to work is the amount which would in all probability have been paid to the lessor if the mine had been worked (*g*); and a lessee may be relieved from such a covenant, where working is unduly expensive, on payment to the lessor of all that he would receive under the lease and surrendering the lease (*h*).

Covenant to work in a particular manner.

1423. A covenant to work a mine in a particular way, as in a workmanlike manner or in accordance with the method usually practised in the district (*i*), does not bind the lessee to work at all, but only to work in the way specified when he does work (*k*). If, however, stipulations as to the method of working are added to a covenant to work, such stipulations do not detract from the obligation to work, but impose an additional obligation (*l*).

How enforced.

A covenant to work in a particular way will not be enforced by an order for specific performance nor by an injunction prohibiting working in any other way (*m*), but an injunction may be obtained to prevent a lessee from doing a particular act which he has covenanted not to do (*n*).

Covenants to leave pillars and barriers.

1424. The specific covenants as to working most frequently contained in mining leases relate to the provision of pillars to support the roof or the surface, and of barriers to exclude water.

How enforced.

A covenant to leave pillars for support will be enforced by injunction (*o*), and if a lessee works pillars which he has covenanted to leave, he is liable for the damage thereby caused, whether to the

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197; compare *Swindell* v. *Birmingham Canal Navigations* (1860), 9 C. B. (N. S.) 241.

(*e*) *Clayton* v. *Greyson* (1836), 5 Ad. & El. 302.

(*f*) *Pollard* v *Clayton* (1855), 1 K. & J. 462, *Wheatley* v. *Westminster Brymbo Coal Co.* (1869), L. R. 9 Eq. 538; *Abinger* (*Lord*) v. *Ashton* (1873), L. R. 17 Eq. 358. As to specific performance generally, see title SPECIFIC PERFORMANCE.

(*g*) *Watson* v. *Charlesworth*, [1905] 1 K. B. 74, C. A.; affirmed, *sub nom.* *Charlesworth* v. *Watson*, [1906] A. C. 14.

(*h*) *Smith* v. *Morris* (1788), 2 Bro. C. C. 311; see *Phillips* v. *Jones* (1839), 9 Sim. 519; *Millers* v. *Devonshire* (*Duke*) (1852), 16 Beav 252; *Ridgway* v. *Sneyd* (1854), Kay, 627; *Sampson* v. *Ingleby* (1872), 27 L. T. 695, C. A. Relief, however, cannot be obtained from an absolute covenant to pay a minimum rent or to pay for a certain quantity of mineral whether got or not. For the difference between the cases, see *Ridgway* v. *Sneyd*, *supra*.

(*i*) A covenant to employ a particular method of working must be read in conjunction with the other provisions of the lease, and a different method may be adopted where necessary to avoid a breach of such other provisions (*Brewer* v. *Rhymney Iron Co.*, [1910] 1 Ch. 766).

(*k*) *Wheatley* v. *Westminster Brymbo Coal Co.*, *supra*; *Jegon* v. *Vivian* (1871), 6 Ch. App. 742, 757; *Abinger* (*Lord*) v. *Ashton*, *supra*.

(*l*) *Walker* v. *Jeffreys* (1842), 1 Hare, 341; *Jervis* v. *Tomkinson* (1856), 1 H. & N. 195; *Charlesworth* v. *Watson*, [1906] A. C. 14.

(*m*) *Wheatley* v. *Westminster Brymbo Coal Co*, *supra*; *Abinger* (*Lord*) v. *Ashton*, *supra*; *Moore* v. *Ulleoats Mining Co. Ltd*, [1908] 1 Ch. 575, 585.

(*n*) *Anon.* (1754), Amb. 209; *Wheatley* v. *Westminster Brymbo Coal Co.*, *supra*; and see title INJUNCTION, Vol. XVII., pp 243 *et seq.*

(*o*) *Mostyn* v. *Lancaster*, *Taylor* v. *Mostyn* (1883), 23 Ch. D. 583, C. A.; see title INJUNCTION, Vol. XVII, p. 240.

SECT. 3. Covenants by Lessee.

surface (*p*) or to the mine (*q*). He must also pay for the mineral contained in the pillars, less the cost of bringing it to the surface, but without any allowance for severing (*r*). A covenant to leave barriers may also be enforced by mandatory injunction (*s*).

If an act be prohibited both by the general law and by covenant the lessor may avail himself of either remedy (*t*).

SUB-SECT. 3.—*Repair, Drainage etc.*

Other covenants usually inserted.

1425. In addition to the covenants already dealt with, it is usual to insert in mining leases covenants as to repair; as to securing the mine against being drowned; as to compensation for surface damage; as to inspection of workings by the lessor; and as to the removal of machinery during or at the end of the term.

Repairs etc.

The questions which arise on covenants to repair are mainly questions of fact or construction (*a*). Covenants to repair (*b*) or to restore damaged surface (*c*) will not be enforced by a decree for specific performance.

Drainage.

In the absence of agreement, a lessee is not bound to drain the demised mine, and the fact that the lessor has a right to pass through the mine does not impose an obligation on the lessee to keep it free from water (*d*). Although a lease contains a covenant not to do any act which would tend to the drowning of the mine, the court will not restrain the lessee from removing pumping machinery during the term (*e*). But a covenant to pump may be enforced by an interlocutory injunction (*f*), and a covenant not to remove machinery at the end of the term will be enforced by injunction (*g*).

(*p*) *Hodgson* v. *Moulson* (1865), 18 C. B. (N. S.) 332. A mandatory injunction to restore fences injured by subsidence may be obtained (*Newton* v. *Nock* (1880), 43 L. T. 197).

(*q*) *Taylor* v. *Mostyn* (1886), 33 Ch. D. 226, C. A.

(*r*) *Ibid.*

(*s*) *Mexborough* (*Earl*) v. *Bower* (1813), 7 Beav. 127. Working a barrier is waste (*Marker* v. *Kenrick* (1853), 13 C. B. 188).

(*t*) *Ibid.*

(*a*) *Foley* v. *Addenbrooke* (1844), 13 M. & W. 174; *James* v. *Cochrane* (1853), 8 Exch. 556, Ex. Ch. As to the obligations of leases under covenants to deliver up in repair, see *Foley* v. *Addenbrooke, supra*; *Beaufort* (*Duke*) v. *Bates* (1862), 3 De G. F. & J. 381, C. A.

(*b*) *Abinger* (*Lord*) v. *Ashton* (1873), L. R. 17 Eq. 358, 376.

(*c*) *Flint* v *Brandon* (1803), 8 Ves. 159.

(*d*) *Payne* v. *Rocher Colliery Co.*, [1887] W. N. 37. In the absence of stipulation the lessor is entitled to go down the shaft to inspect the demised mine (*Lewis* v. *Marsh* (1849), 8 Hare, 97). For a form of notice of intention to inspect, see Encyclopædia of Forms and Precedents, Vol. VIII., p. 439.

(*e*) *Rolleston* v. *New* (1858), 4 K. & J. 640. The lessee may, however, by removing the machinery render himself liable to an action for damages (*ibid.*).

(*f*) *Goodrich* v. *Everglyn Coal Co.*, [1889] W. N. 152.

(*g*) *Hamilton* v. *Dunsford* (1857), 6 I. Ch. R. 412; and see title INJUNCTION, Vol. XVII., p. 240. Where a lessee covenanted to deliver up machinery at the end of the term with respect to which the lessor should have given notice to purchase at any time during the term, an injunction to restrain a breach was refused (*Talbot* v. *Ford* (1842), 13 Sim. 173). For form of such notice to purchaser, see Encyclopædia of Forms and Precedents, Vol. VIII., p. 439.

1426. A covenant to erect a smelting mill on land not part of the demised property has been held to run with the reversion (*h*), and covenants to make compensation for surface damage to run with the land (*i*).

SECT. 3. Covenants by Lessee.

Covenants running with the land.

SECT. 4.—*Covenant for Quiet Enjoyment.*

1427. If a lease contains no express covenant for quiet enjoyment a covenant for quiet enjoyment will be implied by the use of the words "demise" or "lot" or other equivalent words (*k*). The working of an upper stratum so as to cause falls in the demised mine is a breach of the covenant (*l*), but the working of an adjoining mine in a proper manner which unexpectedly causes flooding is not (*m*).

Quiet enjoyment.

Sometimes an act may be not only a breach of a covenant for quiet enjoyment, but wrongful as a derogation from the lessor's grant (*n*).

SECT. 5.—*Lessor's Remedies.*

SUB-SECT. 1.—*Distress.*

1428. Royalties, as well as a fixed or dead rent, may be distrained for (*o*). An express power to distrain, extending to chattels in adjoining or neighbouring mines in the occupation of the lessees, does not constitute the lease a bill of sale (*p*), and is binding upon assignees of such mines who take with notice (*q*).

Distress.

SUB-SECT. 2.—*Forfeiture.*

1429. It is now usual to insert in mining leases a power of re-entry, exercisable not only on non-payment of rent, but also on breach of covenant or condition (*r*). Sometimes the power is also made exercisable in case the mine is not worked for a specified

Forfeiture.

(*h*) *Sampson* v. *Easterby* (1829), 9 B. & C. 505, 516, affirmed, *sub nom. Easterby* v. *Sampson* (1830), 6 Bing. 644, Ex. Ch.; see *Dewar* v. *Goodman*, [1909] A. C. 72; *Ricketts* v. *Enfield Churchwardens*, [1909] 1 Ch. 544, and see title LANDLORD AND TENANT, Vol. XVIII., pp 584, 585.

(*i*) *Norval* v. *Pascoe* (1864), 34 L. J. (CH.) 82; *Dyson* v. *Forster*, *Dyson* v. *Seed*, *Quinn*, *Morgan etc.*, [1909] A. C. 98 A covenant by the lessee with "the owner or owners, occupier or occupiers for the time being" of the surface is effectual, although the surface owners are not parties to the lease, and may be enforced by the surface owners at the time of the demise and by their successors in title (*ibid.*).

(*k*) *Markham* v. *Paget*, [1908] 1 Ch. 697; *Mostyn* v. *West Mostyn Coal and Iron Co.* (1876), 1 C. P. D. 145; and see title LANDLORD AND TENANT, Vol. XVIII., pp. 525 *et seq.*

(*l*) *Shaw* v. *Stenton* (1858), 2 H. & N. 858.

(*m*) *Harrison, Ainslie & Co* v. *Muncaster*, [1891] 2 Q. B. 680, C. A.

(*n*) *Markham* v. *Paget*, *supra*. For a case where workings were restrained as inconsistent with a prior grant, see *Glasgow (Earl)* v. *Hurlet and Campsie Alum Co.* (1850), 3 H. L. Cas. 25.

(*o*) *Daniel* v. *Gracie* (1844), 6 Q. B. 145. As to distress generally, see title DISTRESS, Vol. XI., pp. 115 *et seq.*

(*p*) *Re Roundwood Colliery Co.*, *Lee* v. *Roundwood Colliery Co.*, [1897] 1 Ch. 373, C. A.; Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 6; see title BILLS OF SALE, Vol. III., pp. 11—15.

(*q*) *Daniel* v. *Stepney* (1874), L. R. 9 Exch. 185, Ex. Ch.

(*r*) See Encyclopædia of Forms and Precedents, Vol. VIII., p. 295.

SECT. 5. Lessor's Remedies.

period (*s*), or in case the lessee becomes bankrupt or makes an arrangement with his creditors, or, being a company, goes into liquidation (*t*). If a lease contains, instead of a power of re-entry, a provision that in certain events the lease shall be void the effect is the same, and the lease, on the happening of such events, will subsist until the lessor elects to determine it (*a*). In either case the demand for possession should be made without undue delay (*b*) and must be unequivocal (*c*).

SECT. 6.—*Determination by Lessee.*

Power to determine lease.

1430. In some cases mining leases contain a clause empowering the lessees to determine the tenancy so soon as the minerals are exhausted or in some other event (*d*). To determine the term effectively, all conditions, such as giving notice (*e*) or the performance of covenants (*f*), or otherwise, to which the exercise of the power is made subject must be complied with. A power for the lessee to give notice at any time authorises the lessee to give a notice expiring during the currency of a year (*g*). A power to determine in case of accident is not exercisable on account of an accident happening before the actual date of grant of the lease, but subsequent to the date therein expressed to be the commencement of the term (*h*). If a lessee continues in possession after the expiration of the notice, it is a question of fact whether he has waived the notice and continues to hold over as tenant (*i*).

(*s*) To avoid forfeiture in such case the working must be *bonâ fide* (*Doe* d. *Bryan* v. *Bancks* (1821), 4 B. & Ald. 401).

(*t*) See Encyclopædia of Forms and Precedents, Vol. VIII., at pp. 295, 296.

(*a*) *Doe* d. *Bryan* v. *Bancks* (1821), 4 B & Ald. 401; *Roberts* v. *Davey* (1833), 4 B. & Ad. 664; *James* v. *Young* (1884), 27 Ch. D. 652; and see title LANDLORD AND TENANT, Vol. XVIII., p. 530.

(*b*) *Bowser* v. *Colby* (1841), 1 Hare, 109. In a case where the delay was insufficient to deprive the lessor of the right to take proceedings, he was nevertheless compelled to allow the lessee an opportunity of putting himself in a position to comply with the covenant the breach of which was complained of (*Whitehead* v. *Bennett* (1861), 9 W. R. 626).

(*c*) *Moore* v. *Ullcoats Mining Co., Ltd.*, [1908] 1 Ch. 575; *Muskett* v. *Hill* (1839), 9 L. J. (C. P.) 201. As to the necessity of serving notice before re-entry and as to relief against forfeiture, see title LANDLORD AND TENANT, Vol. XVIII., pp. 539 *et seq.* For form of such notice, see Encyclopædia of Forms and Precedents, Vol. VIII., p. 440.

(*d*) For forms of such clauses, see Encyclopædia of Forms and Precedents, Vol. VIII., pp. 370, 407. As to the construction of expressions such as "fairly worked out," "fairly workable," and "fairly wrought," see *Jones* v. *Shears* (1836), 7 C. & P. 346; *Griffiths* v. *Rigby* (1856), 1 H. & N. 237; *Cartwright* v. *Forman* (1866), 7 B. & S. 243; *Carr* v. *Benson* (1868), 3 Ch. App. 524.

(*e*) *Cartwright* v. *Forman*, *supra*.

(*f*) *Grey* v. *Friar* (1854), 4 H. L. Cas. 565.

(*g*) *Bridges* v. *Potts* (1864), 17 C. B. (N. S.) 314. In such case an apportioned part of the rent is payable for the broken period (see Apportionment Act, 1870 (33 & 34 Vict. c. 35), s. 2); see title LANDLORD AND TENANT, Vol. XVIII., pp. 482, 483. As to the construction of similar powers in leases generally, see *Soames* v. *Nicholson*, [1902] 1 K. B. 157; and title LANDLORD AND TENANT, Vol. XVIII., p. 445.

(*h*) *Griffiths* v. *Rigby*, *supra*.

(*i*) *Jones* v. *Shears* (1836), 4 Ad. & El. 832 (where the lessees claimed to remain in possession in pursuance of a custom). As to the tacit incorporation of customs in leases, see *Tucker* v. *Linger* (1883), 8 App. Cas. 508; and for a

SECT. 7.—*Arbitration.*

SECT. 7. Arbitration.

Arbitration

1431. Mining leases usually contain clauses providing for the reference of disputes to arbitration (*k*).

SECT. 8.—*Stamps.*

Stamps on leases.

1432. A lease granted in consideration of a fine and also of an annual rent bears, in respect of the fine, the same stamp duty as a conveyance on sale for the same consideration (*l*) and *ad valorem* duty on the amount of the rent (*m*).

Part X.—Licences.

SECT. 1.—*Nature of Licensee's Interest.*

Licence coupled with a grant.

1433. A right to work mines and carry away the minerals won is more than a mere licence (*n*). It is a *profit à prendre* lying in grant (*o*), which may be limited either for freehold or chattel interests (*p*), and the estates so created may be devised (*q*), inherited (*r*), or assigned (*s*). It does not convey any estate in the land or in the mines except the parts (*a*) severed which become the property of the grantee (*b*). Such a licence is irrevocable (*c*). A licensee who has entered into possession is liable in an action for use and occupation (*d*), and he

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case dealing with an alleged custom with reference to a quarry, see *Vint* v. *Constable* (1871), 25 L. T. 324.

(*k*) For a form of such a clause, see Encyclopædia of Forms and Precedents, Vol. VIII., p. 298; and for the effect of, and procedure under, such clauses, see *Willesford* v. *Watson* (1873), 8 Ch. App. 473, and title ARBITRATION, Vol. I., pp. 439 *et seq.*

(*l*) See title SALE OF LAND.

(*m*) See title LANDLORD AND TENANT, Vol. XVIII., pp. 397—399 As to the duty where the rent is a share of produce, see *ibid.*, p. 398. As to the cases where a penal rent is reserved, or where the consideration consists of improvements effected by the lessee, see *ibid.*, p. 399. As to the duty on a varying rent and on a dead rent, see *ibid.*, p. 399, note (*f*).

(*n*) As to mere licences and licences coupled with a grant, see titles EASEMENTS AND PROFITS A PRENDRE, Vol. XI., p. 340; FISHERIES, Vol. XIV., p. 584; GAME, Vol. XV., pp 219, 220; LANDLORD AND TENANT, Vol. XVIII., pp. 337 *et seq.*; REAL PROPERTY AND CHATTELS REAL.

(*o*) *Sutherland (Duke)* v. *Heathcote*, [1892] 1 Ch. 475, 483, 484; *Watson* v. *Spratley* (1854), 10 Exch. 222.

(*p*) *Haigh* v. *Jaggar* (1847), 16 M. & W. 525; *Martyn* v. *Williams* (1857), 1 H. & N. 817. As to the effect of a grant to a grantee, his executors and administrators, without the mention of any term, see *Port* v. *Turton* (1763), 2 Wils. 169; *Haigh* v. *Jaggar, supra*, *Low Moor Co.* v. *Stanley Coal Co.* (1876), 34 L. T. 186, C. A.

(*q*) *Mountjoy (Lord)* v. *Huntington (Earl)* (1583), Godb. 17.

(*r*) *Martyn* v. *Williams, supra.*

(*s*) *Muskett* v. *Hill* (1839), 5 Bing. (N. C.) 694; *Martyn* v. *Williams, supra.*

(*a*) *Norway* v. *Rowe* (1812), 19 Ves. 144, 158; *Roberts* v. *Davey* (1833), 4 B. & Ad. 664; *London and North Western Railway* v. *Ackroyd* (1861), 31 L. J. (CH.) 588, 591.

(*b*) *Doe* d. *Hanley* v. *Wood* (1819), 2 B. & Ald. 724, 739.

(*c*) *Ibid.*; *Sutherland (Duke)* v. *Heathcote, supra.*

(*d*) *Jones* v. *Reynolds* (1836), 7 C. & P. 335. Merely digging trial pits is not taking possession.

SECT. 1. Nature of Licensee's Interest.

may if ousted, at any rate where the licence is exclusive (*e*), bring an action to recover possession (*f*).

Bare licence

1434. A bare licence which does not amount to a *profit à prendre*, such as a licence to search for minerals, confers upon the grantee no property in the minerals found (*g*). The grantee has the right of possession for the purpose of examining the minerals found, and has a right of action against a third party who interferes with such possession (*h*). A bare licence, whether granted by deed or not, and whether or not for valuable consideration, is revocable (*i*). In the latter case, however, revocation of the licence may entitle the grantee to damages for breach of contract (*k*).

SECT. 2.—*Form of Licence.*

Form of licence.

1435. Mining licences, coupled with a grant, must be created by deed in order to create a legal right (*l*), and can only be legally transferred by deed (*m*); but a licence under hand only (*n*), or merely verbal (*o*), may be effectual if the licensee incurs expense in working on the faith of such licence.

Except so far as they differ by the omission of the demised parcels, mining licences which amount to a *profit à prendre* are usually made in a form similar to mining leases and contain similar covenants and provisions (*p*). Covenants, for instance, to pay for surface damage (*q*) and to repair (*r*) run with the land in the case of such a licence as in the case of a lease.

Payments reserved in respect of a licence are in the nature of rent (*s*), but they are not a true rent and cannot be distrained for (*t*): it is necessary, therefore, to insert a power of distress. It is also proper and usual to insert a proviso for re-entry (*u*).

(*e*) *Wilson* v *Mackreth* (1766), 3 Burr. 1824. As to exclusive licences, see p. 569, *post*.

(*f*) *Crocker* v. *Fothergill* (1819), 2 B. & Ald. 652; *Doe* d. *Hanley* v. *Wood* (1819), 2 B. & Ald. 724, 729; *Jones* v. *Reynolds* (1836), 4 Ad. & El. 805.

(*g*) *Re Haven Gold Mining Co.* (1882), 20 Ch. D. 151, C. A.

(*h*) *Northam* v. *Bowden* (1855), 11 Exch. 73.

(*i*) *Wood* v. *Leadbitter* (1845), 13 M. & W. 838.

(*k*) *Smart* v. *Jones* (1864), 15 C. B. (N. S.) 717; *Kerrison* v. *Smith*, [1897] 2 Q. B. 445; see title LANDLORD AND TENANT, Vol. XVIII., p. 339.

(*l*) *Wood* v. *Leadbitter*, *supra*; *Doe* d. *Morgan* v. *Powell* (1844), 8 Scott (N. R.), 687, 701, 703; *Watson* v. *Spratley* (1854), 10 Exch. 222, 235; see titles DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 361; LANDLORD AND TENANT, Vol. XVIII., p. 339.

(*m*) *Harekr* v. *Birkbeck* (1764), 3 Burr. 1556, 1563; *Watson* v. *Spratley*, *supra*.

(*n*) *Atkinson* v. *King* (1878), 2 L. R. Ir. 320, 335, C. A.

(*o*) *Harrison* v. *Ames* (1850), 15 L. T. (O. S.) 321.

(*p*) For forms of licences to work minerals, see Encyclopædia of Forms and Precedents, Vol. VIII., pp. 371, 416.

(*q*) *Norval* v. *Pascoe* (1864), 34 L. J. (CH.) 82.

(*r*) *Martyn* v *Williams* (1857), 1 H. & N. 817. A claim for damages for breach of covenant does not pass to a purchaser of the land (*ibid.*).

(*s*) *Ex parte Hankey* (1829), Mont. & M. 247.

(*t*) *Ward* v. *Day* (1863), 4 B. & S. 337; *Re Roundwood Colliery Co.*, *Lee* v. *Roundwood Colliery Co.*, [1897] 1 Ch. 373, C. A.

(*u*) *Doe* d. *Hanley* v. *Wood* (1819), 2 B. & Ald. 724.

SECT. 3.—*Construction of Licences.*

SECT. 3. Construction of Licences.

Construction of licences.

1436. It is sometimes a matter of difficulty to decide whether a particular form of words operates to grant a licence or an estate. Each case depends on its own circumstances, and it is impossible to lay down any general rule except that words denoting liberty to work minerals, if unexplained by the other parts of the deed, only amount to the grant of a licence (*v*). Where the words occur by way of exception or reservation in a grant of lands it is important to consider what estate in the minerals the person in whose favour the exception or reservation is intended to operate had before the execution of the grant. If he were legal owner of the minerals, doubtful words are more easily construed as an exception of the minerals (*w*). In an instrument demising a licence the use of subsequent expressions which are only accurate if the instrument operates as a demise of the minerals will not enlarge the words of demise (*x*). In some cases instruments may operate as a demise of the minerals for a term and as a licence for a subsequent term (*y*). Difficulties arising from informal agreements can only be solved by a consideration of the circumstances of each case (*a*).

SECT. 4.—*Exclusive Licences.*

Exclusive licence.

1437. A licence is said to be exclusive if it expresses to grant to the grantee the sole right to exercise the liberty granted within the defined limits. If not clearly so expressed, the grantor may himself exercise the same right and authorise others to do so (*b*), provided that neither he nor they interfere with the operations of the

(*v*) *Doe* d. *Hanley* v *Wood* (1819), 2 B. & Ald. 724; *Sutherland* (*Duke*) v. *Heathcote*, [1892] 1 Ch. 475, *Mountjoy* (*Lord*) v *Huntington* (*Earl*) (1583), Godb. 17; and see, generally, title LANDLORD AND TENANT, Vol. XVIII., pp. 337 *et seq.* An unenrolled bargain and sale of mines to a person, his executors and administrators, followed by possession, was held to create a tenancy at will (*Low Moor Co.* v. *Stanley Coal Co* (1876), 34 L. T 186, C. A.; but see *Haigh* v. *Jaggar* (1817), 16 M & W. 525).

(*w*) *Chetham* v. *Williamson* (1804), 4 East, 469 (right given to mortgagor held to amount to licence only; in considering the judgment in this case it must be remembered that minerals now lie in grant); *Hamilton* (*Duke*) v. *Dunlop* (1885), 10 App. Cas. 813 (right given to owner, words denoting liberty only held to amount to exception of minerals on construction of deed as a whole); *Sutherland* (*Duke*) v. *Heathcote*, *supra* (right given to donees of joint power held to amount to liberty only).

Doe d. *Hanley* v. *Wood*, *supra*.

Haigh v. *Jaggar*, *supra*; *Stanley* v. *Riky* (1893), 31 L. R Ir. 196, C. A.

E.g., *Re Brindley*, *Ex parte Hankey* (1829), Mont. & M. 247; *Daniel* v. *Gracie* (1844), 6 Q. B. 145; *Re Stroud and East and West India Docks and Birmingham Junction Rail. Co.* (1849), 8 C. B 502. in these cases agreements as to getting earth and making bricks on payment of royalties were held to create tenancies from year to year or at will. In *Atkinson* v. *King* (1878), 2 L. R. Ir. 320, an agreement to allow a man to sink a pit for coal at a royalty was held to create a licence.

(*b*) *Mountjoy* (*Lord*) v. *Huntington* (*Earl*), *supra*; *Chetham* v. *Williamson*, *supra*; *Doe* d. *Hanley* v. *Wood*, *supra*; *Carr* v. *Benson* (1868), 3 Ch. App 524; *Sutherland* (*Duke*) v. *Heathcote*, *supra*.

SECT. 4. Exclusive Licences.

licensee (*c*) nor deprive him of the benefits of his licence (*d*). An exclusive licensee may maintain trespass (*e*).

SECT. 5.—*Remedies of Licensor.*

Remedies of licensor.

1438. The remedies of the licensor are divisible into those to which he is entitled under the general law and those which he enjoys by virtue of provisions contained in the instrument granting the licence. The remedies of the former class are an action for an account (*f*) and, where the licensee has actually exercised the right, an action for use and occupation (*g*). The remedies of the latter class are an action on the covenant for payment of rent and exercise of the powers of distress if expressly provided for (*h*), and re-entry (*i*). A licence, which contains a provision that in certain events it shall be void, is not, upon the happening of the prescribed event, void, but voidable at the instance of the licensor (*j*). Notice to determine a licence must be definite (*k*). Although payments reserved under a licence cannot be distrained for, yet an attempt to levy a distress may be sufficient evidence of intention to waive a previous forfeiture (*l*).

Part XI.—Easements and Rights affecting Mines.

SECT. 1.—*Right of Support.*

SUB-SECT. 1.—*In General.*

Support from subjacent mines.

1439. The principles which regulate the mutual rights and liabilities of the owners of adjoining closes, in respect of lateral support (*m*), apply in respect of support from subjacent mines

(*c*) *Sutherland (Duke)* v. *Heathcote*, [1892] 1 Ch. 475; *Roads* v. *Trumpington Overseers* (1870), L. R. 6 Q. B. 56.

(*d*) *Carr* v. *Benson* (1868), 3 Ch. App. 524; *Newby* v. *Harrison* (1861), 1 John. & H. 393.

(*e*) *Harker* v. *Birkbeck* (1764), 3 Burr. 1556; and see title TRESPASS. As to his right to recover possession, see p. 568, *ante*. As to the rights of a non-exclusive licensee who has taken possession, see *Doe* d. *Hanley* v. *Wood* (1819), 2 B. & Ald. 724; and p. 567, *ante*, and as to what acts constitute taking possession, see *Carr* v. *Benson*, *supra*, and note (*d*), p. 567, *ante*.

(*f*) *Wright* v. *Pitt* (1870), L. R. 12 Eq. 408.

(*g*) *Jones* v. *Reynolds* (1836), 4 Ad. & El. 805.

(*h*) *Ward* v. *Day* (1863), 4 B. & S. 337, 358.

(*i*) As to these provisions, see p. 565, *ante*.

(*j*) *Roberts* v. *Davey* (1833), 4 B. & Ad. 664.

(*k*) *Muskett* v. *Hill* (1839), 5 Bing. (N. C.) 694.

(*l*) *Ward* v. *Day*, *supra*.

(*m*) For the rights of adjoining owners of land to support, see title EASEMENTS AND PROFITS À PRENDRE, Vol. XI., p. 319, as to the right of support for buildings, see *ibid.*, p. 321; and see title BOUNDARIES, FENCES, AND PARTY WALLS, Vol. III., p. 136; and as to right of support by water, see title EASEMENTS AND PROFITS À PRENDRE, Vol. XI., p. 321. See also 2 Roll. Abr. 564, tit. Trespass (I), pl. 1; Com. Dig., Action upon the Case for a Nuisance (A), *Hunt* v. *Peake* (1860), John. 705; *Humphries* v. *Brogden* (1850), 12 Q. B. 739; *Caledonian Rail. Co.* v. *Sprot* (*of Garnkirk*) (1856), 2 Macq. 449, 458, H. L.; *Backhouse* v. *Bonomi* (1861), 9 H. L. Cas. 503, 512, 513; *North-Eastern Rail.*

which are severed in ownership from the surface (*n*). The same principles, apparently, apply to the support of an underground stratum by a deeper seam (*o*).

Nature of right.

1440. The right of support is a right to have the surface kept at its ancient and natural level (*p*); it is independent of the nature of the strata (*q*), or the comparative value of the surface and minerals (*r*), or of the fact that it is impossible from the nature of the ore to mark out pillars adequate to preserve support (*s*). If an adjoining region which affords support is excavated, no right of support is *ipso facto* acquired against a more distant region which in fact affords support in the altered circumstances (*t*). But all persons whose lands in their natural state afford support are, for the purposes of support, adjoining owners or neighbours of the person whose land enjoys the support (*a*).

Limits to natural right.

1441. The natural right of support is not an interest in the subjacent mines sufficient to entitle the owner of the land to insist upon the minerals remaining unworked (*b*). The owner of the minerals is entitled as incident to the enjoyment of his property to get his minerals in a usual and proper course of working consistently with leaving support (*c*): they may be worked out completely, provided artificial support is substituted (*d*).

Modification of natural rights.

1442. The *primâ facie* rights and liabilities of the surface owner and the mine-owner may be varied by contract (*e*), custom (*f*), or

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Co. v. *Elliot* (1860), 1 John. & H. 115, 153; *Dalton* v. *Angus* (1881), 6 App. Cas. 740.

(*n*) *Humphries* v. *Brogden* (1850), 12 Q. B. 739, 744.

(*o*) See *Butterley Co., Ltd.* v. *New Hucknall Colliery Co., Ltd.*, [1909] 1 Ch. 37, C. A.; affirmed, [1910] A. C. 381, see *ibid.*, *per* Lord MACNAGHTEN, at p. 386; compare S. C., [1908] 2 Ch. 475, 483, *Mundy* v. *Rutland* (*Duke*) (1883), 23 Ch. D. 81, C. A. See title EASEMENTS AND PROFITS À PRENDRE, Vol. XI., p. 320.

(*p*) *Humphries* v. *Brogden, supra; Bonomi* v. *Backhouse* (1859), E. B. & E. 646, 657, Ex. Ch.; affirmed, *sub nom. Backhouse* v. *Bonomi* (1861), 9 H. L. Cas. 503.

(*q*) *Humphries* v. *Brogden, supra; Rowbotham* v. *Wilson* (1856), 6 E. & B. 593, 601, (1857), 8 E. & B. 123, Ex. Ch.; (1860), 8 H. L. Cas. 348; see also *Trinidad Asphalt Co.* v. *Ambard*, [1899] A. C. 602, P. C. (support from liquid pitch); *Jordeson* v. *Sutton, Southcoates and Drypool Gas Co.*, [1899] 2 Ch. 217, C. A.; *Fletcher* v. *Birkenhead Corporation*, [1906] 1 K. B. 605 (support from running silt).

(*r*) *Humphries* v. *Brogden, supra.*

(*s*) See *Wakefield* v. *Buccleuch* (*Duke*) (1867), L. R. 4 Eq. 613, 628, 638.

(*t*) *Birmingham Corporation* v. *Allen* (1877), 6 Ch. D. 284, C. A.; *Darley Main Colliery Co.* v. *Mitchell* (1886), 11 App. Cas. 127.

(*a*) *Birmingham Corporation* v. *Allen, supra.*

(*b*) See *Bonomi* v. *Backhouse* (1859), E. B. & E. 646, 655, Ex. Ch.; affirmed, *sub nom. Backhouse* v. *Bonomi* (1861), 9 H. L. Cas. 503; *Dalton* v. *Angus, supra*, at p. 808. As to the right to work minerals under the uninclosed waste of a manor, see title COMMONS AND RIGHTS OF COMMON, Vol. IV., p. 503.

(*c*) *Rowbotham* v. *Wilson* (1860), 8 H. L. Cas. 348, 360; *Butterknowle Colliery Co.* v. *Bishop Auckland Industrial Co-operative Co.*, [1906] A. C. 305.

(*d*) See *Harris* v. *Ryding* (1839), 5 M. & W. 60, 74, 76; *Humphries* v. *Brogden, supra*, at p. 744; *Rowbotham* v. *Wilson* (1857), 8 E. & B. 123, 157, Ex. Ch.; (1860), 8 H. L. Cas. 348; *Backhouse* v. *Bonomi, supra.*

(*e*) See p. 573, *post.*

(*f*) See p. 576, *post.*

SECT. 1. Right of Support.

statute (*g*); and the mine-owner may be empowered to work so as to cause subsidence of the surface in a proper course of working, but the natural right of support, if it exists, is a legal incident of the property in the surface, and a subsequent purchaser or lessee from the mine-owner is not protected by want of notice (*h*). If the natural right is excluded, the mine-owner is, as a rule, either by condition or covenant bound to make compensation for injury caused to the surface by his mining operations; and he may be so liable although no power to let down exists (*i*); in either case the liability runs with the land (*k*), and none the less so, in the case of liability under covenant, that the surface owner is not a party to the deed containing the covenant (*l*).

Infringement of right.

1443. The right of support is infringed (*m*) if the subsidence of the surface is substantial, although the surface owner has suffered no pecuniary loss; but a slight subsidence, which causes no damage, will be disregarded (*n*).

Rights of highway authorities.

Mine-owners, in working under highways, are bound to work without causing damage to the road or highway (*o*). A local authority in whom a highway becomes vested by statute (*p*) is in much the same position as an ordinary surface owner with regard to subsidence (*q*); but no right of action accrues to the local authority unless the damage to the road is appreciable (*r*).

SUB-SECT. 2.—*By Grant.*

Effect of grant of surface.

1444. The right of support passes upon the grant of land as incident to the land itself (*s*); upon the severance of the surface from the minerals, there *primâ facie* passes with or remains in the surface the common law right of support, whether the severance is effected

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(*g*) See pp. 577, 578, *post.*

(*h*) See *Mundy* v. *Rutland* (*Duke*) (1883), 23 Ch. D. 81, 90, 91, C. A.

(*i*) See *Harris* v. *Ryding* (1839), 5 M. & W. 60, 74; and p. 574, *post.*

(*k*) *Aspden* v. *Seddon*, *Preston* v. *Seddon* (1876), 1 Ex. D. 496, C. A.; *Dyson* v. *Forster*, *Dyson* v. *Seed*, *Quinn*, *Morgan etc.*, [1909] A. C. 98; affirming *Forster* v. *Elvet Colliery Co., Ltd.*, *Quin* v. *Same*, *Seed* v. *Same*, *Morgan* v. *Same*, [1908] 1 K. B. 629, C. A.

(*l*) *Dyson* v. *Forster*, *Dyson* v. *Seed*, *Quinn*, *Morgan etc.*, *supra*. As to certain covenants which run with the land, see p. 565, *ante*.

(*m*) As to when the cause of action arises, see title EASEMENTS AND PROFITS A PRENDRE, Vol. XI., p. 325. As to the measure of damage, see p. 582, *post*. As to the remedy by injunction, see p. 582, *post*.

(*n*) *A.-G.* v. *Conduit Colliery Co.*, [1895] 1 Q. B. 301, *per* COLLINS, J., at p. 311. The principle is the same as regards the easements: see *Mitchell* v. *Darley Main Colliery Co.* (1884), 14 Q. B. D. 125, 137, C. A.; see, *contrà*, *Smith* v. *Thackerah* (1866), L.R. 1 C. P. 514, explained in *A.-G.* v. *Conduit Colliery Co.*, *supra*, at p. 313.

(*o*) See the Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), s. 27. Mines are reserved under the Highway Act, 1835 (5 & 6 Will. 4, c. 50), the Turnpike Roads Act, 1822 (3 Geo. 4, c. 126), and the Turnpike Roads Act, 1827 (7 & 8 Geo. 4, c. 24).

(*p*) See title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 57 *et seq.*

(*q*) *A.-G.* v. *Logan*, [1891] 2 Q. B. 100.

(*r*) See *A.-G.* v. *Conduit Colliery Co.*, *supra*, at pp. 308, 313, 314. As to the measure of damages, see p. 582, *post*.

(*s*) *Manchester Corporation* v. *New Moss Colliery, Ltd.*, [1906] 1 Ch. 278, 295; [1906] 2 Ch. 564, C. A.

SECT. 1. Right of Support.

by a grant of the surface excepting the minerals (*a*) or by a grant of the minerals excepting the surface (*b*). But the right of working minerals so as to cause subsidence of the surface is capable of grant (*c*), and the common law right of support may, therefore, be excluded by the instrument of severance (*d*).

When right to let down surface inferred.

1445. The insertion of a clause in the instrument of severance conferring general powers of working, expressed in the widest terms, is not sufficient to rebut the presumption in favour of the surface owner; such a clause *primâ facie* confers only the powers of working incident at common law to the ownership of mines (*e*). Thus, in an Inclosure Act, liberty to the lord to work and enjoy the mines in as full and ample a manner as if the Act had not been passed will not of itself rebut the presumption in favour of the allottee (*f*). But if there appears from the instrument an intention that the minerals should be worked, and it is proved by relevant admissible evidence that, to the knowledge of the parties at the time of the execution of the instrument, the minerals could not be worked at all without causing subsidence, the reason for limiting the express powers disappears, and a power to work so as to cause subsidence will be inferred (*g*).

Construction of compensation provisions.

1446. The presence of a wide provision for compensation for surface damage is not of itself sufficient to extend the scope of the working powers granted or reserved to the mine-owner; for it is not the function of a compensation clause to define or extend working powers (*h*). If the clause is capable of being satisfied by construing it as a provision for compensation in respect of surface

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(*a*) *Smart* v. *Morton* (1855), 5 E. & B. 30, 46, *Roberts* v. *Haines* (1856), 6 E. & B. 643, 652, 654, 655; affirmed, *sub nom. Haines* v. *Roberts* (1857), 7 E. & B. 625, Ex. Ch.; *Caledonian Rail. Co.* v. *Sprot* (*of Garnkirk*) (1856), 2 Macq. 449, 451, H. L.

(*b*) *Davis* v. *Treharne* (1881), 6 App. Cas. 460. As to the effect of Inclosure Acts on rights of support, see title COMMONS AND RIGHTS OF COMMON, Vol. IV., pp. 573 *et seq.*

(*c*) *Rowbotham* v. *Wilson* (1860), 8 H. L. Cas. 348; overruling the *dictum* of Lord DENMAN, C.J., in *Hilton* v. *Granville* (*Earl*) (1844), 5 Q. B. 701, at p. 730; see *Bell* v. *Love* (1883), 10 Q. B. D. 547, 561, C. A.

(*d*) See title COMMONS AND RIGHTS OF COMMON, Vol. IV., p. 574, and pp. 550, 551, *ante*.

(*e*) See *Harris* v. *Ryding* (1839), 5 M. & W. 60; *Smart* v. *Morton* (1855), 5 E. & B. 30; *Roberts* v. *Haines* (1856), 6 E. & B. 643; *Haines* v. *Roberts* (1857), 7 E. & B. 625, Ex. Ch.; *Caledonian Rail. Co.* v. *Sprot* (*of Garnkirk*), *supra*, *Proud* v. *Bates* (1865), 34 L. J. (CH.) 406; *Buchanan* v. *Andrew* (1873), L. R. 2 Sc. & Div. 286, 290; *Bell* v. *Love* (1883), 10 Q. B. D. 547, C. A.; *Love* v. *Bell* (1884), 9 App. Cas. 286; *New Sharlston Collieries Co., Ltd.* v. *Westmorland* (*Earl*) (1900), [1904] 2 Ch. 443, n., H. L.; *Bishop Auckland Industrial Co-operative Society* v. *Butterknowle Colliery Co., Ltd.*, [1904] 2 Ch. 435; *Butterley Co., Ltd.* v. *New Hucknall Colliery Co., Ltd.*, [1910] A. C. 381.

(*f*) *Love* v. *Bell*, *supra*, at pp. 291, 292, 293, 297, 300; *Butterknowle Colliery Co.* v. *Bishop Auckland Industrial Co-operative Co.*, [1906] A. C. 305, 310, 313, 314, 316, 320.

(*g*) *Butterley Co., Ltd.* v. *New Hucknall Colliery Co., Ltd.*, *supra*. As to conferring express powers of working upon a lessee, and thus enabling him to withdraw support, see p. 559, *ante*.

(*h*) *Love* v. *Bell*, *supra*, at p. 299; and see title COMMONS AND RIGHTS OF COMMON, Vol. IV., p. 574.

SECT. 1. Right of Support.

injury, caused by the exercise of surface powers, it will be so limited, although it is wide enough in terms to include surface injury caused by subsidence (*i*); if the clause does, in fact, cover injury by subsidence, it only provides a cumulative remedy (*k*). In such case it may refer to injury caused by accident or negligence (*l*), and a provision for compensation for injury caused by subsidence is not inconsistent with an obligation not to let down (*m*). The clause may, nevertheless, be so framed as to explain the character and extent of the working powers (*n*); thus where no surface powers are granted, but the powers of working are subject to the condition that compensation shall be made for injury to buildings on the surface, it is a reasonable, if not a necessary, inference that the kind of working contemplated and sanctioned is such as would cause subsidence and injury to buildings on the surface (*o*). On similar principles, where no surface powers are granted and the mine-owner is expressly exempted from liability in respect of injury to the surface and the buildings thereon, the clause cannot be satisfied by injury other than subsidence, and a power to let down will be inferred (*p*).

Effect of absence of compensation clause.

1447. The absence of a provision for compensation is almost conclusive that the common law obligation is to continue (*q*), and the inadequacy or inappropriateness of the compensation, if applied to damage by subsidence, is cogent evidence that subsidence was not contemplated (*r*); thus a provision for the payment to the surface occupiers of £5 per acre yearly for damage and spoil of ground during

(*i*) *Butterknowle Colliery Co.* v. *Bishop Auckland Industrial Co-operative Co.*, [1906] A. C. 305, 309, 310; see *Harris* v. *Ryding* (1839), 5 M. & W. 60; *Smart* v. *Morton* (1855), 5 E. & B 30; *Allaway* v. *Wagstaff* (1859), 4 H. & N 681; *Davis* v. *Treharne* (1881), 6 App. Cas 460; *Mundy* v *Rutland* (*Duke*) (1883), 23 Ch. D. 81, C. A.; *Dixon* v. *White* (1883), 8 App. Cas. 833; *Sitwell* v. *Londesborough* (*Earl*), [1905] 1 Ch. 460.

(*k*) *Harris* v. *Ryding*, *supra*.

(*l*) See *Dixon* v. *White*, *supra*.

(*m*) *New Sharlston Collieries Co., Ltd.* v. *Westmorland* (*Earl*) (1900), [1904] 2 Ch. 443, n., H. L.; see *ibid*, *per* Lord DAVEY, at p. 417, who seems to refer to a general provision which may include injury by subsidence, and not necessarily an express provision for compensation for injury caused by subsidence, see *Butterknowle Colliery Co.* v. *Bishop Auckland Industrial Co-operative Co.*, *supra*, at pp. 315, 316, and *Davis* v. *Treharne*, *supra*, *per* Lord BLACKBURN, at pp. 467, 468.

(*n*) *Love* v. *Bell* (1884), 9 App. Cas. 286, 299.

(*o*) *Aspden* v. *Seddon* (1875), 10 Ch. App. 394; see *Love* v. *Bell*, *supra*, at p. 299. See also *Smith* v. *Darby* (1872), L. R. 7 Q. B. 716; *Twyerould* v. *Chamber Colliery Co.*, [1892] W. N. 27, C. A., where there were surface powers, but the compensation clause extended to injury done to buildings, and a right to cause subsidence was inferred. In *Buccleuch* (*Duke*) v. *Wakefield* (1870), L. R. 4 H. L. 377 (a case on an Inclosure Act), a power to cause subsidence was inferred; there was a wide compensation provision. *Buccleuch* (*Duke*) v. *Wakefield*, *supra*, is discussed in *Hext* v. *Gill* (1872), 7 Ch. App. 699, 716, 717, and in *Love* v. *Bell*, *supra*, at pp. 295, 296, 298; it stands by itself; see *Butterknowle Colliery Co.* v. *Bishop Auckland Industrial Co-operative Co.*, *supra*, at pp. 314, 316.

(*p*) *Williams* v. *Bagnall* (1866), 15 W. R. 272; *Buchanan* v. *Andrew* (1873), L. R. 2 Sc. & Div. 286.

(*q*) See *Butterknowle Colliery Co.* v. *Bishop Auckland Industrial Co-operative Co.*, *supra*, *per* Lord DAVEY, at p 315.

(*r*) See *ibid.*, *per* Lord MACNAGHTEN, at p. 314.

the time of working cannot apply to subsidence, which injures the owner, and may not occur till the workings have ceased (*s*); and a provision that compensation for injury to an allotment in the exercise of reserved mining powers should be made by a rateable levy, enforceable by distress, on the occupiers of other allotments within the township, cannot refer to subsidence, for it would compel temporary occupiers to pay for permanent damage (*t*).

Workings forbidden within specified area.

1448. The protection of a specific area by the absolute prohibition of the working of minerals thereunder is not inconsistent with the continuance of the common law right of support from the minerals outside that area (*a*); but it may be that upon the construction of the instrument as a whole the common law right is excluded (*b*).

Grant of right of support for buildings, the mines being reserved.

1449. The right of support for an artificial burden imposed upon land may be acquired by grant, express or implied (*c*); upon the grant of land subject to an exception of mines, there *primâ facie* passes to the grantee by implication of law, a right of support from the subjacent mines and the adjoining lands of the grantor, for any artificial burden then upon the land (*d*), and for all buildings or structures reasonably within the contemplation of the parties at the time of severance (*e*). The object for which the land is acquired

(*s*) *Love* v. *Bell* (1884), 9 App Cas. 286

(*t*) *Butterknowle Colliery Co.* v. *Bishop Auckland Industrial Co-operative Co.*, [1906] A. C. 305.

(*a*) *Haines* v. *Roberts* (1857), 7 E. & B. 625, Ex. Ch.; *Dugdale* v. *Robertson* (1857), 3 K. & J 695.

(*b*) *Eadon* v. *Jeffcock* (1872), L. R. 7 Exch. 379. *Eq.*, where the main objects of the provisions of a lease were considered to be the safety of the mine and the intention to get all the coal, which could be got consistently with the safety of the mine (*Shafto* v. *Johnson* (1863), 8 B. & S. 252, n). It is doubtful if *Eadon* v. *Jeffcock*, *supra*, is consistent with *Butterknowle Colliery Co.* v. *Bishop Auckland Industrial Co operative Co.*, *supra*. In cases prior to the decision in *Butterley Co., Ltd.* v. *New Hucknall Colliery Co., Ltd.*, [1910] A. C. 381, it was either proved or admitted, or assumed that the subjacent mines could be worked in such a way as not to produce subsidence (S. C., [1909] 1 Ch. 37, 46, C. A.). In that case the court was for the first time by proper evidence made cognisant of the fact that it is impossible to work mines so as to be commercially profitable without causing subsidence. Prior to that decision the form of the instrument of severance was of little importance (*Butterknowle Colliery Co.* v. *Bishop Auckland Industrial Co-operative Co.*, *supra*); an obligation might be imposed by a lease inconsistent with the duty of leaving support (*Taylor* v. *Shafto* (1867), 8 B. & S. 228; *Davis* v. *Treharne* (1881), 6 App. Cas. 460, 469, 470). The fact that a royalty was reserved and that an intention of working largely appeared from the instrument was of some weight (*Davis* v *Treharne*, *supra*, *per* Lord BLACKBURN, at p. 467), but the effect of *Butterley Co., Ltd.* v. *New Hucknall Colliery Co., Ltd.*, *supra*, seems to be that in all leases of modern date a right to let down will be implied, where it is not specifically excluded. The result in the case of a grant or reservation in fee simple will depend upon the circumstances of each case. It is considered that decisions under the Inclosure Acts of the eighteenth century will be unaffected; as to these decisions, see title COMMONS AND RIGHTS OF COMMON, Vol. IV., pp. 574 *et seq.*

(*c*) *Bonomi* v. *Backhouse* (1859), E. B. & E. 646, 655, Ex. Ch.; *Dalton* v. *Angus* (1881), 6 App. Cas. 740, 792; and see title EASEMENTS AND PROFITS À PRENDRE, Vol. XI., pp. 322, 323.

(*d*) See *Wyrley Canal Co.* v. *Bradley* (1806), 7 East, 368, 372; *Caledonian Rail. Co.* v. *Sprot* (*of Garnkirk*) (1856), 2 Macq. 449, 451, H. L.; *Dalton* v. *Angus*, *supra*, at pp. 792, 826.

(*e*) See *Caledonian Rail. Co.* v. *Sprot* (*of Garnkirk*), *supra*, at pp. 451, 452;

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need not be stated in the instrument of severance, provided it is within the contemplation of the parties at the time (*f*), but a reference in the instrument to the possibility of the erection of buildings may raise the implication (*g*). The right is independent of the nature of the burden to be imposed, or of the purposes for which the proposed structures are to be used (*h*).

The same principle applies whether the severance be voluntary or be effected under statutory powers (*i*), but the right may be excluded by provision to the contrary in the instrument of severance or the Act of Parliament authorising the acquisition of the land: whether it has been so excluded is a question of the construction of the instrument of severance or the statute (*k*). Where it is not excluded the right is limited to the mines and lands of the grantor (*l*), but in the case of the construction of works of public utility in the lands of private owners, under statutory powers, where no property is acquired in these lands a right of support may be implied against lateral owners (*m*), provided the statute contains provisions for compensation applicable in respect of the acquisition of such right (*n*).

Reservation of support for buildings on grant of mines.

1450. Upon a grant of mines excepting the surface, a right of support for buildings can only be reserved by express provision (*o*), for the easement is not one of reciprocal dependence of one portion of the joint tenement on the other, as in the case of two houses mutually affording support (*p*).

SUB SECT. 3.—*By Custom.*

Custom to cause subsidence.

1451. An alleged custom to work under the tenements of a manor or under an allotment of the waste so as to cause subsidence, but without payment of compensation, is unreasonable and void (*q*);

North Eastern Rail. Co. v. *Elliot* (1860), 1 John. & H. 145, 153; *Elliot* v. *North Eastern Rail. Co.* (1863), 10 H. L. Cas 333, 357, 362, *Great Western Rail. Co.* v. *Bennett* (1867), L. R. 2 H. L. 27, 40; *London and North Western Rail. Co.* v. *Evans*, [1893] 1 Ch. 16, 24, 25, C. A.; *Ruabon Brick and Terra Cotta Co.* v. *Great Western Rail. Co.*, [1893] 1 Ch. 427, 456, C. A.

(*f*) *Suddons* v. *Short* (1877), 2 C. P. D. 572

(*g*) *Berkley* v. *Shafto* (1863), 15 C. B. (N. S.) 79

(*h*) *Caledonian Rail. Co.* v. *Sprot* (*of Garnkirk*) (1856), 2 Macq. 449, 462, H. L.

(*i*) See *Caledonian Rail. Co.* v. *Sprot* (*of Garnkirk*), *supra*, *Elliot* v. *North Eastern Rail. Co.*, *supra*.

(*k*) *Ruabon Brick and Terra Cotta Co.* v. *Great Western Rail. Co.*, *supra*.

(*l*) Compare *Pountney* v. *Clayton* (1883), 11 Q. B. D. 820, C. A., *per* BOWEN, L.J., at pp. 840, 841.

(*m*) See *Re Dudley Corporation* (1881), 8 Q. B. D. 86, C. A.; *Roderick* v. *Aston Local Board* (1877), 5 Ch. D. 328, 332, C. A.; explained in *Jary* v. *Barnsley Corporation*, [1907] 2 Ch. 600, 619.

(*n*) See *Metropolitan Board of Works* v. *Metropolitan Rail. Co.* (1869), L. R. 4 C. P. 192, Ex. Ch.; *Roderick* v. *Aston Local Board*, *supra*; and title EASEMENTS AND PROFITS À PRENDRE, Vol. XI., p. 323.

(*o*) Compare *Union Lighterage Co.* v. *London Graving Dock Co.*, [1902] 2 Ch. 557, C. A.; *Suffield* v. *Brown* (1864), 33 L. J. (CH.) 249.

(*p*) *Richards* v. *Rose* (1853), 9 Exch. 218; see title EASEMENTS AND PROFITS À PRENDRE, Vol. XI., p. 323.

(*q*) *Hilton* v. *Granville* (*Earl*) (1844), 5 Q. B. 701 (tenements); *Blackett* v. *Bradley* (1862), 1 B. & S. 940 (allotments). The former decision was questioned in *Buccleuch* (*Duke*) v. *Wakefield* (1870), L. R. 4 H. L. 377, but approved in *Bell*

although a claim to cause subsidence, based on prescription or custom, may be good, if the exercise of the right is subject to the payment of compensation (*r*). The custom alleged must be shown to have existed at the time of severance (*s*).

SUB-SECT. 4.—*By Prescription.*

Prescription.

1452. Support for buildings may be acquired by prescription, either at common law or under statute (*t*); but the existence of any contract between the parties or a grant inconsistent with the claim prevents its acquisition; thus, no right can be acquired if the surface owner is, by some instruments, expressly excluded from the natural right of support (*a*). Similar principles apply in the case of land weakened by excavation of the subjacent mines; if the subjacent mines afford adequate support for buildings before excavation, no right is acquired by prescription against a lateral owner, if twenty years have not elapsed since the excavation of the subjacent mines (*b*); nor if the lateral owner was ignorant of the workings (*c*); but where buildings have been erected over partially excavated mines a right is acquired after twenty years against persons interested in the mines, if but for the working of the mines the buildings would not have subsided (*d*).

SUB-SECT. 5.—*Under Statutes conferring Compulsory Powers of Purchase.*

Railways and waterworks.

1453. In modern statutes conferring compulsory powers for the purchase of land and powers for the construction and maintenance of railways or waterworks, there are incorporated the provisions of the Railways Clauses Consolidation Act, 1845 (*e*), or of the Waterworks Clauses Act, 1847 (*f*), as the case may be. Each of those Acts contains a series of sections dealing with mines, known as the

v. *Love* (1883), 10 Q. B. D. 547, C. A., *per* BAGGALLAY, L.J., at p. 561, and in *Salisbury* (*Marquis*) v. *Gladstone* (1861), 9 H. L. Cas. 692. In *Gill* v. *Dickinson* (1880), 5 Q. B. D. 159, a case on the same Inclosure Act as *Blackett* v. *Bradley* (1862), 1 B. & S. 940, the custom was admitted. In both cases the lord might before inclosure have justified his right in virtue of his freehold estate in the wastes. See, further, titles COMMONS AND RIGHTS OF COMMON, Vol. IV., p. 503; CUSTOM AND USAGES, Vol. X., pp. 224, 226.

(*r*) As to custom, see *Aspden* v. *Seddon*, *Preston* v. *Seddon* (1876), 1 Ex. D. 496, C. A., *per* MELLISH, L.J., at p. 510; see also *Buccleuch* (*Duke*) v. *Wakefield* (1870), L. R. 4 H. L. 377, 395, 396, 399. As to prescription, see *Rowbotham* v. *Wilson* (1860), 8 H. L. Cas. 348, *per* Lord WENSLEYDALE, at p. 363; compare *Smart* v. *Morton* (1855), 5 E. & B. 30, where the evidence did not establish the custom; and see, generally, title CUSTOM AND USAGES, Vol. X., pp. 217 *et seq.* There can be no custom of a county to work to the prejudice of third persons; see *Davis* v. *Treharne* (1881), 6 App. Cas. 460, *per* Lord SELBORNE, at p. 464.

(*s*) *Smart* v. *Morton*, *supra*.

(*t*) *Dalton* v. *Angus* (1881), 6 App. Cas. 740; and see title EASEMENTS AND PROFITS À PRENDRE, Vol. XI., p. 324.

(*a*) See *Rowbotham* v. *Wilson* (1856), 6 E. & B. 593.

(*b*) *Partridge* v. *Scott* (1838), 3 M. & W. 220; see title EASEMENTS AND PROFITS À PRENDRE, Vol. XI., pp. 260, 262.

(*c*) *Woodall* v. *Hingley* (1866), 14 L. T. 167.

(*d*) *Richards* v. *Jenkins* (1868), 17 W. R. 30.

(*e*) 8 & 9 Vict. c. 20.

(*f*) 10 & 11 Vict. c. 17.

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mining code (*g*), with the exception of certain provisions specifically applicable to railways or waterworks respectively (*h*). The codes of either Act are similar in policy, and so nearly identical in language that decisions on the one Act are, as a rule, authorities upon the other (*i*).

Sewers.

By the Public Health Act, 1875 (Support of Sewers), Amendment Act, 1883 (*k*), the waterworks code has been applied in a modified form to mines under or near sanitary works.

Prior to the passing of the last-mentioned Act (*k*) a sewer constructed under the powers of the Public Health Act, 1875 (*l*), was entitled to support from subjacent mines (*a*); and such rights are preserved if the right of support had been acquired and there was, at the passing of the Public Health Act, 1875 (Support of Sewers), Amendment Act, 1883 (*b*), no compensation payable in respect of such right (*c*). It appears that lateral support, in respect of which no compensation had been paid at the passing of the Act (*b*), is not preserved (*d*).

SUB-SECT. 6.—*Under Special Statutes.*

Special statutes.

1454. If the statute authorising the acquisition of land or the construction of works contains no specific provision with regard to mines and minerals, then, although the mines and minerals are not taken, the undertakers acquire the rights of subjacent and adjacent support for the works reasonably within the contemplation of the parties, which would be acquired by an ordinary purchaser (*e*); and the compensation payable includes the loss of value of the mines due to the liability to leave support (*f*). The position

Effect of no provision as to support.

(*g*) *I.e.*, the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), ss. 77-85; the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), ss. 18-27.

(*h*) See p. 579, *post*; titles RAILWAYS AND CANALS; WATERS AND WATERCOURSES.

(*i*) The rights and liabilities of the owners of minerals lying under or near railways or waterworks are dealt with in title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 49 *et seq.* Since the publication of that title it has been decided that a railway company may be entitled to restrain working outside the prescribed limit of forty yards (see *ibid.*, p. 51) from the railway so as to withdraw lateral support therefrom (*London and North Western Railway* v. *Howley Park Coal and Cannel Co.*, [1911] 2 Ch. 97, C. A.).

(*k*) 46 & 47 Vict. c. 37, s. 3 (2). This Act was passed in consequence of the decision in *Re Dudley Corporation* (1881), 8 Q. B. D. 86, C. A.; see titles PUBLIC HEALTH AND LOCAL ADMINISTRATION; SEWERS AND DRAINS.

(*l*) 38 & 39 Vict. c. 55.

(*a*) See *Re Dudley Corporation*, *supra*; and see the text, *infra*.

(*b*) 46 & 47 Vict. c. 37.

(*c*) Public Health Act, 1875 (Support of Sewers), Amendment Act, 1883 (46 & 47 Vict. c. 37); s. 5; see *Jary* v. *Barnsley Corporation*, [1907] 2 Ch. 600.

(*d*) See *Jary* v. *Barnsley Corporation*, *supra*, *per* PARKER, J., at p. 619.

(*e*) *Re Dudley Corporation*, *supra*, *Normanton Gas Co.* v. *Pope and Pearson, Ltd.* (1882), 48 L. T. 666; affirmed (1883), 52 L. J. (Q. B.) 629, C. A. (gas mains under special Act); see title GAS, Vol. XV., p. 331; *London and North Western Rail. Co.* v. *Evans*, [1893] 1 Ch. 16, C. A. (canal under special Act); *Clippens Oil Co.* v. *Edinburgh and District Water Trustees*, [1904] A. C. 64 (water pipes under special Act); see title WATER SUPPLY; compare *Dixon* v. *White* (1883), 8 App. Cas. 833; *Bell* v. *Dudley* (*Earl*), [1895] 1 Ch. 182. As to railway and canal companies, and as to tramway companies generally, see, respectively, titles RAILWAYS AND CANALS; TRAMWAYS AND LIGHT RAILWAYS.

(*f*) *London and North Western Rail. Co.* v. *Evans*, *supra*; *Glamorganshire*

may be different with regard to the lateral mines of an owner between whom and the undertakers there is no privity. If there is no provision for compensation to the lateral owner, a right of support will not be presumed (*g*); but it may be otherwise when there are compensation provisions which can be applied (*h*).

Special provisions as to support.

1455. Railway and canal Acts and other similar Acts usually contain specific provisions with regard to mines and minerals. Whether the undertakers acquire a right of support is then a question of the construction of the special sections of the Acts (*i*). The Acts may be divided into three classes: (1) those in which there is an immediate grant of the right of support, with an inherent present right to compensation on the part of the mine-owner (*k*); (2) those in which the mine-owner can compel the purchase of support, when he is proceeding to work his minerals (*l*); (3) those under which the undertakers have a right, but are under no obligation, to purchase support when the minerals are about to be worked (*m*).

Inherent present right to compensation.

1456. A grant of the right of support will be presumed unless there is some provision inconsistent with the ordinary presumption as between grantor and grantee (*n*); there may be in addition an express statutory liability imposed upon the mine-owner not to injure the works of the undertakers (*o*); or he may be prohibited from working without the consent of the undertakers and without giving security for damage done to their works (*p*). In these cases there is an inherent right to immediate compensation (*q*), which was included or ought to have been included in the compensation paid on the acquisition of the works (*r*); and after the lapse of time,

Canal Navigation Co. v. *Nixon's Navigation Co.* (1901), 85 L. T. 53, C. A.; *Clippens Oil Co.* v. *Edinburgh and District Water Trustees*, [1904] A. C. 64.

(*g*) *Metropolitan Board of Works* v. *Metropolitan Rail. Co.* (1869), L. R. 4 C. P. 192, Ex. Ch. This was a case of a sewer constructed under a special Act; the sewer might have been constructed of sufficient strength not to require the lateral support of which it was deprived; see *Roderick* v. *Aston Local Board* (1877), 5 Ch. D. 328, 332, C. A., and as to the construction of compensation clauses, see pp. 573, 574, *ante*.

(*h*) See *Re Dudley Corporation* (1881), 8 Q. B. D. 86, C. A., in conjunction with *Roderick* v. *Aston Local Board*, *supra*, explained in *Jary* v. *Barnsley Corporation*, [1907] 2 Ch. 600.

(*i*) *Cromford Canal Co.* v. *Cutts* (1848), 5 Ry. & Can. Cas. 442; *Knowles & Sons* v. *Lancashire and Yorkshire Rail. Co.* (1889), 14 App. Cas. 248; *London and North Western Railway* v. *Walker*, [1903] A. C. 289.

(*k*) See the text, *infra*.

(*l*) See p. 580, *post*.

(*m*) See p. 580, *post*.

(*n*) See *Caledonian Rail. Co.* v. *Sprot* (*of Garnkirk*) (1856), 2 Macq. 449, H. L.; *Elliot* v. *North Eastern Rail. Co.* (1863), 10 H. L. Cas. 333; *North Eastern Rail. Co.* v. *Crosland* (1862), 4 De G. F. & J. 550, C. A.; *Benfieldside Local Board* v. *Consett Iron Co.* (1876), 3 Ex. D. 54 (highway); and, as to the ordinary presumption, see p. 572, *ante*.

(*o*) *Elliot* v. *North Eastern Rail. Co.*, *supra*; *North Eastern Rail. Co.* v. *Crosland*, *supra*.

(*p*) *Caledonian Rail. Co.* v. *Sprot* (*of Garnkirk*), *supra*.

(*q*) See *North Eastern Rail. Co.* v. *Elliot* (1860), 1 John. & H. 145, *per* WOOD, V.-C., at pp. 153, 154; 2 De G. F. & J. 423, *per* Lord CAMPBELL, L.C., at p. 432.

(*r*) *Re Dudley Corporation*, *supra*.

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it will be presumed to have been included, even if it appears that the question was not in fact considered (*s*).

Power to compel assessment of compensation.

1457. In one class of canal Acts there is imposed upon the owner of excepted mines a liability not to injure the works of the undertakers. The liability is, as a rule, subject to a right on his part, if the result of his working will be to injure the canal or to flood his mines, to initiate proceedings for the assessment of compensation in respect of his liability to leave support and to compel payment (*t*); in such case, if instead of compelling the assessment of compensation, he proceeds to work and injures the canal, he will be liable in damages (*a*). In statutes of this class the statutory liability applies only to the excepted mines; but if there are provisions for payment of compensation which apply to mines "near or under" the canal (*b*), on the refusal of compensation the owner of adjacent mines is not liable in damages, if he works and injures the canal (*c*), even if he is also owner of the subjacent mines (*d*).

Undertakers' option to acquire support.

1458. Some special Acts contain provisions similar to the provision of the mining code (*e*). There is no grant of the right of support in the first instance; the undertakers have an option, but they are under no obligation, either to purchase the minerals or to pay compensation in respect of their not being worked. In these cases, the power to acquire support, as a rule, extends to certain prescribed limits (*f*); there may be no remedy available to the mine-owner if his mines are flooded (*g*).

SUB-SECT. 7. *Under Brine Pumping (Compensation for Subsidence) Act*, 1891.

Special provisions for compensation.

1459. Land is entitled to the natural support of brine or salt (*h*); but in a district where brine-pumping is carried on, subsidence may be due to the operations of different individuals, and statutory means of providing compensation for damage by subsidence have therefore been provided. The Brine Pumping (Compensation for

(*s*) *London and North Western Rail. Co.* v. *Evans*, [1893] 1 Ch. 16, C. A.
(*t*) *Cromford Canal Co.* v. *Cutts* (1848), 5 Ry. & Can. Cas 442.
(*a*) *Knowles & Sons* v. *Lancashire and Yorkshire Rail. Co.* (1889), 14 App. Cas 248.
(*b*) Compare *Manchester, Sheffield, and Lincolnshire Rail. Co.* v. *Johnson* (undated), 36 Ch. D. 629, n.; *Evans* v. *Manchester, Sheffield, and Lincolnshire Rail. Co* (1887), 36 Ch. D. 626; and cases cited in notes (*c*), and (*d*), *infra*.
(*c*) *Chamber Colliery Co.* v. *Rochdale Canal Co.*, [1895] A. C. 564.
(*d*) *New Moss Colliery Co.* v. *Manchester, Sheffield, and Lincolnshire, Rail. Co.*, [1897] 1 Ch. 725.
(*e*) See pp. 577, 578, *ante*.
(*f*) See the Acts considered in *Dudley Canal Navigation Co.* v. *Grazebrook* (1830), 1 B. & Ad. 59; followed in *Stourbridge Navigation Co.* v. *Dudley (Earl)* (1861), 3 E. & E. 409, Ex. Ch.; compare also the provisions for support of masonry referred to in *North Eastern Rail. Co.* v. *Elliot* (1860), 1 John. & H. 145; see also *Birmingham Canal Navigation Co.* v. *Dudley (Earl)* (1862), 7 H. & N. 969; *Birmingham Canal Co.* v. *Swindell* (1856), 7 H. & N. 980, n.; *Midland Rail. Co.* v. *Checkley* (1867), L. R. 4 Eq. 19, which cases involve questions of lateral support.
(*g*) *Dunn* v. *Birmingham Canal Co.* (1872), L. R. 8 Q. B. 42, Ex. Ch.
(*h*) *Salt Union, Ltd.* v. *Brunner, Mond & Co*, [1906] 2 K. B. 822.

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Subsidence) Act, 1891 (*i*), authorises the incorporation of compensation boards, who are empowered to raise a compensation fund by a levy on the brine-pumpers in the district. Any person who can prove that land has been damaged by brine-pumping, and that his interest in the land is such as would entitle him to recover damages for subsidence of that land, caused by the wrongful excavation of strata underlying or affording support to that land, is entitled to compensation (*j*); the board, however, has large powers of filling up cavities and restoring buildings (*k*). Compensation is paid in respect of damage, as defined by the Act (*l*), by subsidence or permanent submersion of land or buildings other than machinery or fixtures (*m*). Public companies and authorities, brine-pumpers, the owners of land receiving brine or salt royalties and persons interested in salt and alkali works, are not entitled to compensation; and, except as provided by the Act (*l*), no action may be brought for damage in respect of which compensation has been claimed (*n*).

SUB-SECT. 8.—*Remedies for Disturbance.*

Liability of successive owners.

1460. If the occupier of subjacent or adjacent mines wrongfully withdraws support from land and subsidence ensues, he is liable in damages for the injury thereby caused (*o*). A person in possession of mines is not liable for the injury caused by previous workings (*p*); nor is the person working adjacent mines liable for injury due to the wrongful withdrawal of the support of the subjacent mines, even if the proximate cause of the subsidence be the lawful working of the adjacent mines (*q*).

Liability of lessors and licensors.

If a miner holds under a lease or irrevocable licence and wrongfully withdraws support his grantor is not in general liable (*r*); but it is otherwise in the case of a revocable licence, if the licensor knew that damage might ensue from the acts of his licensee (*s*). Where a mining lessee, in the proper exercise of his powers, withdraws support, the remedy, in virtue of a contractual relation between the lessor and the surface owner or occupier or of an implied grant, may be against the lessor only. Thus, where the owner, subsequently to the grant of the mining lease, sells the surface,

(*i*) 54 & 55 Vict. c. 40.

(*j*) Brine Pumping (Compensation for Subsidence) Act, 1891 (54 & 55 Vict. c. 40), s. 23 (1).

(*k*) *Ibid.*, s. 30.

(*l*) Brine Pumping (Compensation for Subsidence) Act, 1891 (54 & 55 Vict. c. 40).

(*m*) *Ibid.*, s. 22.

(*n*) *Ibid.*, s. 50.

(*o*) *Harris* v. *Ryding* (1839), 5 M. & W. 60; *Humphries* v. *Brogden* (1850), 12 Q. B. 739; *Smart* v. *Morton* (1855), 5 E. & B. 30; *Backhouse* v. *Bonomi* (1861), 9 H. L. Cas. 503 (land in natural state); *Hilton* v. *Granville* (*Earl*) (1844), 5 Q. B. 701; *Haines* v. *Roberts* (1857), 7 E. & B. 625, Ex. Ch.; *Rogers* v. *Taylor* (1858), 2 H. & N. 828; *Brown* v. *Robins* (1859), 4 H. & N. 186; *Hunt* v. *Peake* (1860), John. 705 (land artificially burdened).

(*p*) *Greenwell* v. *Low Beechburn Coal Co.*, [1897] 2 Q. B. 165; followed in *Hall* v. *Norfolk* (*Duke*), [1900] 2 Ch. 493.

(*q*) *Darley Main Colliery Co.* v. *Mitchell* (1886), 11 App. Cas. 127,

(*r*) *Atkinson* v. *King* (1878), 2 L. R. Ir. 320. As to irrevocable licences, see p. 547, *ante*.

(*s*) *Atkinson* v. *King*, *supra*, at p. 337. As to revocable licences, see p. 568, *ante*.

SECT. 1. Right of Support.

excepting the mines and reserving working liberties, and covenants to pay compensation for damage to the surface, he alone is liable (*t*); and where, in similar circumstances, he lets the surface, without reserving a power to let down, he alone will be liable, if he refuses to allow the mining lessee to retain a pillar for support, in accordance with the provisions of the mining lease (*a*).

Liability of contractors and trustees

Contractors and their principals are alike liable for damage caused by the wrongful withdrawal of support (*b*). A trustee who works mines for the benefit of his testator's estate and causes subsidence is entitled to be indemnified out of the estate (*c*).

Inspection.

1461. Liberty to inspect mines and the working drawing may be obtained upon interlocutory application, if the plaintiff makes out a *primâ facie* case that his right of support has been infringed (*d*).

Measure of damages.

1462. The measure of damages, when buildings are injured, is the cost of repairs, together with the depreciation in value of the premises; but, in estimating the latter the depreciation in selling value attributable to the risk of future subsidence is not to be taken into account (*e*). In the case of subsidence of a highway, the measure of damages is the cost of rendering the road at the sunken level equally commodious (*f*).

Right to injunction.

1463. Interference with the right of support will, in general, entitle the injured person to an injunction (*g*). It must be shown, however, that actual damage has ensued (*h*), or that danger of injury is imminent and certain (*i*), or that the wrongdoer claims a right to work in an improper manner (*k*). If the subsidence is substantial, pecuniary loss need not be shown (*l*), and an injunction will not be refused merely on the ground that damages provide a sufficient remedy for the injury (*m*), or on the ground that mines cannot be

(*t*) See *Berkley* v. *Shafto* (1863), 15 C. B. (N. S.) 79, 97, 99.

(*a*) *Markham* v. *Paget*, [1908] 1 Ch. 697. As to the effect of covenants for support, as running with the land, see p. 572, *ante*.

(*b*) *Dalton* v. *Angus* (1881), 6 App. Cas. 740, *Jordeson* v. *Sutton, Southcoates, and Drypool Gas Co.*, [1898] 2 Ch. 614, 626, 627, affirmed, [1899] 2 Ch. 217, C. A.

(*c*) *Re Raybould, Raybould* v. *Turner*, [1900] 1 Ch. 199. As to a trustee's right of indemnity, see, generally, title TRUSTS AND TRUSTEES.

(*d*) See *Wall* v. *Dunn* (1876), 1 Seton, Judgments and Orders, 6th ed., 571, C. A.; *Baynton* v. *Leonard* (1853), 1 Seton, Judgments and Orders, 6th ed., 576.

(*e*) *West Leigh Colliery Co., Ltd.* v. *Tunnicliffe and Hampson, Ltd.*, [1908] A. C. 27; see title DAMAGES, Vol. X., p. 310, and p. 542, *ante*.

(*f*) *Lodge Holes Colliery Co., Ltd.* v. *Wednesbury Corporation*, [1908] A. C. 323. As to damage to highways, see p. 572, *ante*.

(*g*) See *Proud* v. *Bates* (1865), 34 L. J. (CH.) 406; *Trinidad Asphalt Co.* v. *Ambard*, [1899] A. C. 594, P. C. (land in natural state); *Dugdale* v. *Robertson* (1857), 3 K. & J. 695; *Hunt* v. *Peake* (1860), John. 705; *Elliot* v. *North Eastern Rail. Co.* (1863), 10 H. L. Cas. 333 (land artificially burdened); and see, generally, title INJUNCTION, Vol XVII., pp. 232 *et seq.*

(*h*) See *Birmingham Corporation* v. *Allen* (1877), 6 Ch. D. 284, C. A., *per* JESSEL, M.R., at p. 288.

(*i*) *Darley Main Colliery Co.* v. *Mitchell* (1886), 11 App. Cas. 127, *per* Lord BRAMWELL, at p. 145.

(*k*) See *Heat* v. *Gill* (1872), 7 Ch. App. 699, 711, 712; and see title INJUNCTION, Vol. XVII, pp. 210, 271.

(*l*) *A.-G.* v. *Conduit Colliery Co.*, [1895] 1 Q. B. 301, 311.

(*m*) *Siddons* v. *Short* (1877), 2 C. P. D. 572, 577.

worked at a profit if the injunction is granted (*n*). If, however, there is no claim of right, an injunction will be refused if it is shown that mining operations have ceased and that no further damage is to be anticipated (*o*). SECT. 1. Right of Support.

On account of the serious injury which may be caused by the suspension of mining operations, an interlocutory injunction will not generally be granted (*p*). Interlocutory injunction.

SECT. 2.—*Rights affecting Enjoyment of Surface.*

1464. Upon the severance of mines from the surface, whether by grant or exception, working powers and liberties are usually expressly granted or reserved (*q*), but in the absence of express provision, there is incident, by implication of law, to the ownership of mines a power to get and carry away the minerals (*r*); and on the same principle an express power will give rise to an implication of all incidental liberties necessary for the exercise of the power (*s*). An implied liberty will not be curtailed by the terms of an express power which may be exercisable to a greater extent or for a longer period (*a*); and such implied liberty may be available if the grant of the express liberty is invalid (*b*). Implied right to get minerals on severance. Comparison of express and implied powers.

There is *primâ facie* incident to the ownership of mines, power on the part of the mine-owner to enter upon the surface, to dig pits and get the minerals (*c*); to drive shafts vertically through an upper seam (*d*), or make underground communications through Extent of implied rights incident to ownership.

(*n*) *Westmorland* (*Earl*) v. *New Sharlston Colliery Co., Ltd.* (1898), 79 L. T. 716, 722.

(*o*) *Jordeson* v. *Sutton, Southcoates, and Drypool Gas Co.*, [1899] 2 Ch. 217, C. A.

(*p*) See *Hilton* v. *Granville* (*Earl*) (1811), Cr. & Ph. 283, 297; *Wheatley* v. *Westminster Brymbo Coal Co.* (1869), L. R. 9 Eq. 538, 551, 552.

(*q*) Provision is made for powers of working and incidental liberties in connection with minerals by various public general Acts—namely, in the case of inclosures (see Inclosure Act, 1859 (22 & 23 Vict. c. 43); and title COMMONS AND RIGHTS OF COMMON, Vol IV., p. 572); in favour of the Duke of Cornwall and his lessees in respect of mines in the assessional manors of the Duchy (see title CONSTITUTIONAL LAW, Vol. VII., pp 261, 264); in favour of the Crown and persons claiming under it in respect of mines under the sea adjacent to Cornwall (see *ibid.*, pp. 258, 259); in favour of the Crown in respect of the foreshore or the adjacent lands (see *ibid*, pp. 118, 147, 203). See *Honeywell Cotton Spinning Co.* v. *Marland*, [1875] W. N. 16.

(*r*) Compare Shep. Touch., ed. Preston, 89, 100; *Cardigan* (*Earl*) v. *Armitage* (1823), 2 B. & C. 197, 207; *Durham and Sunderland Rail. Co.* v. *Walker* (1842), 2 Gal. & Dav. 326, 345; see, *contra*, *Harris* v. *Ryding* (1839), 5 M. & W. 60, *per* Lord ABINGER, C.B, at p. 65; and see title EASEMENTS AND PROFITS À PRENDRE, Vol. XI., pp. 249 *et seq.*

(*s*) *Dand* v. *Kingscote* (1840), 6 M. & W. 174, 196. The limitation to such implied or incidental powers, and the manner in which express powers must be exercised, have already been discussed in dealing with leases; see pp. 557, 558, 562, *ante*.

(*a*) *Cardigan* (*Earl*) v. *Armitage*, *supra*, at p 211; compare *Hodgson* v. *Field* (1806), 7 East, 613.

(*b*) *Whidborne* v. *Ecclesiastical Commissioners for England* (1877), 7 Ch. D. 375, 381.

(*c*) *Cardigan* (*Earl*) v. *Armitage*, *supra*, at p. 207; *Durham and Sunderland Rail. Co.* v. *Walker*, *supra*, at p. 345; see, *contrà*, *Harris* v. *Ryding*, *supra*, at p. 65.

(*d*) *Goold* v. *Great Western Deep Coal Co* (1865), 2 De G. J & Sm. 600.

SECT. 2. Rights affecting Enjoyment of Surface.

a vertical barrier separating excepted mines (*e*); but the power to win and work will not be implied, if the process, as in the case of quarrying, will be destructive of or permanently injurious to the surface (*f*); such a power will only be conferred if the instrument of severance grants the liberty in clear and unambiguous language (*g*).

Implication of ancillary powers.

1465. An express liberty to dig pits implies *primâ facie* a right to fix on the surface, machinery necessary for draining the mines and raising the minerals (*h*); and, if necessary, to erect steam engines for these purposes, with an engine-house and a pond for supplying the engines with water (*i*). Similarly, a liberty with servants, carriages, and horses to enter and carry away the minerals may authorise the construction of a railway (*k*); and liberty to make a sough or drain carries with it liberty to make sough pits for its repair (*l*).

Spoil.

To an express right of working is probably incidental the right to deposit minerals and spoil on the surface (*m*); or, in the case of a

Appropriation of spoil.

quarry, to deposit spoil upon the adjoining lands of the grantor (*n*); and an express right to work implies a power, so far as it is necessary for winning and getting the minerals, to remove overlying strata and intermixed minerals (*o*), but not to appropriate intermixed minerals or minerals in overlying strata (*p*), unless they are of the nature of spoil (*q*). Refuse produced in refining the minerals gotten may be sold by the lessee (*r*), but refuse or spoil, if abandoned, becomes part of the freehold (*s*).

Spoil banks.

1466. If there is express power in a lease to deposit spoil the spoil banks belong to the lessee (*t*).

Measure of damages.

Where spoil from a colliery is wrongfully deposited on land the measure of damages in respect of land actually used is the value of the land for the purposes for which it has been used;

(*e*) *Re Gerard and London and North Western Rail. Co.*, [1895] 1 Q. B 459, 466, 471, C. A.

(*f*) *Bell* v. *Wilson* (1866), 1 Ch. App. 303; *Hext* v. *Gill* (1872), 7 Ch. App. 699, 714; *Whidborne* v. *Ecclesiastical Commissioners for England* (1877), 7 Ch. D. 375, 379, 381; *Midland Rail. Co.* v. *Miles* (1886), 33 Ch. D. 632, 647, C. A.

(*g*) *Hext* v. *Gill*, *supra*, at pp. 714, 717, 718; see *A.-G.* v. *Welsh Granite Co.* (1887), 35 W. R. 617, C. A.

(*h*) *Dand* v. *Kingscote* (1840), 6 M. & W. 174, 196. As to the express and implied powers, in leases, to bore and sink, see p. 558, *ante*.

(*i*) *Dand* v. *Kingscote*, *supra*.

(*k*) *Antrim* (*Earl*) v. *Dobbs* (1891), 30 L. R. Ir. 424.

(*l*) *Hodgson* v. *Field* (1806), 7 East, 613.

(*m*) *Cardigan* (*Earl*) v. *Armitage* (1823), 2 B. & C. 197, 211; *Marshall* v. *Borrowdale Plumbago Mines and Manufacturing Co.* (1892), 8 T. L. R. 275.

(*n*) *Middleton* v. *Clarence* (1877), 11 I. R. C. L. 499.

(*o*) *Robinson* v. *Milne* (1884), 53 L. J. (CH.) 1070, 1074.

(*p*) *Rogers* v. *Brenton* (1848), 10 Q. B. 26, 56 (intermixed minerals); *Goold* v. *Great Western Deep Coal Co.* (1865), 2 De G. J. & Sm. 600, 608 (overlying strata).

(*q*) *Robinson* v. *Milne*, *supra*.

(*r*) *Boileau* v *Heath*, [1898] 2 Ch. 301.

(*s*) *Ibid.*, at p. 305.

(*t*) *Robinson* v. *Milne*, *supra*. As to powers in leases, see, further, pp 561 *et seq.*, *ante*.

the injured party is also entitled to the diminution in value of adjoining land, whose value has been affected by the tipping (*a*).

SECT. 2. Rights affecting Enjoyment of Surface.

1467. A grant of land for building purposes, with an exception of the mines, empowers the grantee to remove minerals in digging foundations, but not to excavate minerals for the improvement of the land for selling or letting, or with a view to carry on a trade in the manufacture of the minerals (*b*).

Building land.

1468. Penalties can be exacted for sinking pits, or erecting steam engines, gins, or other like machinery within twenty-five yards from any part of a carriage-way or cartway, unless screened therefrom, so as not to be dangerous to passengers, horses or cattle (*c*). It is *primâ facie* the duty of a mine-owner properly to fence a shaft sunk through the surface in the exercise of a liberty, whether express or implied; failure in this respect renders him liable in respect of injuries to cattle of the surface owner which fall through the shaft (*d*).

Liability to screen and fence workings.

SECT. 3.—*Rights of Way.*

SUB-SECT. 1.—*Application of General Principles.*

1469. Roads may be constructed through mines in virtue of the right of property in the mines; and for this purpose the term "mine" in an exception is not restricted to the mineral stratum, but includes a layer of the adjoining soil sufficient for getting the excepted mine in a proper mode of working (*e*). Rights of way may also exist as rights *in alieno solo* appurtenant to mines, and may arise by express grant (*f*), by implication of law (*g*), or under the doctrine of prescription (*h*). In such case the dominant owner (*i*) is not entitled as against the servient owner (*i*) to the exclusive user of the right of way (*k*); and the servient owner may make alterations in the way, provided he does not thereby obstruct the dominant owner (*l*).

Rights of way in mines.

(*a*) *Whitwham* v. *Westminster Brymbo Coal and Coke Co.*, [1896] 2 Ch. 538, C. A.

(*b*) *Robinson* v. *Milne* (1884), 53 L. J. (CH.) 1070, 1074. The same rule applies to a lessee (*ibid.*); see, further, title BUILDING CONTRACTS, ENGINEERS, AND ARCHITECTS, Vol. III., p. 157.

(*c*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 70; and see titles BOUNDARIES, FENCES, AND PARTY WALLS, Vol. III., p. 130; HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 169. As to the liability for excavations amounting to a nuisance, see titles BOUNDARIES, FENCES, AND PARTY WALLS, Vol. III., pp. 128, 129; HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 153, 156, 157; and as to nuisance generally, see title NUISANCE.

(*d*) *Re Williams* v. *Groucott* (1863), 4 B. & S. 149; and see titles ANIMALS, Vol. I., p. 376; BOUNDARIES, FENCES, AND PARTY WALLS, Vol. III., p. 129.

(*e*) *Batten Pooll* v. *Kennedy*, [1907] 1 Ch. 256, following *Proud* v. *Bates* (1865), 34 L. J. (CH.) 406; *Hamilton* (*Duke*) v. *Graham* (1871), L. R. 2 Sc. & Div. 166; *Eardley* v. *Granville* (1876), 3 Ch. D. 826, and distinguishing *Ramsay* v. *Blair* (1876), 1 App. Cas. 701.

(*f*) See title EASEMENTS AND PROFITS À PRENDRE, Vol. XI., p. 287.

(*g*) *Ibid.*, pp. 288 *et seq.*

(*h*) *Ibid.*, p. 291.

(*i*) See *ibid.*, p. 236.

(*k*) See *R.* v. *Jolliffe* (1787), 2 Term Rep. 90, 95.

(*l*) *Bradburn* v. *Morris*, *Morris* v. *Bradburn* (1876), 3 Ch. D. 812, 821,

Rights of Way.

General wayleave.

1470. A general grant of wayleave, in connection with mines, but undefined in position, will authorise the construction and use of such a way as is necessary, having regard to the surrounding circumstances of the case or the requirements of the grantee (*m*); thus, a right of wayleave may authorise a framed waggon way, if it is necessary for the commodious carriage of coals (*n*); and the term "sufficient wayleave" may authorise the construction of a fenced railroad, if it is necessary to enable the minerals to be worked at a reasonable profit (*o*).

Wayleave of definite kind.

1471. If the nature of a right of way is clearly defined by the instrument of grant, the grantee cannot construct or use a way of a different nature; thus, a right of waggon-way (*p*) or a mere right of passage (*q*) will not authorise the construction and use of a tramroad or railroad.

Wayleave for defined purpose.

1472. So, if the purposes for which the way is to be used are defined in the grant, the user is restricted to these purposes (*r*); thus, a grant for all purposes except the carriage of minerals (*s*), or for agricultural purposes (*t*), or other purposes not including mining purposes (*u*), will not authorise the carriage of minerals. A right of way for minerals cannot be used for other purposes (*b*), and a right for the carriage of minerals from a particular mine does not authorise the carriage of foreign minerals (*c*), nor, if a terminus is defined, beyond that terminus (*d*). It is a question of construction whether a wayleave is limited to the carriage of minerals from the granted or excepted mine (*e*).

Direction of way.

1473. The right of way, when it arises by implication of law,

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(*m*) See *Farrow* v. *Vansittart* (1839), 1 Ry. & Can. Cas. 602, 609. For a form of grant of wayleave, see Encyclopædia of Forms and Precedents, Vol. V., p. 515; *ibid.*, Vol. VIII., p. 431.

(*n*) *Senhouse* v. *Christian* (1787), 1 Term Rep 560.

(*o*) *Dand* v. *Kingscote* (1840), 6 M. & W. 174. The right under a Canal Act, passed before the introduction of locomotive engines, to make railways or roads to convey coals to the canal, authorised the use of locomotive engines (*Bishop* v. *North* (1813), 11 M. & W. 418).

(*p*) See title EASEMENTS AND PROFITS À PRENDRE, Vol. XI., pp. 287 *et seq.*; *Farrow* v. *Vansittart*, *supra*, at p. 609; *Bidder* v. *North Staffordshire Rail. Co.* (1879), 4 Q. B. D. 412, 429, C. A.

(*q*) *Beaufort* (*Duke*) v. *Bates* (1862), 3 De G. F. & J. 381, 392, C. A.; *Neath Canal Co.* v. *Ynisarwed Resolven Colliery Co.* (1875), 10 Ch. App. 450.

(*r*) *Hamilton* (*Duke*) v. *Graham* (1871), L. R. 2 Sc. & Div. 166; and see title EASEMENTS AND PROFITS À PRENDRE, Vol. XI., p. 287.

(*s*) *Stafford* (*Marquis*) v. *Coyney* (1827), 7 B. & C. 257.

(*t*) *Bradburn* v. *Morris*, *Morris* v. *Bradburn* (1876), 3 Ch. D. 812, C. A.

(*u*) *Cowling* v. *Higginson* (1838), 4 M. & W. 245.

(*b*) *Durham and Sunderland Rail. Co.* v. *Walker* (1842), 2 Q. B. 940, Ex. Ch.; *Mowell* v. *Surtees* (1854), 3 Sm. & G. 101, 117, 118; *Farrow* v. *Vansittart*, *supra*.

(*c*) *Dand* v. *Kingscote*, *supra*, *Durham and Sunderland Rail. Co.* v. *Walker*, *supra*; *Midgley* v. *Richardson* (1845), 14 M. & W. 595.

(*d*) *James* v. *Cochrane* (1853), 8 Exch. 556, Ex. Ch.

(*e*) The grant was held to be general in *Bidder* v. *North Staffordshire Rail. Co.*, *supra*; *James* v. *Cochrane*, *supra*; *Bowes* v. *Ravensworth* (*Lord*) (1885), 15 Q. B. 512; *Proud* v. *Bates* (1865), 34 L. J. (CH.) 406.

must be exercised in some convenient direction (*f*). Under express grant the direction is in general defined, and no material deviation may be made from the defined route, although the deviation may be sanctioned by acquiescence (*g*). Where no definite route is prescribed the road may be constructed in the most convenient direction for purposes incident to the getting of the mines; the shortest practicable route need not be chosen (*h*).

SECT. 3. Rights of Way.

1474. Where a right of way is acquired by prescription the burden on the servient tenement may not be increased by more onerous user or by the construction of a more onerous way (*i*); but, while user for a particular purpose will not justify a user for other purposes or for a different object (*k*), user for a variety of purposes may be evidence of a right of user for all purposes (*l*).

Excessive user of way.

SUB-SECT 3 —*Remedies.*

1475. The obstruction of a private right of way will give rise to an action for damages (*m*); the dominant owner is also entitled to an injunction (*n*), and, if necessary, a mandatory injunction (*o*).

Remedies for obstruction.

1476. If a right of way is wrongly claimed an injunction will in general be granted to restrain the future user (*p*); and if rails have been wrongfully laid (*q*), or an aperture is made in adjoining land (*r*) for the carriage of minerals, a mandatory injunction will be granted to compel the wrongdoer to remove the rails or to stop up the aperture; but not if the wrongdoer merely uses an aperture wrongfully made by another person, although he will be compelled to allow the injured party access to enable the latter to stop it up (*s*).

Injunction in case of wrongful user.

1477. If a mine-owner carries minerals through land in which he has neither a right of property nor a right of way, he commits a trespass in respect of which an action for damages will lie (*t*);

In case of trespass.

(*f*) *Staple* v. *Heydon* (1703), 6 Mod. Rep. 1, 3
(*g*) *Mold* v. *Wheatcroft* (1859), 27 Beav. 510
(*h*) *Richards* v. *Richards* (1859), John. 255.
(*i*) *Stafford* (*Marquis*) v. *Coyney* (1827), 7 B. & C. 257; and see title EASEMENTS AND PROFITS À PRENDRE, Vol. XI., pp. 286, 291.
(*k*) *Cowling* v. *Higginson* (1838), 4 M. & W. 245: *Bradburn* v. *Morris*, *Morris* v. *Bradburn* (1876), 3 Ch. D. 812, C. A.; and see p. 586, *ante*, and the text, *supra*.
(*l*) *Wimbledon and Putney Commons Conservators* v. *Dixon* (1875), 1 Ch. D. 362, C. A.
(*m*) *Bell* v. *Midland Rail. Co.* (1861), 10 C. B. (N. S.) 287; *Mold* v. *Wheatcroft* (1860), 27 Beav. 510, 521; and see titles EASEMENTS AND PROFITS À PRENDRE, Vol. XI., p. 297; INJUNCTION, Vol. XVII., pp. 206, 245.
(*n*) *Newmarch* v. *Brandling* (1818), 3 Swan. 99, and cases cited in note (*m*), *supra*.
(*o*) See *Bradburn* v. *Morris*, *Morris* v. *Bradburn*, *supra*.
(*p*) *Powell* v. *Aiken* (1858), 4 K. & J. 343; *Wright* v. *Pitt* (1870), L. R. 12 Eq. 408, 417; *Phillips* v. *Homfray*, *Fothergill* v. *Phillips* (1871), 6 Ch. App. 770; *Wimbledon and Putney Commons Conservators* v. *Dixon*, *supra*; *Eardley* v. *Granville* (1876), 3 Ch. D. 826, 832.
(*q*) *Neath Canal Co.* v. *Ynysarwed Resolven Colliery Co.* (1875), 10 Ch. App. 450.
(*r*) *Powell* v. *Aiken*, *supra*.
(*s*) *Ibid.*
(*t*) *Monmouth Canal Co.* v. *Harford* (1834), 1 Cr. M. & R. 614; see, generally, title TRESPASS.

SECT. 3. Rights of Way.

similarly, if he uses a way of a kind unauthorised by his grant (*a*), or in a direction which is unauthorised (*b*), or for improper purposes (*c*), as the carriage of foreign minerals, he may be liable in damages (*d*).

Damages.

1478. The measure of damages is the value of the land for the purposes for which it is used; compensation is measured by wayleave rent in respect of the minerals carried (*e*), and the rate (if any) usual in the neighbourhood is adopted as a convenient measure (*f*).

SECT. 4.—*Rights as to Water.*

SUB-SECT. 1.—*Use of Water.*

Natural watercourse.

1479. The natural right enjoyed by a riparian proprietor (*g*) to use the water of a stream cannot be granted to a non-riparian proprietor (*h*), and a lessee of mines under land adjoining a stream is not, as regards the user of the water in the stream, a riparian proprietor (*i*). A riparian proprietor is entitled to the reasonable use of the stream for the purpose of working machinery connected with his mines (*k*); but *primâ facie* a mine-owner may not, by causing subsidence, obstruct the flow of the water (*l*).

Artificial watercourses

1480. A right to conduct water in an artificial channel over adjoining land may be acquired by express grant, in which case the rights and liabilities of the parties are regulated by the terms of the grant (*m*). Such right may also be acquired by prescription: the uninterrupted user as of right, for twenty years, of adjoining land so

(*a*) *Neath Canal Co.* v. *Ynisarwed Resolven Colliery Co.* (1875), 10 Ch. App. 450.

(*b*) *Senhouse* v. *Christian* (1787), 1 Term Rep. 560; *Abson* v. *Fenton* (1823), 1 B. & C. 195, *Dand* v. *Kingscote* (1840), 6 M. & W. 174, 199.

(*c*) *Howell* v. *King* (1674), 1 Mod. Rep. 190; *Stafford* (*Marquis*) v. *Coyney* (1827), 7 B. & C. 257; *Dand* v. *Kingscote*, *supra*, at p. 195; *Midgley* v. *Richardson* (1845), 14 M. & W. 595; *Powell* v. *Vickerman* (1887), 3 T. L. R. 358.

(*d*) These remarks do not apply to a way which exists by virtue of a right of property, see *Batten Poull* v. *Kennedy*, [1907] 1 Ch. 256.

(*e*) *Martin* v. *Porter* (1839), 5 M. & W. 351; *Powell* v. *Aiken* (1858), 4 K. & J. 343; *Hilton* v. *Woods* (1867), L. R. 4 Eq. 432, *Jegon* v. *Vivian* (1871), 6 Ch. App. 742; *Phillips* v. *Homfray*, *Fothergill* v. *Phillips* (1871), 6 Ch. App. 770; *A.-G.* v. *Tomline* (1880), 15 Ch. D. 150, C. A.; and see title DAMAGES, Vol. X., pp. 340, 341, 343.

(*f*) *Whitcham* v. *Westminster Brymbo Coal and Coke Co.*, [1896] 2 Ch. 538, C. A.

(*g*) As to the natural rights of a riparian owner to use water, see title EASEMENTS AND PROFITS À PRENDRE, Vol. XI., pp. 311 *et seq.*

(*h*) *Ormerod* v. *Todmorden Mill Co.* (1883), 11 Q. B. D. 155.

(*i*) *Insole* v. *James* (1856), 1 H. & N. 213.

(*k*) See *Weeks* v. *Heward* (1862), 10 W. R. 557.

(*l*) *Elwell* v. *Crowther* (1862), 31 Beav. 163. Rights to alter and divert streams for mining purposes are conferred by the Inclosure Act, 1859 (22 & 23 Vict. c. 43); as to the Duchy of Cornwall, see title CONSTITUTIONAL LAW, Vol. VII., p. 264; and as to rights to use streams in Ireland, Landlord and Tenant Law Amendment Act, Ireland, 1860 (23 & 24 Vict. c. 154).

(*m*) *Gaved* v. *Martyn* (1865), 19 C. B. (N. S.) 732, 758. As to artificial watercourses generally, see titles EASEMENTS AND PROFITS À PRENDRE, Vol. XI., pp. 315 *et seq.*; WATERS AND WATERCOURSES.

as to receive the flow, creates an easement in favour of the dominant owner (*n*), but such user does not *prima facie* create a servitude compelling the dominant owner to continue the flow (*o*). In such case, a party through whose land the water flows may *prima facie* abstract or divert the water without liability to other owners through whose land it flows (*p*). If the water is discharged for a temporary and particular purpose, as the draining of mines or by tapping a natural source for mining purposes, no right to the uninterrupted use of the stream will be acquired by persons through whose land it flows (*q*); but if the stream was originally intended to have a permanent flow, or, if the party by whom it was caused to flow has abandoned, without intention to resume, the works by which the flow was caused, and given up all right to and control over the stream, rights may be acquired by prescription, both as against the person from whose land the stream issues and any person through whose land it flows, similar to the rights existing in natural streams *ex jure naturæ* (*r*).

Remedies for infringement of rights.

1481. An action for damages lies if a riparian proprietor's natural or acquired rights are infringed (*s*), and an injunction will generally be given to restrain the continuance of the injury (*t*), although no actual damage is proved (*a*). Inspection of the neighbour's property may, if a *prima facie* case is shown, be obtained on interlocutory application (*b*). The infringement of rights in an artificial watercourse also gives rise to the right to damages and to an injunction (*c*), but if the aggrieved party allows his neighbour to incur expenditure the right to an injunction may be lost, and an injunction will not readily be granted if the result would be to cause inconvenience or injury in the working of a mine (*d*).

Injury to wells and springs.

1482. A mine-owner who, in carrying on mining operations in the usual manner, drains away water from adjacent and superjacent land, so that the wells and springs become dry, is under no liability

(*n*) See *Arkwright* v. *Gell* (1839), 5 M. & W. 203; *Mayor* v. *Chadwick* (1840), 11 Ad. & El. 571; *Wood* v. *Waud* (1849), 3 Exch. 748; *Gaved* v. *Martyn* (1865), 19 C. B. (N. S.) 732, 758; *Chamber Colliery* v. *Hopwood* (1886), 32 Ch. D. 549, 558, C. A.

(*o*) *Gaved* v. *Martyn*, *supra*.

(*p*) *Wood* v. *Waud*, *supra*.

(*q*) *Arkwright* v. *Gell*, *supra*, *Gaved* v. *Martyn*, *supra*; *Chamber Colliery Co.* v. *Hopwood*, *supra*; *Burrows* v. *Lang*, [1901] 2 Ch. 502.

(*r*) *Gaved* v. *Martyn*, *supra*, at p. 759; *Ivimey* v. *Stocker* (1866), 1 Ch. App. 396; *Baily & Co.* v. *Clark, Son & Morland*, [1902] 1 Ch. 649, C. A.; *Whitmores (Edenbridge), Ltd.* v. *Stanford*, [1909] 1 Ch. 427; compare *Ennor* v. *Barwell* (1860), 2 Giff. 410, 419—421; on appeal, 1 De G. F. & J. 529, C. A.

(*s*) *Bastard* v. *Smith* (1837), 2 Mood. & R. 129 (natural rights); *Pennington* v. *Brinsop Hall Coal Co.* (1877), 5 Ch. D. 769, 773, 774.

(*t*) *Ennor* v. *Barwell*, *supra*.

(*a*) *Pennington* v. *Brinsop Hall Coal Co.*, *supra*.

(*b*) See *Ennor* v. *Barwell* (1860), 1 De G. F. & J. 529, C. A.; and compare *Bradford Corporation* v. *Ferrand*, [1902] 2 Ch. 655.

(*c*) *Gaved* v. *Martyn*, *supra*; *Ivimey* v. *Stocker*, *supra*.

(*d*) *Birmingham Canal Co.* v. *Lloyd* (1812), 18 Ves. 515; see title INJUNCTION, Vol. XVII., p. 219.

SECT. 4. **Rights as to Water.**

in respect of such act (*e*); but the right to prevent the abstraction or diversion of water which percolates through the soil may be acquired by grant; thus a person who has conveyed land containing wells may be precluded from abstracting the water which supplies the wells (*f*), and damages may be recovered for the infringement of such right (*g*).

SUB-SECT. 2.—*Discharge of Water.*

Natural right to permit percolation.

1483. There is incident to property in land a right to permit water naturally present to flow or percolate under the action of gravitation to land or underground strata at a lower level (*h*), the lower owner's only remedy being to protect himself by the retention or erection of barriers (*i*); but there is *primâ facie* no right on the part of the upper owner to be an active agent in discharging water into lands at a lower level, by interference with the action of gravitation, or by conducting the water through artificial channels constructed for that purpose (*k*).

Liability for damage by unreasonable or improper working.

1484. The occupier of a mine is entitled to get all the minerals in his mine in a skilful and usual course of working, and legitimate operations conducted for that purpose do not impose a liability upon the owner of mines lying at a higher level, if the result is to permit the escape of water which collects in the workings, or even if the natural flow is increased. Thus the removal of a stratum which results in the inundation of a lower mine by an accumulation of water above the *stratum* (*l*), or the construction between two parallel inclined seams of a passage for the carriage of minerals which incidentally allows water to flow along it (*m*), or working in a proper manner which results in surface cracks and allows surface water to enter (*n*), or getting the minerals by quarrying where that is the usual mode of working in the district (*o*); or damming up water by a barrier so that water accumulates and overflows into an adjacent mine (*p*), or increasing the natural flow by vigorous working (*q*), does not impose liability upon the owner of an upper mine

(*e*) *Acton* v. *Blundell* (1843), 12 M. & W. 324, Ex. Ch.; *Ballacorkish Silver, Lead, and Copper Mining Co.* v. *Harrison* (1871), L. R. 5 P. C. 49. As to percolating water generally, see titles EASEMENTS AND PROFITS À PRENDRE, Vol. XI., p. 313, WATERS AND WATERCOURSES.

(*f*) *Whitehead* v. *Parks* (1858), 2 H. & N. 870.

(*g*) *Ibid.*; and see p. 542, *ante*.

(*h*) See, generally, title WATERS AND WATERCOURSES; see also *Smith* v. *Kenrick* (1849), 7 C. B. 515; *Young* (*John*) *& Co.* v. *Bankier Distillery Co.*, [1893] A. C. 691, 697, 701. The law of Scotland is the same.

(*i*) *Trower* v. *Chadwick* (1839), 6 Bing. (N. C.) 1, Ex. Ch.; see *Smith* v. *Kenrick*, *supra*, *Baird* v. *Williamson* (1863), 15 C. B. (N. S.) 376.

(*k*) See *Gaved* v. *Martyn* (1865), 19 C. B. (N. S.) 732, 758; *Roberts* v. *Rose* (1865), L. R. 1 Exch. 82, Ex. Ch.; *Baird* v. *Williamson*, *supra*; *Lomax* v. *Stott* (1870), 39 L. J. (CH.) 834.

(*l*) *Smith* v. *Kenrick*, *supra*.

(*m*) *Baird* v. *Williamson*, *supra*.

(*n*) *Wilson* v. *Waddell* (1876), 2 App. Cas. 95.

(*o*) See *Smith* v. *Fletcher* (1874), L. R. 9 Exch. 64, Ex. Ch.; *Fletcher* v. *Smith* (1877), 2 App. Cas. 781.

(*p*) *Lomax* v. *Stott*, *supra*.

(*q*) *Scot's Mines Co.* v. *Leadhills Mines Co.* (1859), 34 L. T. (O. S.) 34, H. L.

in respect of injury caused to the adjoining mine-owner by the inflow of water resulting from the respective operations. But it is essential that the mining operations should be ordinary, reasonable and proper. Operations which result in the flooding of a mine and are of no advantage to the owner of that mine are not ordinary, reasonable, nor proper (*r*).

Liability in case of trespass.

1485. A mine-owner who trespasses on an adjoining mine and pierces a barrier is liable in respect of the injury caused by the inflow of water (*s*); but the damage is consequential on the original trespass and must be recovered once for all; there is no continuing nuisance and a subsequent trespasser cannot be sued in respect of further damage (*t*).

Diversion of water.

1486. The diversion of the flow of water within the limits of the mine-owner's own property does not render him liable if the burden upon the lower owner is not thereby increased (*u*); but it is otherwise if the result of the operations is to increase the volume of the discharge or to alter its direction (*a*).

Pumping.

1487. A mine-owner is not, *primâ facie*, entitled to pump up water from his mine and to discharge it into a stream in which his neighbour has riparian rights (*b*), nor to conduct water to a mine at a lower level by artificial pipes (*c*) or channels (*d*). He will also be liable if he pumps up water from a lower part of his mine and allows it to descend by gravitation into the adjoining mine (*e*), or conducts water to a weak spot in his neighbour's boundary (*f*).

Liability of landowner.

1488. A person is *primâ facie* liable for all the damage which may result from the escape of water which he has collected and retained upon his land for his own purposes. Thus, he is liable if water which he has collected and retained breaks into a subjacent mine (*g*). His liability does not depend upon any question of negligence or unusual or unreasonable user (*h*). The right, however, to discharge water into a neighbour's mine may be acquired as an easement by grant (*i*), or by prescription; whether the water does or does not originate in the land of the dominant owner.

(*r*) *Crompton* v. *Lea* (1874), L. R. 19 Eq. 115.

(*s*) *Firmstone* v. *Wheeley* (1844), 2 Dow. & L. 203; *Clegg* v. *Dearden* (1848), 12 Q. B. 576; *Smith* v. *Kenrick* (1849), 7 C. B. 515.

(*t*) *Clegg* v. *Dearden*, *supra*; *Smith* v *Kenrick*, *supra*.

(*u*) *West Cumberland Iron and Steel Co.* v. *Kenyon* (1879), 11 Ch. D. 782, C. A.

(*a*) See *Smith* v. *Kenrick*, *supra*; *Rylands* v. *Fletcher* (1868), L. R 3 H. L 330; 1 Smith, L. C., 11th ed., 810; *West Cumberland Iron and Steel Co.* v. *Kenyon*, *supra*, at pp. 785—790.

(*b*) *Young (John) & Co.* v. *Bankier Distillery Co*, [1893] A. C. 691.

(*c*) *Lomax* v. *Stott* (1870), 39 L. J. (CH.) 831.

(*d*) *Baird* v. *Williamson* (1863), 15 C. B. (N. S.) 376, 390, 391; *Phillips* v. *Homfray*, *Fothergill* v. *Phillips* (1871), 6 Ch. App. 770, 781.

(*e*) *Baird* v. *Williamson*, *supra*, at p. 391.

(*f*) *Westminster Brymbo Coal and Coke Co.* v. *Clayton* (1867), 36 L. J. (CH.) 476, 478.

(*g*) *Rylands* v. *Fletcher*, *supra*; see also title WATERS AND WATERCOURSES.

(*h*) *Rylands* v. *Fletcher*, *supra*, at pp. 340—342.

(*i*) Mining easements in respect of water are provided for by the following statutes: (1) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20);

SECT. 4. SUB-SECT. 3.—*Pollution of Water.*

Rights as to Water.

Pollution.

1489. The pollution (*j*) of a river, or interference with its flow, by the deposit of solid refuse from a quarry or a mine is a statutory offence (*k*); as is also the putting into a river of any poisonous, noxious or polluting solid or liquid matter proceeding from a mine, other than water in the same condition as that in which it has been drained or raised from the mine, unless it can be shown that the best means are being used to render it harmless (*l*). The prosecution can only be undertaken by the local sanitary authority with the consent of the Local Government Board, or, if the authority fails to act, under the order of the Board (*m*).

SECT. 5.—*Ventilation.*

Ventilation.

1490. A mine-owner is not *primâ facie* entitled to use his neighbour's property for purposes of ventilation, either by the construction of air-passages (*n*) or by using artificial means to send air from his own mine into his neighbour's property or to draw air from his neighbour's property (*o*); but he is not *primâ facie* liable if air passes from his mine into his neighbour's property under the action of the forces of nature (*p*). The measure of compensation in respect of the wrongful use of a neighbour's property for ventilation is an air-leave rent; and, in case of such wrongful use, an injunction may be granted (*q*).

SECT. 6.—*Nuisance.*

Nuisance.

1491. The emission of smoke and noxious vapours in the processes of calcining, smelting, or reducing mineral ores, or the burning of bricks may constitute an actionable nuisance (*r*). Whether a nuisance has been committed is in such cases a question of fact; but substantial interference with the comfort and enjoyment

(2) Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17); (3) Inclosure Act, 1859 (22 & 23 Vict. c. 43); (4) Duchy of Cornwall Act, 1844 (7 & 8 Vict. c. 105), in respect of the assessional manors of the Duchy of Cornwall (see note (*l*), p. 588, *ante*); (5) Cornwall Submarine Mines Act, 1858 (21 & 22 Vict. c. 109), (6) Crown Lands Act, 1865 (29 & 30 Vict. c. 62).

(*j*) As to pollution of watercourses and water generally, see titles EASEMENTS AND PROFITS À PRENDRE, Vol XI., pp. 347 *et seq.*, NUISANCE; WATERS AND WATERCOURSES.

(*k*) Rivers Pollution Prevention Act, 1876 (39 & 40 Vict. c. 75), s. 2.

(*l*) *Ibid.*, s. 5.

(*m*) *Ibid.*, s. 6; as to enforcing compliance with the statutory provisions see *ibid.*, ss. 8—16; and title NUISANCE.

(*n*) *Powell* v. *Aiken* (1858), 4 K. & J. 343; *Bowser* v. *Maclean* (1860), 2 De G. F. & J. 415, 421.

(*o*) The principle is the same as in the case of water; see pp. 588 *et seq.*, *ante*.

(*p*) See *Jegon* v. *Vivian* (1871), 6 Ch. App. 742, 759; *Powell* v. *Vickerman* (1887), 3 T. L. R. 358.

(*q*) See the cases cited in notes (*m*), (*n*) p. 587, *ante*, and in notes (*t*), (*a*), p. 589, *ante*. Rights of air may be exercised under the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20); the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17); the Inclosure Act, 1859 (22 & 23 Vict. c. 43); and, in the assessional manors of the Duchy of Cornwall, under the Duchy of Cornwall Act, 1844 (7 & 8 Vict. c. 105).

(*r*) See title NUISANCE.

of the property of the aggrieved party must be shown (*s*). If a nuisance is established, it is no defence that the injured party has come to the nuisance (*t*).

Public Health Act, 1875.

The provisions of the Public Health Act, 1875 (*u*), do not apply so as to interfere with or obstruct the efficient working of mines, or the processes of smelting ores and minerals, or of the calcining, puddling and rolling of iron and other metals, or the conversion of pig iron into wrought iron (*v*); but this exemption does not affect the common law liability in respect of nuisances caused by the respective processes (*a*).

Part XII.—Statutory Regulation of Mines (*b*).

SECT. 1.—*Coal Mines.*

SUB-SECT. 1.—*In General.*

Statutes affecting coal mines.

1492. The statutory law regulating coal mines and mines of stratified ironstone and mines of shale and mines of fireclay (*c*) is embodied in the Coal Mines Regulation Acts, 1887 to 1908 (*d*),

(*s*) See *Walter* v. *Selfe* (1851), 4 De G. & Sm. 315; *St. Helen's Smelting Co.* v. *Tipping* (1865), 11 H. L. Cas. 642; *Salvin* v. *North Brancepeth Coal Co.* (1874), 9 Ch. App. 705; *Shotts Iron Co.* v. *Inglis* (1882), 7 App. Cas. 518.

(*t*) *St. Helen's Smelting Co.* v. *Tipping*, *supra*.

(*u*) 38 & 39 Vict. c. 55.

(*v*) *Ibid.*

(*a*) *A.-G.* v. *Logan*, [1891] 2 Q. B. 100.

(*b*) At the time this volume is passing through the press, a Bill dealing with the regulation of mines is before Parliament. In the event of the measure becoming law, its provisions will be dealt with in Supplement No. III. to the Laws of England.

(*c*) See Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 3. All other mines are regulated by the Metalliferous Mines Acts (see p. 624, *post*). The Secretary of State has power to decide to which group of Acts a particular mine belongs, unless the question arises in legal proceedings (Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 71). As to the meaning of coal mine and colliery, see pp. 501, 502, *ante*.

(*d*) These Acts are the Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58); the Coal Mines (Check Weigher) Act, 1894 (57 & 58 Vict. c. 52), the Coal Mines Regulation Act, 1896 (59 & 60 Vict. c. 43), the Coal Mines Regulation Act (1887) Amendment Act, 1903 (3 Edw. 7, c. 7); the Coal Mines (Weighing of Minerals) Act, 1905 (5 Edw. 7, c. 9); and the Coal Mines Regulation Act, 1908 (8 Edw. 7, c. 57). Coal mines are also governed, as regards the payment of wages, by the Truck Acts, 1831 (1 & 2 Will. 4, c. 37); 1887 (50 & 51 Vict. c. 46); 1896 (59 & 60 Vict. c. 44); and by the Weights and Measures Acts, 1878 (41 & 42 Vict. c. 49); 1889 (52 & 53 Vict. c. 21), 1892 (55 & 56 Vict. c. 18); 1893 (56 & 57 Vict. c. 19); 1897 (60 & 61 Vict. c. 46); 1904 (4 Edw. 7, c. 28); see titles FACTORIES AND SHOPS, Vol. XIV., pp. 514 *et seq.*; WEIGHTS AND MEASURES (see p. 601, *post*): with respect to accidents, by the Notice of Accidents Act, 1906 (6 Edw. 7, c. 53), and the Mines Accidents (Rescue and Aid) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 10); see titles CORONERS, Vol. VIII., pp. 209 *et seq.*; FACTORIES AND SHOPS, Vol. XIV., pp. 417 *et seq.*: with respect to child labour, by the Mines (Prohibition of Child Labour Underground) Act, 1900 (63 & 64 Vict. c. 21); see title INFANTS AND CHILDREN, Vol. XVII., pp. 154, 156: with respect to the use of explosives, by the Explosives Act, 1875 (38 & 39 Vict. c. 17); see title EXPLOSIVES, Vol. XIV., p. 398 (as to boiler explosions, see title FACTORIES AND SHOPS, Vol. XIV., pp. 474 *et seq.*): and with respect to the liability of mine-owners for compensation for injuries or death in the case of employees,

SECT. 1. Coal Mines.

which, as regards mines in the Forest of Dean, are supplemented by special Acts confirming customs existing among the free miners of the forest from time immemorial (*e*).

SUB-SECT. 2.—*Hours and Conditions of Labour.*

Hours of labour.

1493. The period during which a workman (*f*) may be employed below ground in a coal mine for the purposes of his work and of going to and from his work is eight hours in any consecutive twenty-four hours (*g*). In the case of workmen working in a shift (*h*) the period may be measured between the time the last workman in the shift leaves the surface and the time when the first workman in the shift returns to the surface (*i*).

Exceptional extensions.

National emergency.

Local emergency.

1494. The foregoing restriction may be suspended, or the period extended, by Order in Council in the event of war or imminent national danger, or great emergency, or any grave economic disturbance due to the demand for coal exceeding the supply (*k*); and exception is made in the case of any workman who is below ground for the purpose of rendering assistance in the event of accident, or for meeting any danger or apprehended danger, or for dealing with any emergency or work, uncompleted through unforeseen circumstances, which requires to be dealt with to avoid serious interference with ordinary work in the mine or any district of the mine (*l*). The period may also be extended in the

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by the Fatal Accidents Acts, 1846 (9 & 10 Vict. c. 93), and 1864 (27 & 28 Vict. c. 95); the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42); and the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), see titles MASTER AND SERVANT, pp. 131 *et seq.*, *ante*, and NEGLIGENCE. To these statutes may be added, as regards strikes and criminal law, the Trade Union Acts, 1871 and 1876 (34 & 35 Vict. c. 31; 39 & 40 Vict. c. 22), and the Trade Disputes Act, 1906 (6 Edw. 7, c. 47); the Conspiracy, and Protection of Property Act, 1875 (38 & 39 Vict. c. 86); the Conciliation Act, 1896 (59 & 60 Vict. c. 30); the Larceny Act, 1861 (24 & 25 Vict. c. 96); and the Malicious Damage Act, 1861 (24 & 25 Vict. c. 97); see titles CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 563 *et seq.*, 638, 783; and TRADE AND TRADE UNIONS: as regards sanitation, the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 38, see title PUBLIC HEALTH AND LOCAL ADMINISTRATION; and as regards rating, the Poor Relief Act, 1601 (43 Eliz. c. 2), s. 1; the Parochial Assessments Act, 1836 (6 & 7 Will. 4, c. 96), s. 1); the County Rates Act, 1852 (15 & 16 Vict. c. 81), s. 5; the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 144; the Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 27; the Lighting and Watching Act, 1833 (3 & 4 Will. 4, c. 90), ss. 9, 33; and the Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 163, 211; see title RATES AND RATING.

(*e*) As to the Forest of Dean, see p. 645, *post*.

(*f*) The expression "workman" means any person employed in a mine below ground who is not an official of the mine (other than a fireman, examiner, or deputy), or a mechanic or horsekeeper, or a person solely engaged in surveying or measuring (Coal Mines Regulation Act, 1908 (8 Edw. 7, c. 57), s. 1 (7)). For the restrictions as to employment of boys, girls, and women in mines, see title INFANTS AND CHILDREN, Vol. XVII., pp. 159 *et seq.*; and as to the penalty for breach of the regulations as to such employment, see Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 9; Coal Mines Regulation Act, 1908 (8 Edw. 7, c. 57), s. 1.

(*g*) Coal Mines Regulation Act, 1908 (8 Edw. 7, c. 57), s. 1 (1).

(*h*) "Shift of workmen" means any number of workmen whose times for beginning and terminating work in the mine are approximately the same (*ibid.*, s. 1 (7)).

(*i*) *Ibid.*, s. 1 (2).

(*k*) *Ibid.*, s. 4.

(*l*) *Ibid.*, s. 1 (2).

case of stallmen taking down top coal in square or wide work in the thick coal of the South Staffordshire district with a view to the safety of the mine (*m*). Firemen, examiners or deputies, on-setters, pump-minders, fanmen, and furnace-men may be employed below ground for a continuous period of nine hours and a half, and a workman engaged in the work of sinking a pit or driving a cross-measure drift which is being carried on continuously may be employed for a longer period than eight hours in the twenty-four hours if the time spent by him at his working place does not exceed six hours, and the interval between his time of leaving the working place and returning thereto is in no case less than twelve hours (*n*). A repairing shift of workmen may, for the purpose of avoiding work on Sunday, commence their period of work on Saturday before twenty-four hours have elapsed since the termination thereof (*o*).

South Staffordshire.

Firemen etc.

Workmen on cross-measure drifts.

Repairing shifts.

The time during which the workmen in a mine may be below ground may be extended by any owner (*p*), agent (*q*), or manager (*r*) on not more than sixty days in any calendar year by not more than one hour a day (*s*).

Limit of power of owner etc.

1495. The owner, agent, or manager of every mine is required to fix for each shift of workmen the times of commencing and completing the lowering (*t*) of the men to the mine, to keep a notice of such times posted at the pit-head, and to make arrangements for observance of the times fixed (*u*). The interval between the commencement and completion of the lowering must be approved as reasonable by the inspector (*v*), but may be extended in the case of accident to the winding machinery or other accident interfering with the lowering and raising of workmen (*x*). In the case of the owner, agent, or manager being aggrieved by the decision of the inspector, provision is made for referring the dispute to a person nominated by the judge of the county court of the district (*y*).

Lowering and raising miners.

(*m*) Coal Mines Regulation Act, 1908 (8 Edw. 7, c. 57), s. 1 (2).

(*n*) *Ibid.*, s. 1 (7)

(*o*) *Ibid.*, s. 1 (6).

(*p*) As to the meaning of "owner," see Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 75; *R.* v. *Brown* (1857), 7 E. & B. 757; *Stott* v. *Dickinson* (1876), 34 L. T. 291; *Arkwright* v. *Evans* (1880), 49 L. J. (M. C.) 82; *Evans* v. *Mostyn* (1877), 2 C. P. D. 547, 552; compare *Knuckey* v. *Redruth Rural Council*, [1904] 1 K. B. 382; and see note (*f*), p. 626, *post*.

(*q*) As to the meaning of "agent," see Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 75; and see note (*g*), p. 626, *post*.

(*r*) As to managers, see pp. 604 *et seq.*, *post*.

(*s*) Coal Mines Regulation Act, 1908 (8 Edw. 7, c. 57), s. 3. As to the liability of workmen to comply with notice of extension, see *Robinson* v. *Insoles, Ltd.* (1909), 102 L. T. 45.

(*t*) In the case of mines entered otherwise than by a shaft and to which workmen are not lowered by machinery, the admission and return of the men corresponds to lowering and raising (Coal Mines Regulation Act, 1908 (8 Edw. 7, c. 57), s. 5).

(*u*) *Ibid.*, s. 1 (3).

(*v*) As to inspectors, see pp. 608 *et seq.*, *post*.

(*x*) Coal Mines Regulation Act, 1908 (8 Edw. 7, c. 59), s. 1 (4).

(*y*) *Ibid.*, s. 1 (5). Regulations under this provision have been made by the Secretary of State (Stat. R. & O., 1909, p. 591).

SECT. 1. **Coal Mines.**

Registers of times of lowering and raising.

1496. The owner, agent, or manager is bound to appoint a person or persons to direct at the pit-head the lowering and raising of men to and from the mine, and to keep a register in the prescribed form of the times of lowering and raising, and the cases in which any man is below ground for longer than the proper period and the cause thereof, and such register must be open to inspection by the inspector (*z*). The owner, agent, or manager must also enter in a register the cases in which the time of work has been extended by him (*a*). The workmen may, at their own cost, appoint the check weigher (*b*), or any other person or persons for the purpose of observing the times of lowering and raising the workmen (*c*).

Regulations.

The owner, agent, or manager is also bound to make and publish regulations for securing compliance with the provisions mentioned in the two preceding paragraphs (*d*), and to provide the necessary means for raising the workmen from the mine within the proper period (*e*).

Offences and penalties.

1497. Any person who contravenes or fails to comply with the foregoing provisions, or connives at any such contravention or failure on the part of any other person, is guilty of a statutory offence, but a workman is not guilty thereof in case of any failure to return to the surface within the time limited if he proves that he was, without default on his part, prevented from doing so owing to means not being available for the purpose (*f*). A person guilty of an offence for which a special penalty is not provided, is liable in respect of each offence, on summary conviction, if he is the owner, agent, or manager of the mine, to a fine not exceeding £2, and in any other case to a fine not exceeding 10*s*. (*g*).

Evidence.

A workman who is below ground for a longer period during any consecutive twenty-four hours than the time fixed by the statute is deemed to have been below ground in contravention thereof, unless the contrary is proved (*h*).

Sanitary accommodation.

1498. The provisions of the Public Health Act, 1875 (*i*), with respect to privy accommodation in houses used as factories or buildings in which both sexes are employed apply equally to the

(*z*) Coal Mines Regulation Act, 1908 (8 Edw. 7, c. 57), s. 2 (1). For the penalty for making false entries in the register, see *ibid.*, s. 2 (3).

(*a*) *Ibid.*, s. 3 (2), see p. 595, *ante*

(*b*) As to check weighers, see p. 598, *post*.

(*c*) Coal Mines Regulation Act, 1908 (8 Edw. 7, c. 57), s. 2 (2). The provisions of the Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), ss. 13, 14; the Coal Mines (Check Weigher) Act, 1894 (57 & 58 Vict. c. 52), s. 1; and the Coal Mines (Weighing of Minerals) Act, 1905 (5 Edw. 7, c. 9), dealing with the relations of the check weigher and the owner, agent, or manager (see pp. 598, 599, *post*), are made applicable to the person so appointed (Coal Mines Regulation Act, 1908 (8 Edw. 7, c. 57), s. 2 (2)).

(*d*) Coal Mines Regulation Act, 1908 (8 Edw. 7, c. 57), s. 6. Publication is effected by posting the regulations at the pit-head and supplying a copy *gratis* to every workman who, not having been previously supplied therewith, applied for a copy at the office at which he is paid (*ibid.*).

(*e*) Coal Mines Regulation Act, 1908 (8 Edw. 7, c. 57), s. 6.

(*f*) *Ibid.*, s. 7 (1).

(*g*) *Ibid.*, s. 7 (2).

(*h*) *Ibid.*, s. 7 (3). As to legal proceedings, see pp. 622 *et seq.*, *post*.

(*i*) 38 & 39 Vict. c. 55; see title FACTORIES AND SHOPS, Vol. XIV., p. 452.

portions of a mine above ground in which girls and women are employed (*k*).

SUB-SECT 3.—*Payment of Wages.*

Place of payment.

1499. No wages may be paid to persons employed in or about a mine at or within any public-house, beer-shop, or place for the sale of spirits, beer, wine, cider, or other spirituous or fermented liquor, or other house of entertainment, or in any garden, office, or place belonging or contiguous thereto or occupied therewith (*l*).

Deductions from wages.

1500. Where the amount of wages to be paid to any persons employed in a mine depends on the amount of the mineral gotten, they must be paid according to the actual weight gotten of the mineral contracted to be gotten (*m*), which must be weighed (*n*) at a place as near to the pit's mouth as is reasonably practicable (*o*). But by agreement deductions may be made in respect of stones or substances other than the mineral contracted to be gotten, or of any tub, basket, or hutch improperly filled by the getter or his deputy or the person immediately employed by him (*p*). An agreement for deduction in respect of over-filling (*q*), or for an average deduction from the contents of each tub (*r*), is valid, but an agreement that no payment shall be made for any tub which, being selected at random out of an agreed number of tubs, proves to be improperly filled, is invalid (*s*). Deductions are determined in the special mode agreed upon or by some person appointed by the owner, agent, or manager and (if a check weigher has been appointed) by the check weigher; or, in the case of difference, by a third person mutually agreed upon by the owner, agent, or manager, and the persons employed in the mine, or, in default of agreement, appointed by a chairman of quarter sessions within the jurisdiction of which the

(*k*) Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 74.

(*l*) *Ibid.*, s. 11 (1). Contravening or failing to comply with this provision is a statutory offence, and the burden is thrown on the owner, agent, or manager of proving that he has taken all reasonable means to prevent such contravention or non-compliance (*ibid.*, s. 11 (2)). As to "reasonable means," see *Hall* v. *Hopwood* (1879), 49 L. J. (M. C.) 17 (manager); *Baker* v. *Carter* (1878), 3 Ex. D. 132 (owner); *Stokes* v. *Cheekland* (1893), 68 L. T. 457 (owner); *Stokes* v. *Matcheson*, [1902] 1 K. B. 857 (agent). As to payment of wages, see, further, titles MASTER AND SERVANT, pp. 82 *et seq.*, *ante*; WORK AND LABOUR.

(*m*) For the meaning of this phrase, see *Brace* v. *Abercarn Colliery Co.*, *Huggins* v. *London and South Wales Colliery Co.*, [1891] 2 Q. B. 699, C. A., *Kearney* v. *Whitehaven Colliery Co.*, [1893] 1 Q. B. 700, C. A.

(*n*) The total contents of each tub, whether consisting of the mineral contracted to be gotten or not, must be weighed (*Kearney* v. *Whitehaven Colliery Co.*, *supra*, *per* Lord ESHER, M.R., at pp. 708, 710). The weight of improper substances should be deducted from the total weight (*ibid.*)

(*o*) Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 12 (1).

(*p*) *Ibid.* Improper deductions may be recovered by action (*Netherseal Colliery Co.* v. *Bourne* (1889), 14 App. Cas. 228, followed in *Brace* v. *Abercarn Colliery Co.*, *Huggins* v. *London and South Wales Colliery Co.*, *supra*); but do not justify the miner in quitting his employment without notice (*Kearney* v. *Whitehaven Colliery Co.*, *supra*).

(*q*) *Atkinson* v. *Hastie* (1894), 21 Rettie (Justiciary Cases), 62.

(*r*) *Kearney* v. *Whitehaven Colliery Co.*, *supra*, *per* A. L. SMITH, L.J., at p. 714; *Ronaldson* v. *Mowat* (1894), 21 Rettie (Justiciary Cases), 55.

(*s*) *Kearney* v. *Whitehaven Colliery Co.*, *supra*; see *Ronaldson* v. *Mowat*, *supra*, at p. 61.

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mine is situate (*t*). The contravention of this provision is a statutory offence, and the owner, agent, or manager who neglects to take all reasonable means to prevent it, will be held liable for such offence (*a*). A Secretary of State may, however, on the joint representation of the owner or owners of any mine or class of mines employing not more than thirty persons underground, permit by order payment of such persons by any method other than that provided for by the statute (*b*).

Check weigher.

1501. The persons employed in mines where wages are paid according to the weight of mineral gotten (*c*) may, at their own cost, station a check weigher at the places appointed for weighing the mineral gotten and determining the deductions in order to take a correct account of the weight and correctly to determine the deductions, and may also appoint a deputy to act in the absence, for reasonable cause, of the check weigher (*d*). A statutory declaration by the person presiding at a meeting for appointing a check weigher or deputy check weigher that he has presided thereat, and that the person named was duly appointed, is required to be forthwith delivered to the owner, agent, or manager of the mine, and is *primâ facie* evidence of the appointment (*e*). The declaration must state whether the check weigher or deputy check weigher was appointed by a majority of the persons employed and paid according to the mineral gotten, as ascertained by ballot (in which case he is deemed to be appointed on behalf of all the persons employed who are entitled to appoint him), and, if he was not so appointed, must state the names of the persons by whom, or on whose behalf, the appointment was made (*f*). A check weigher or deputy

(*t*) Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 12 (1).

(*a*) *Ibid.*, s. 12 (2).

(*b*) *Ibid.*, s. 12 (3); compare *ibid.*, s. 79, under which orders of exemption under the Coal Mines Regulation Act, 1872 (35 & 36 Vict. c. 76), s. 17 (now repealed), as to the employment of more than thirty persons underground, remain in force (*Dickinson* v. *Handsley* (1889), 60 L. T. 567). In *Humble* v. *Humphreys*, [1902] A. C. 207, P. C., it was held that this provision does not apply where men, under a colliery agreement, are to receive payment by measurement for work done by them as miners at specified wages, and the amount of wages does not depend on the quantity of mineral gotten. Where the persons employed are, in pursuance of any order of exemption made by a Secretary of State, paid by the measure or gauge of the material gotten, the foregoing provisions apply as if the term "weighing" included measuring and gauging, and the terms relating to weighing are to be construed accordingly (Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 13 (7)).

(*c*) Including in addition to the persons in charge of the working places all holers, fillers, trammers and other persons paid according to the weight of the mineral gotten (Coal Mines (Weighing of Minerals) Act, 1905 (5 Edw. 7, c. 9), s. 2 (1)); and see p. 599, *post*.

(*d*) Coal Mines Regulation Act 1887 (50 & 51 Vict. c. 58), s. 13 (1), as amended by the Coal Mines (Weighing of Minerals) Act, 1905 (5 Edw. 7, c. 9), s. 1 (1), which defines "check weigher" as including "deputy check weigher" whenever used in these Acts. Where there are two seams in a mine the men in one have no power to elect a separate check weigher for that seam only, and the election must be by a majority of the persons employed (*Thorpe* v. *Davies*, [1908] 2 K. B. 750; compare, too, *Hopkinson* v. *Caunt* (1885), 14 Q. B. D. 592, decided on the Coal Mines Regulation Act, 1872 (35 & 36 Vict. c. 76), s. 18 (now repealed).

(*e*) Coal Mines (Weighing of Minerals) Act, 1905 (5 Edw. 7, c. 9), s. 1 (2).

(*f*) *Ibid.*, s. 1 (3).

check weigher appointed by a majority, ascertained by ballot, of the persons employed in the mine and paid according to the mineral gotten, cannot be removed by the persons employed in the mine except by a majority, ascertained by ballot, of the persons so employed and paid at the time of the removal (*g*).

Notice of appointment.

All persons entitled to appoint a check weigher, or deputy check weigher, must be informed of the intention to appoint, by notice posted at the pit-head or otherwise, specifying the time and place of the meeting, and must have the same facilities for each of them for recording their votes, either by ballot or otherwise (*h*).

Remuneration.

1502. A check weigher or deputy check weigher, duly appointed, who has acted as such, may recover his proportion of wages or recompense (including expenses properly incurred by him in carrying out his work (*i*)) from any person for the time being employed in the mine, and paid according to the weight of mineral gotten, notwithstanding that any of the persons by whom the check weigher was appointed may have left the mine or others have entered since his appointment (*j*). Where the majority of the persons, ascertained as aforesaid, agree, the owner or manager of any mine may, notwithstanding the provisions of the Truck Acts (*k*), retain the agreed contribution of such persons for the check weigher and pay and account to him therefor (*l*).

Such persons include not only those in charge of the working places, but also holers, fillers, trammers, or brushers, whether they are paid according to the weight of mineral gotten (*m*) or by a contractor employed in the mine who is himself so paid; but where such persons are paid by a contractor the proportion of wages or recompense recoverable from them is payable by and recoverable from him alone (*n*).

Facilities to be afforded to check weigher.

1503. The owner, agent, and manager of a mine are bound to give a check weigher all facilities necessary for fulfilling his duties, including facilities for examining and testing the weighing

(*g*) Coal Mines (Weighing of Minerals) Act, 1905 (5 Edw. 7, c. 9), s. 1 (5).

(*h*) *Ibid.*, s. 3. If the owner, agent, or manager, or any person employed by him or acting under his instructions, interferes with the appointment of a check weigher or deputy check weigher; or refuses proper facilities for holding a meeting where the persons entitled to make the appointment do not possess or are unable to obtain a suitable meeting place; or attempts by threats, bribes, promises, notice of dismissal or otherwise, to exercise improper influence in respect of such appointment, or to induce such persons entitled to appoint a check weigher not to reappoint him, or to vote for or against any particular person or class of persons in the appointment, such owner, agent, or manager is guilty of an offence against the Coal Mines Regulation Acts (Coal Mines (Check Weigher) Act, 1894 (57 & 58 Vict. c. 52), s. 1; Coal Mines (Weighing of Minerals) Act, 1905, s. 1 (1)). As to legal proceedings, see pp. 622 *et seq.*, *post*.

(*i*) Coal Mines (Weighing of Minerals) Act, 1905 (5 Edw. 7, c. 9), s. 2 (3).

(*j*) Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 14 (1); Coal Mines (Weighing of Minerals) Act, 1905 (5 Edw. 7, c. 9), s. 2 (1).

(*k*) 1831 (1 & 2 Will. 4, c. 37); 1887 (50 & 51 Vict. c. 46); (1896) 59 & 60 Vict. c. 44); see title FACTORIES AND SHOPS, Vol. XIV., pp. 514—521.

(*l*) Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 14 (2).

(*m*) Coal Mines (Weighing of Minerals) Act, 1905 (5 Edw. 7, c. 9), s. 2 (1).

(*n*) *Ibid.*, s. 2 (2). A miner paid by the day temporarily and not according to the weight of mineral gotten by him is not liable to contribute to the check weigher's wages under the statute (*Oaton* v. *Williams* (1910), 101 L. T. 957).

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machine and checking the tareing of tubs and trams, and also a shelter from the weather, containing the number of cubic feet requisite for two persons, a desk or table at which the check weigher may write, and a sufficient number of weights to test the weighing machine (*o*).

Limit upon check weigher's powers.

1504. A check weigher or deputy check weigher may not in any way impede or interrupt the working of the mine, nor interfere with the weighing or any of the workmen or the management of the mine (*p*). He is authorised only to take the account of the weight of the mineral or determine the deductions, and, unless he has reasonable grounds for supposing that the weighing or determination of the deductions will not be proceeded with, his absence from the place at which he is stationed is not a reason for interrupting or delaying such weighing or determination, which, unless the absent check weigher had reasonable ground to suppose that it would not be proceeded with, must be done or made by a person appointed in that behalf by the owner, agent, or manager (*q*). A check weigher or deputy check weigher may, however, give to any workman an account of the mineral gotten by him, or any information with respect to the weighing, or the weighing machine, or the tareing of the tubs or trams, or the deductions, or any other matter within the scope of his duties as check weigher if he does not thereby interrupt or impede the working of the mine (*r*).

Removal of check weigher.

1505. If the owner, agent, or manager desires the removal of a check weigher on the ground of his having impeded the working of the mine, or interfered with the weighing or the workmen or the management of the mine, or in any way exceeded the scope of his duties, he may complain to a court of summary jurisdiction, who, if of opinion that sufficient ground has been shown to justify the removal of the check weigher, may make a summary order therefor, but another check weigher may be stationed in his place (*s*).

(*o*) Coal Mines Regulation Act, 1887 (50 & 51 Vict c 58), s. 13 (2); Coal Mines (Weighing of Minerals) Act, 1905 (5 Edw. 7, c. 9), s 1 (4). Neglect to afford such facilities is a statutory offence (Coal Mines Regulation Act, 1887 (50 & 51 Vict c. 56), s 13 (2)). As to legal proceedings, see pp. 622 *et seq.*, *post*.

(*p*) As to misconduct of a check weigher, see *Prentice* v. *Hall* (1878), 26 W. R. 237; *Ex parte White* (1897), 13 T. L. R. 580, C. A.; *Sykes* v. *Barraclough*, [1904] 2 K. B. 675.

(*q*) Coal Mines Regulation Act, 1887 (50 & 51 Vict. c 58), s. 13 (3). If the person so appointed impedes or interrupts the check weigher or deputy check weigher in the discharge of his duties or improperly interferes with or alters the weighing machine or the tare in order to prevent a correct account being taken of the weighing and tareing, he is guilty of an offence against the Act (*ibid.*, s. 13 (8)); Coal Mines (Weighing of Minerals) Act, 1905 (5 Edw. 7, c. 9), s. 1 (1); see *Whitehead* v. *Holdsworth* (1878), 4 Ex. D. 13. As to legal proceedings, see pp. 622 *et seq.*, *post*.

(*r*) Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 13 (3); Coal Mines (Weighing of Minerals) Act, 1905 (5 Edw. 7, c. 9), s. 1 (1).

(*s*) Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 13 (4), (5). The court calls upon the check weigher to show cause against his removal (*ibid.*, s. 13 (4)), and may in every case make such order as to costs as the court thinks fit (*ibid.*, s. 13 (6)). It is not necessary, in order to constitute an "interference"

Inspection of weights and measures.

1506. The Weights and Measures Act, 1878 (*a*), applies to all weights, balances, scales, steelyards, and weighing machines used for determining the wages payable to any person employed in a mine according to the weight of mineral gotten, in like manner as it applies to weights, balances, scales, steelyards, and weighing machines used for trade (*b*). An inspector of weights and measures is bound, once at least in every six months, to inspect and examine the weights, balances, scales, steelyards, and weighing machines used or in possession of any person for use at any mine in his district, and also to make such inspection at any other time when he has reasonable cause for believing that any false or unjust weight, balance, scale, steelyard, or weighing machine is in use at any mine. He is also required to inspect the measures and gauges in use, but without preventing or interfering with the use of such as are ordinarily used at the mine (*c*).

SUB-SECT. 4.—*Shafts and Outlets.*

Shafts and outlets.

1507. The owner, agent, or manager of a mine (*d*) is required to provide at least two shafts or outlets (*e*), communicating with every seam for the time being at work, in order to afford separate means of ingress and egress for persons employed in the seam, whether the shafts or outlets belong to the same mine or to more than one mine (*f*). The shafts or outlets must not be nearer to one another at any given point than fifteen yards (*g*), and must have a communication between them not less than four feet both in width and height (*h*); and proper appliances for raising and lowering persons

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with workmen within the meaning of the Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 13 (4), that the acts of interference should be acts done at the mine (*Sykes* v. *Barraclough*, [1904] 2 K. B. 675). As to form of order for removal by justices, see *R.* v. *Llewellyn, Ex parte Squire* (1906), 96 L. T. 32. As to the enforcement of orders of courts of summary jurisdiction, see title MAGISTRATES, Vol. XIX., pp. 602 *et seq.*

(*a*) 41 & 42 Vict. c. 49; see title WEIGHTS AND MEASURES.

(*b*) Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 15 (1).

(*c*) *Ibid.*, s. 15 (2), (3), (4), (5). For the foregoing purposes of *ibid.*, s. 15 (1)—(5), an inspector may, without any authorisation from a justice of the peace, exercise at or in any mine all such powers as he could exercise with such an authorisation in writing under the Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), s. 48, and all the provisions of that section, including the liability to penalties, apply to such inspection, but the inspector must not, in fulfilling his duties, impede nor obstruct the working of the mine.

(*d*) "Mine" includes every shaft in the course of being sunk and every level and inclined plane in the course of being driven, and all the shafts, levels, planes, works, tramways, and sidings both below and above ground in and adjacent and belonging to the mine (Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 75). The whole of a private line leading from a mine to a main line is not a siding adjacent to the mine within the meaning of this provision (*Anderson* v. *Lochgelly Iron and Coal Co.* (1904), 7 F. (Ct. of Sess.) 187).

(*e*) "Shaft" includes pit (Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 75).

(*f*) Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 16 (1) (a).

(*g*) *Ibid.*, s. 16 (1) (b). This provision does not apply to any mine provided with two shafts sunk before January, 1865, but at that time separated by less than ten feet, nor to any mine begun to be sunk before the commencement of the Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), but separated by more than ten feet and less than fifteen yards (*ibid.*, s. 18).

(*h*) *Ibid.*, s. 16 (1) (b). This provision does not apply to any mine or class of

at each shaft must be kept on the works, and if not in actual use must be constantly available (*i*). Not only is contravention or non-compliance with these provisions a statutory offence, but the Attorney-General may obtain an injunction to restrain the working of any mine in which any person is employed or permitted to be employed in contravention thereof (*k*).

SUB-SECT. 5.—*Division of Mines into Parts.*

Division of mines into parts.

1508. Where the owner, agent, or manager has given notice in writing to the inspector of the district that two or more parts of a mine are worked separately, each such part is deemed a separate mine. A Secretary of State may, however, by notice served on the owner, agent, or manager, object to such a division as tending to induce an evasion or interference with the operation of the statute, and if the owner, agent, or manager, within twenty days after receipt of the notice, sends a notice to the inspector that he declines to acquiesce in the objection, the matter is determined by arbitration, and the date of the receipt of the last-mentioned notice is deemed to be the date of the reference (*l*).

SUB-SECT. 6.—*Plans.*

Plans of workings.

1509. The owner, agent, or manager is required to keep in the office at the mine an accurate plan (*m*) showing the workings, up to

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mines excepted by order of a Secretary of State on account of the thinness of the seams or other exigencies affecting the mine or class of mines so long as the conditions of the order are duly observed (*ibid.*, s. 18).

(*i*) *Ibid.*, s. 16 (1) (c); and see Coal Mines Regulation Act, 1908 (8 Edw. 7, c. 53), s. 6 (*b*). A working miner who is let down is bound to be brought up safely, even though he comes up on his own business and not on that of his master (*Brydon* v. *Stewart* (1855), 2 Macq. 30, H. L.).

(*k*) Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 16 (3). Ten days' notice of the intention to apply for an injunction must be given to the agent, owner, or manager (*ibid.*, s. 16 (4)). No person is precluded by any agreement from doing acts necessary for providing a second shaft where required, or liable under any contract to any penalty or forfeiture for doing acts necessary for complying with the provisions of the Act (*ibid.*, s. 17). Where not more than twenty persons are employed below ground at any one time in the whole of the different seams in connection with a single shaft the provisions of *ibid.*, s. 16, do not apply either—(1) to any working for making a communication between two or more shafts, or searching for or proving minerals, in the case of a new mine being opened; or (2) to any proved mine exempted by order of a Secretary of State on the ground (a) that the mineral proved is insufficient to repay the outlay of sinking a second shaft or making a second outlet, or re-establishing communication with a shaft or outlet where it has become unavailable; or (b) that the working in any seam has reached the boundary of the property or the extremity of the mineral field, and it is expedient to work away pillars formed in the course of ordinary working, notwithstanding that one of the shafts may be cut off by such working. Any mine exempted by an order of a Secretary of State is exempted from the operation of *ibid.*, s. 16, provided that the conditions of the order are duly observed, while a shaft is being sunk or an outlet made, or where one of the shafts or outlets has become unavailable for use through accident (Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 18).

(*l*) *Ibid.*, s. 19; compare *Thorpe* v. *Davies*, [1908] 2 K. B. 750. The provisions with respect to arbitration are contained in the Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 47.

(*m*) "Plan" includes a copy or tracing of any original plan (Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 75).

a date not more than three months previously, with regard to the surface; the position, extension, and direction of every known fault or dislocation of the seam, with its vertical throw; and the general direction and rate of dip of the strata, together with a section of the strata sunk through, or, if that be not reasonably practicable, a statement of the depth of the shaft with a section of the seam (*n*). He is also bound to produce the plan and section when requested by the inspector, and to mark the workings of the mine thereon, and the inspector may make a copy of any parts of the plan and section for official purposes only (*o*). The inspector may also, by notice in writing, require the owner, agent, or manager, to make, within a reasonable time, at the expense of the owner, an accurate plan and section (*p*) showing the above-mentioned particulars, and failure to comply with this requirement within twenty days after such requisition, or such further time as may be allowed by a Secretary of State, is a statutory offence (*q*).

SUB-SECT. 7.—*Abandoned Mines.*

Fencing.

1510. It is the duty of the owner of any mine the working of which has been abandoned or discontinued, at whatever time the abandonment or discontinuance (*r*) occurred, and of every person interested in the minerals, to cause the top of the shaft and every side entrance to be securely fenced in order to prevent accidents (*s*). Subject to any contract to the contrary the owner is liable, as between himself and any other person interested in the minerals, to carry this provision into effect, and to pay all expenses incurred by such other person in doing so (*t*).

(*n*) Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 34 (1); Coal Mines Regulation Act, 1896 (59 & 60 Vict. c. 43), s. 3.

(*o*) Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 34 (2).

(*p*) The scale of the plan must be not less than the Ordnance Survey of twenty-five inches to the mile or the same scale as the plan for the time being in use at the mine (*ibid.*, s. 34 (3)).

(*q*) *Ibid.*, s. 34 (3), (4). It is also an offence if the owner, agent, or manager fails, or wilfully refuses, to produce or allow the plan or section to be examined; or withholds any portion thereof; or refuses to mark the state of the workings thereon; or conceals any part of those workings; or produces an imperfect or inaccurate plan or section, unless he can show that he was ignorant of the concealment, imperfection, or inaccuracy. The notice in writing requiring the plan to be made at the owner's expense may be given by an inspector whether a penalty for the above offence has or has not been inflicted (*ibid.*, s. 34 (3)). As to legal proceedings, see pp. 622 *et seq.*, *post*.

(*r*) As to notice of abandonment and reopening, see p. 608, *post*.

(*s*) Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 37 (1); see, further, title BOUNDARIES, FENCES, AND PARTY WALLS, Vol. III., p. 130. The provision applies to mines abandoned before the passing of the Act; see *Stott* v. *Dickinson* (1876), 34 L. T. 291.

(*t*) Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 37 (1). The provision does not exempt persons from liability under other Acts (*ibid.*, s. 37 (3)). It is an offence against the Act if any person fails to act in conformity with this provision, or if any occupier of land or other person wilfully obstructs the owner of a mine or any other person interested as aforesaid (see the text, *supra*) in doing any act necessary in order to comply with it (*ibid.*, s. 37 (2), (4)). As to the meaning of "person interested in the minerals," see note (*f*), p. 626, *post*. As to legal proceedings, see pp. 622 *et seq.*, *post*.

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Plans of abandoned mines.

1511. The owner of the mine or seam must, within three months of its abandonment, send to a Secretary of State (1) either the original working plan of the mine or seam or an accurate copy thereof, made by a competent draughtsman and showing the boundaries of the workings, including the working faces and all headings in advance thereof, up to the time of abandonment; the pillars of coal or other mineral remaining unworked; the position, direction, and extent of every known fault or dislocation of the seam, with its vertical throw; the position of the workings with regard to the surface boundary; the general direction and rate of dip of the strata; and a statement of the depth of the shaft from the surface to the seam abandoned; and (2) a section of the strata sunk through, or, if that is not reasonably practicable, a statement of the depth of the shaft with a section of the seam (*a*). The plan and section are to be preserved by the Secretary of State, but, until the expiration of ten years from the time of the abandonment, no person is entitled to see the plan, when so sent, without the consent of the owner or the licence of a Secretary of State, which may not be granted unless he is satisfied that the inspection thereof is necessary in the interests of safety (*a*). Any person having, for the time being, the custody or possession of any plan or section of an abandoned mine or seam may be required by order of the High Court, on the application of the Secretary of State, to produce it to him for the purpose of inspection or copying (*b*). The owner of a mine or seam who fails to comply with the foregoing provisions is guilty of a statutory offence and is liable to a fine not exceeding £30 (*c*).

SUB-SECT. 8.—*Management.*

Appointment of manager and under-manager.

1512. Every mine, with certain exceptions (*d*), must be under a manager, who is responsible for its control, management, and direction. The owner or agent is bound to nominate himself or some other person as manager and to send written notice of the name and address of such manager to the inspector of the district (*e*).

(*a*) Coal Mines Regulation Act, 1896 (59 & 60 Vict. c. 43), s. 4 (1) (i.). The accuracy of the plan, which must be on a scale of not less than that of the Ordnance Survey of twenty-five inches to the mile or on that of the plan used at the mine when abandoned, must be certified by a surveyor or other person approved by an inspector of mines (*ibid.*). The owner must also, within three months of the abandonment, send to the inspector, on behalf of a Secretary of State, a correct return specifying particulars respecting the number of persons employed, the quantity of mineral wrought, and the number of days in each month on which coal or ironstone has been drawn during the period which has elapsed since the expiration of the year covered by the last annual return (Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 38 (3), s. 33, and Sched. III.).

(*a*) Coal Mines Regulation Act, 1896 (59 & 60 Vict. c. 43), s. 4 (1), (2).

(*b*) *Ibid.*, s. 4 (2).

(*c*) Coal Mines Regulation Act, 1887 (50 & 51 Vict. c 58), s. 38 (4). By *ibid.*, s. 38 (5), a complaint or information may be made or laid at any time within six months after the abandonment, or after service on the owner of a notice to comply with the requirements of *ibid.*, s. 38, whichever last happens. It is sufficient that the notice should call attention to *ibid.*, s. 38, without specifying its particular requirements (*Stokes* v. *Hill*, [1901] 1 K. B. 493). As to legal proceedings, see pp. 622 *et seq.*, *post*.

(*d*) For the exceptions, see p. 605, note (*j*), *post*.

(*e*) Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 20 (1).

Only a person for the time being registered as the holder of a first-class certificate under the Coal Mines Regulation Acts (*f*) is qualified to be a manager (*g*); and the owner and agent of any mine which is worked for more than fourteen days in contravention of these provisions are each liable to a fine not exceeding £50, and a further fine not exceeding £10 for every day during which the mine is so worked (*h*). The owner, however, is not so liable if he can prove that he has taken all reasonable means to prevent such contravention (*i*); and if, for any reasonable cause, there is for the time being no certificated manager, the owner or agent may appoint any competent person not so qualified as manager for two months, or until such person has had an opportunity, in the district in which the mine is situated, of obtaining a certificate by examination, and must send his name and address to the inspector (*j*). Daily personal supervision must be exercised in every mine, either by the manager or by an under-manager (*k*) nominated in writing by the owner or agent (*l*).

Cancellation of manager's certificate

1513. If any certificated manager or under-manager is represented to a Secretary of State by an inspector (*m*) or otherwise to be unfit for the discharge of his duties on account of incompetency or gross negligence, or has been convicted of an offence against the Coal Mines Regulation Acts (*f*), the Secretary of State may order a

(*f*) See note (*d*), p. 593, *ante*.

(*g*) Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 20 (2). The qualification for receiving a first-class or second-class certificate of competency is five years' practical experience in a mine (*ibid.*, s. 23 (1)), or three years' such practical experience, and either the holding of a diploma in scientific and mining training after a course of at least two years at any university, university college, mining school, or other educational institution approved by a Secretary of State, or the holding of a degree of any university so approved which includes scientific and mining subjects (Coal Mines Regulation Act (1887) Amendment Act, 1903 (3 Edw. 7, c. 7), s. 1). Certificates are granted by a Secretary of State to applicants who have given satisfactory evidence of sobriety, experience, ability, and general good conduct, and have been reported by examiners to have passed the examination satisfactorily (Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 26 (1)). The examination and qualifications of applicants for a second-class certificate must be suitable for practical working miners (*ibid.*, s. 24 (2)). Provision is made for the appointment of examiners and making rules for the conduct of examinations and incidental matters (*ibid.*, ss. 23 (2), (3), 24, 25). All holders of certificates are registered (*ibid.*, s. 26 (2)).

(*h*) *Ibid.*, s. 20 (3). As to legal proceedings, see pp 622 *et seq.*, *post*.

(*i*) Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 20 (3) (a).

(*j*) *Ibid.*, s. 20 (3) (b). Mines employing not more than thirty persons below ground are exempted from these provisions unless the inspector of the district requires, by notice in writing served on the owner or agent, that a mine should be under the control of a manager (*ibid.*, s. 20 (3) (c)).

(*k*) Such under-manager must hold a first-class or second-class certificate, and in the absence of the manager has the same responsibility as the manager (*ibid.*, s. 21 (2)). Certificates of service having the same effect as second-class certificates could be granted to persons exercising the functions of under-manager at or prior to the passing of the Act (*ibid.*, s. 80). The nomination of the under-manager does not affect the personal responsibility of the manager (*ibid.*, s. 21 (2)) Contractors for minerals and persons employed by them are not eligible for the post of manager or under-manager (*ibid.*, s. 22)).

(*l*) *Ibid.*, s. 21.

(*m*) As to inspectors, see pp. 608 *et seq.*, *post*.

public inquiry into his conduct at such place and before such county court judge, metropolitan police magistrate, stipendiary, or other person or persons (alone or with assessors) as he may appoint (*n*). The person or persons so appointed, who are termed "the court," have, for the purposes of the inquiry, all the powers of a court of summary jurisdiction and also of an inspector under the Coal Mines Regulation Act, 1887 (*o*). The court has power to cancel or suspend the certificate of the manager or under-manager if it finds that he is unfit for the discharge of his duties through gross incompetency or negligence or his conviction of an offence (*p*), against the Coal Mines Regulation Acts (*q*), and such cancellation or suspension is recorded on the register of holders of certificates (*r*). Orders of the court as to the costs and expenses of the inquiry are enforceable by any court of summary jurisdiction as if such costs and expenses were a fine imposed by it (*s*).

Renewal of certificate.

1514. The Secretary of State may at any time renew or restore any cancelled or suspended certificate on such terms as he thinks fit, and cause the renewal or restoration to be recorded in the aforesaid register (*t*). Any person proving to the satisfaction of a Secretary of State that he has lost or has been deprived of his certificate without fault on his part can, on payment of such fee as the Secretary of State directs, obtain a copy thereof certified by the person keeping the register, and any copy purporting to be so made and certified has all the effect of the original certificate (*u*).

Certified copies.

SUB-SECT. 9.—*Returns.*

Returns.

1515. The owner, agent, or manager of every mine is required to send to the inspector of the district, on or before the 21st January in every year, a correct return for the year ending on the 31st December preceding, with respect to the persons ordinarily employed, the

(*n*) Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 27 (1).

(*o*) *Ibid.*, s. 27 (8). Provisions are made by *ibid.*, ss. 27, 28, for the conduct of the inquiry generally, including the summoning of witnesses and the payment of costs, and also for the remuneration of the court and assessors (*ibid.*, s. 28 (2), (3)). As to the powers of inspectors, see p. 609, *post*. As to courts of summary jurisdiction, see title MAGISTRATES, Vol. XIX., pp. 567 *et seq.*

(*p*) *Ibid.*, s. 27 (6). The court sends to the Secretary of State a full report of the case with its opinion thereon, and such report of or extracts from the evidence as it thinks fit (*ibid.*, s. 27 (5)). The court can require the manager or under-manager to deliver up his certificate under a penalty of £100 (*ibid.*, s. 27 (7)).

(*q*) See note (*d*), p. 593, *ante*.

(*r*) Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 29 (1).

(*s*) *Ibid.*, s. 28 (1). As to enforcement of orders of court of summary jurisdiction, see title MAGISTRATES, Vol. XIX., pp. 602 *et seq.*

(*t*) Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 20 (2). As to forgery of and other offences connected with such certificate, see *ibid.*, s. 32; title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 761, 762.

(*u*) Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 30. The expenses incurred by a Secretary of State in carrying the provisions as to certificates into effect are defrayed out of moneys provided by Parliament, and all fees payable by applicants for examination or for copies of certificates are paid into the Exchequer as the Treasury directs (*ibid.*, s. 31 (1), (2)). The Home Secretary is charged with the administration of the statutory regulations relating to mines; see title CONSTITUTIONAL LAW, Vol. VII., pp. 82, 83.

quantity of mineral wrought, the number of days in each month in which coal or ironstone has been drawn, and the methods of ventilation (*a*), and such return must be in the prescribed form (*b*). The return must also include a statement containing such particulars as the Secretary of State may prescribe of all accidents which occurred in or about the mine during the year, and disabled, for more than seven days, any person employed from working at his ordinary work (*c*); and where any line or siding, not being part of a railway within the meaning of the Railway Employment (Prevention of Accidents) Act, 1900 (*d*), is used in connection with a mine or quarry, these provisions have effect, so far as regards accidents to persons employed by or on behalf of the owner of the mine, as if the line or siding were part of the mine (*e*).

Publication of returns.

1516. The Secretary of State may publish the aggregate results of the returns with respect to any particular county or inspector's district, and any individual return except such part as relates to the quantity of mineral gotten or wrought, but the publication of such part of the return must not be made without the consent of the person making the return or of the owner of the mine (*f*). No person, except an inspector or Secretary of State, or any body of commissioners incorporated by Act of Parliament for the drainage of mines, and authorised to assess and levy rates in respect of the mineral gotten from such mines, may, without such consent, see such part of any return (*g*).

Notice of accident.

1517. Where any accident occurs in or about any mine, above or below ground, which causes loss of life, or any fracture of the head or of any limb, or dislocation of a limb, or any other serious personal injury, to any person employed, or is caused by any explosion of gas or coal dust, or any explosive, or by electricity, or by overwinding or any other such special cause as the Secretary

(*a*) The return as to ventilation is not required (unless and until a Secretary of State otherwise prescribes) in the case of a mine which is not required to be under the control of a certificated manager (*ibid.*, s. 33 (1)), *i.e.*, a mine in which not more than thirty persons are employed below ground, and as to which no notice requiring it to be under the control of a manager has been served by the inspector (see Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), ss. 33 (1), 20 (3) (c); and note (*j*), p. 605, *ante*).

(*b*) *I.e.*, the form in the Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), Sched. III., or such other form as a Secretary of State may from time to time prescribe (s. 33 (1), Sched. III.). The inspector of the district is bound, on behalf of the Secretary of State, to furnish forms for the purpose of the returns required on application (*ibid.*, s. 33 (2)).

(*c*) *Ibid.*, s. 33, Sched. III., amended by the Notice of Accidents Act, 1906 (6 Edw. 7, c. 53), s. 1. For provisions as to coroners' inquests on deaths from accidents in mines, see title CORONERS, Vol. VIII., pp. 245, 246.

(*d*) 63 & 64 Vict. c. 27.

(*e*) Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 33, Sched. III., amended by the Notice of Accidents Act, 1906 (6 Edw. 7, c. 53), s. 1. By the Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 33 (4), every owner, agent, or manager failing to comply with the foregoing provisions, or making any return which is to his knowledge false in any particular, is guilty of a statutory offence. As to legal proceedings, see pp. 622 *et seq.*, *post*.

(*f*) Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 33 (3).

(*g*) *Ibid.*

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of State specifies by order (*h*), and causes any personal injury whatsoever to any person employed, the owner, agent, or manager must forthwith send notice in writing of the accident, and of any loss of life or personal injury caused thereby, to the inspector of the district in such form and accompanied by such particulars as the Secretary of State prescribes (*i*).

Notice of death.

If any such personal injury results in the death of the injured person, notice must be sent to the inspector within twenty-four hours after such death comes to the knowledge of the owner, agent, or manager (*j*).

Disturbance of place of accident.

Where loss of life or serious personal injury has immediately resulted from an explosion or accident, the place where the explosion or accident occurred must be left as it was immediately after the explosion or accident for at least three days after the sending of the notice or until the visit of an inspector (whichever first happens), unless compliance with this provision would tend to increase or continue a danger or impede the working of the mine (*k*).

Notice of opening, abandoning, or re-opening mine, and of change of name.

1518. The owner, agent, or manager of every mine must, within two months, give notice to the inspector of the district of the commencement of any working for the purpose of opening a new shaft for or a seam of any mine; the abandonment or discontinuance of the working (*l*) of a shaft or seam; or the recommencement, after abandonment or discontinuance for more than two months, of such working; or of any change in the name of any mine, or in the name of the owner, agent, or manager of any mine, or in the principal officers of any incorporated company which is the owner of a mine (*m*).

SUB-SECT. 10.—*Inspectors and Court of Inquiry.*

Appointment of inspectors.

1519. A Secretary of State may from time to time appoint any fit persons as inspectors of mines, and may assign them their duties, awarding them such salaries as the Treasury may approve: notice of each such appointment must be published in the *London Gazette* (*n*). A Secretary of State may also remove any such inspector (*n*).

(*h*) See note (*n*), p. 627, *post*.

(*i*) Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 35, amended by the Notice of Accidents Act, 1906 (6 Edw. 7, c. 53), s. 2 (1).

(*j*) Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 35 (3). Failure to act in compliance with this provision is a statutory offence (*ibid.*, s. 35 (4)). As to inspectors, see the text, *infra*, and p. 609, *post*. As to legal proceedings, see pp. 622 *et seq.*, *post*.

(*k*) Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 35 (2).

(*l*) As to abandonment, see p. 603, *ante*.

(*m*) Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 36. Failure to give such notice is a statutory offence (*ibid.*). As to legal proceedings, see pp. 622 *et seq.*, *post*.

(*n*) Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 39 (1), (2). In the appointment of inspectors in Wales and Monmouthshire, among candidates otherwise equally qualified, persons having a knowledge of the Welsh language must be preferred (*ibid.*; compare the similar provision with regard to factory inspectors as stated in title FACTORIES AND SHOPS, Vol. XIV., p. 529). By the Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 39 (3), "the inspector of a district" means the inspector who for the time being is assigned to the district or portion of the United Kingdom with reference to which the

Persons ineligible for appointment.

No person who practises or acts as, or is a partner of any person who practises or acts as, a land agent or mining engineer, or as a manager, viewer, agent or valuer of mines, or arbitrator in any difference arising between owners, agents, or managers of mines, or is otherwise employed in or about any mine, or is a miner's agent or a mine-owner (whether the mine is one to which the Coal Mines Regulation Acts (*o*) apply or not), may act as an inspector, nor may an inspector be a partner or have any interest, direct or indirect, in any mine in the district under his charge (*p*).

Powers of inspectors.

1520. An inspector of mines has power to make any examination and inquiry necessary for ascertaining whether, in the case of any mine, the statutory provisions relating to matters above ground or below ground are complied with; to enter, inspect, and examine any mine, and every part thereof, at all reasonable times by day and night, but without impeding or obstructing the working; to examine and inquire into the state and condition of any mine, or any part thereof, the ventilation, the sufficiency of the special rules for the time being in force, and all matters and things connected with or relating to the safety of the persons employed therein or in any mine contiguous thereto, or the care and treatment of horses and other animals; and to exercise all other powers necessary for carrying the Coal Mines Regulation Acts (*o*) into effect (*q*).

Duties of inspectors: to give notice of danger:

1521. If in any respect not expressly provided against by the Coal Mines Regulation Acts (*o*), or by any special rule, any inspector finds any mine or part thereof, or any matter, thing, or practice connected therewith, or with the control, management, or direction of the manager, to be so dangerous (*r*) or defective as to threaten or tend to the bodily injury of any person, he may give notice in writing to the owner, agent, or manager, stating the particulars in which he considers the mine or any part thereof, or any matter, thing, or practice, to be dangerous or defective, and requiring them to be remedied, and unless they are remedied forthwith he must report the matter to a Secretary of State (*s*). An owner, agent, or

term is used. Any person appointed or acting as inspector under the Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77) (see pp. 624, 625, *post*), if directed by a Secretary of State to act as an inspector under the Coal Mines Regulation Acts (see note (*d*), p. 593, *ante*), may so act, and shall be deemed to be an inspector thereunder (Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 39 (4)). The salaries of inspectors and the expenses incurred by them or by a Secretary of State are paid out of moneys provided by Parliament (*ibid.*, s. 39 (5)).

(*o*) See note (*d*), p. 593, *ante*.

(*p*) Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 40.

(*q*) *Ibid.*, s. 41. Wilful obstruction of an inspector in the execution of his duty, and refusal by an owner, agent, or manager to furnish him with the necessary means for making any entry, inspection, examination, or inquiry, is a statutory offence (*ibid.*). As to special rules, see pp. 619 *et seq.*, *post*

(*r*) As to danger caused by the condition of a neighbouring mine, see *R.* v. *Spon Lane Colliery Co.* (1878), 3 Q. B. D. 673; Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 49, r. 7; and see p. 614, *post*.

(*s*) Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 42 (1). As to inspection of mines before and during shifts, and when found to be dangerous by reason of gas, see pp 612, 614, *post*.

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manager who objects to remedy the matter complained of may, within ten days after receipt of the notice, send his objections in writing to a Secretary of State, in which case the matter is determined by arbitration (*t*), the date of the receipt of the objection being deemed to be the date of the reference (*u*). Failure to comply with the requisition of the notice, or, in the case of an arbitration, with the award, is a statutory offence, the notice and award being respectively deemed to be written notice of the offence (*a*). No agreement can preclude any person from complying with these provisions, and such compliance cannot give rise to any forfeiture or penalty (*b*).

to make reports.

Every inspector of a district is required to make an annual report of his proceedings during the preceding year to a Secretary of State to be laid before both Houses of Parliament (*c*); and where an explosion or accident has caused loss of life or personal injury to any person in a mine, a Secretary of State may at any time direct an inspector to make a special report thereon (*d*), and may publish such report as aforesaid, at such time and in such manner as he may think fit (*e*).

Courts of inquiry into accidents.

1522. A Secretary of State has power to appoint a competent person, and any person or persons possessing legal or special knowledge to act as assessor or assessors, to hold a formal investigation of any explosion or accident (*f*). The person or persons so appointed (who are termed "the court") are required to hold such investigation in open court in the manner and under the conditions which they deem most effectual for ascertaining the causes and circumstances of the explosion or accident and enabling them to report thereon to the Secretary of State, and are invested with all the powers of a court of summary jurisdiction (*g*) when hearing informations for offences against the Coal Mines Regulation Acts (*h*) and all the powers of an inspector (*i*) under those Acts (*k*). The court is

(*t*) Under the Coal Mines Regulation Acts, 1887 (50 & 51 Vict. c. 58), s. 47, and 1896 (59 & 60 Vict. c. 43), s. 2. The arbitrator's duty under these provisions is only to determine whether the matter entails danger and not what is the proper remedy, nor to direct its adoption (*Re Arbitration between Secretary of State for Home Department and Fletcher* (1887), 18 Q. B. D. 339, C. A.).

(*u*) Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 42 (2).

(*a*) *Ibid.*, s. 42 (3). The court may adjourn any proceedings before it for punishing the offence if satisfied that the owner, agent, or manager has taken active measures for complying with the notice or award, but has been unable with reasonable diligence to complete the works, and, if the works are completed within a reasonable time, no penalty will be inflicted (*ibid.*).

(*b*) *Ibid.*, s. 42 (4).

(*c*) *Ibid.*, s. 43.

(*d*) *Ibid.*, s. 44.

(*e*) Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 46.

(*f*) *Ibid.*, s. 45 (1). As to boiler explosions, see title FACTORIES AND SHOPS, Vol. XIX., pp. 474, 475.

(*g*) See title MAGISTRATES, Vol. XIX., pp. 58 *et seq.*

(*h*) See note (*d*), p. 593, *ante*.

(*i*) See pp. 608, 609, *ante*, and the text, *infra*.

(*k*) Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 45, (2), (3), (5). The Secretary of State may publish the report of the court (*ibid.*, s. 46).

also empowered to enter and inspect places and buildings when necessary; to summon witnesses and order production of books, papers, and documents; and to administer oaths and require persons examined to make and sign declarations of the truth of their statements under examination (*l*). All expenses incurred in connection with such an investigation, including the remuneration of any assessor, are deemed part of the expenses of the Secretary of State in the execution of the Coal Mines Regulation Acts (*m*).

SUB-SECT. 11.—*General Rules as to Safety.*

1523. Certain general rules (*n*) to provide for the safety of mines must, so far as reasonably practicable (*o*), be observed (*p*) in every mine; contravention of or non-compliance with these rules by any person is a statutory offence (*q*); and if any person contravenes (*r*) or does not comply with any of such general rules the owner (*s*), General rules as to safety.

(*l*) Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 45 (3) (a), (b), (c), (d). Witnesses are allowed the same expenses as are allowed to witnesses attending before a court of record, disputes as to amount being referred to a master of the High Court (*ibid.*, s. 45 (4)). Any person who, without reasonable excuse, fails to comply with any summons or requisition of the court after having his expenses tendered to him, or prevents or impedes the court in the execution of its duty, is liable to a fine not exceeding £10 for every offence, and, on failure to comply with a requisition for making any return or producing any document, to a fine of £10 for every day that the failure continues (*ibid.*, s. 45 (7)).

(*m*) *Ibid.*, s. 45 (6).

(*n*) These rules are contained in the Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 49, rr. 1—39, as amended by the Coal Mines Regulation Act, 1896 (59 & 60 Vict. c. 43), ss. 5, 6. The Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), repealed (by *ibid.*, s. 84, Sched. IV.), the Coal Mines Regulation Act, 1872 (35 & 36 Vict. c. 76), the Stratified Ironstone Mines (Gunpowder) Act, 1881 (44 & 45 Vict. c. 26), and the Coal Mines Act, 1886 (49 & 50 Vict. c. 40). The Coal Mines Regulation Act, 1872 (35 & 36 Vict. c. 76), s. 51, contained general rules similar to, but not identical with, the general rules contained in the Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58). Many of the decisions cited in the notes, *infra*, and to pp. 612—622, *post*, which are dated before 1887, are decisions upon expressions in the Coal Mines Regulation Act, 1872 (35 & 36 Vict. c. 76), s. 51, or in the Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77) (see p. 624, *post*), similar to those contained in the Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 49, and are cited as a guide to the meaning and effect of such expressions.

(*o*) These words refer to difficulties of engineering and the like, not to the question whether obedience is practicable, if the mine is to yield a profit (*Wales* v. *Thomas* (1886), 16 Q. B. D. 340, 347).

(*p*) The general rules must be observed in addition to the special rules (see pp. 619 *et seq.*, *post*), except in some specified cases where the special rules are inconsistent therewith (see note (*i*), p. 621, *post*). Every person must obey such directions as are given to him with a view to comply with the general and special rules (Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 49, r. 36).

(*q*) Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 50. As to penalties for these statutory offences, see p. 623, *post*. Working miners are, it seems, liable for breach of the general rules (*Frecheville* v. *Souden* (1883), 48 L. T. 612).

(*r*) As to contravention, see *Stokes* v. *Mitcheson*, [1902] 1 K. B. 857.

(*s*) One of several co-owners may be separately liable (*R.* v. *Brown* (1857), 7 E. & B. 757; *Baker* v. *Carter* (1878), 3 Ex. D. 132). An owner is not liable for an accident due entirely to the negligence of the manager if the owner has taken all reasonable care to appoint a qualified manager (*Watkins* v. *Naval Colliery Co* (1897), *Ltd.*, [1911] 2 K. B. 162, C. A.; and see *Baddeley* v. *Granville* (*Earl*) (1887), 19 Q. B. D. 423).

agent (*t*), or manager (*u*) is each guilty of such offence unless he can prove that he has taken all reasonable means (*v*), by publishing and to the best of his power enforcing such rules as regulations for working the mine, to prevent such contravention or non-compliance (*w*).

Ventilation.

1524. An adequate amount of ventilation must be constantly produced to dilute and render harmless noxious gases to such extent that the working places of the shafts, levels, stables, and workings of the mine, and the travelling roads are in a fit state for working and passing therein (*x*). Ventilation must be continuous (*a*) and extend over such parts of the mine as must be ventilated to ensure safety at the working places and travelling roads (*b*). Where a fire is used for ventilation, the return air, unless so diluted as to be non-inflammable, must be carried off clear of the fire by a dumb drift or airway; and where a mechanical contrivance for ventilation is introduced it must be in such a position and under such conditions as tend to ensure its being uninjured by an explosion (*c*).

Inspection before and during shifts.

1525. A station or stations must be appointed at the entrance of the mine (*d*) or of its different parts (*e*), and a competent person or persons (not being contractors for getting minerals) must be appointed by the owner, agent, or manager for the purpose of inspecting, within such time, immediately before the commencement of each shift, as may be fixed by the special rules of the mine (*f*), every part of the mine, situate beyond the station or each of the stations in which workmen are to work or pass during that shift (*g*), and ascertaining the condition thereof so far as the presence of gas, ventilation, roof and sides, and general safety are

(*t*) As to the liability of an agent of a mine under the control of a certificated manager, see *Wynne* v. *Forrester* (1879), 5 C. P. D. 361; *Stokes* v. *Mitcheson*, [1902] 1 K. B. 857.

(*u*) As to the position of a manager, see *Howells* v. *Wynne* (1863), 15 C. B. (N. S.) 3; *Howells* v. *Landore Steel Co.* (1874), L. R. 10 Q. B. 62; *Hall* v. *Hopwood* (1880), 49 L. J. (M. C.) 17; *Jones* v. *Robson*, [1901] 1 K. B. 673.

(*v*) As to taking reasonable means, see *Bell* v. *Bruce* (1891), 55 J. P. 535; *Anderson* v. *Atkinson* (1908), 99 L. T. 22, and see note (*l*), p. 597, *ante*.

(*w*) Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 50. As to an action for damages for injury caused by an explosion, see *Britannic Merthyr Coal Co., Ltd.* v. *David*, [1910] A. C. 74.

(*x*) Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 49, r. 1. *Ibid.*, r. 1, also provides that at least once a month in the case of mines required to be under the control of a certificated manager (see p. 604, *ante*) the quantity of air in the respective splits or currents shall be measured and the result entered in a book kept at the mine; see *Stokes* v. *Mitcheson*, *supra*; *Brough* v. *Homfray* (1868), L. R. 3 Q. B. 771.

(*a*) *Knowles* v. *Dickinson* (1860), 2 E. & E. 705.

(*b*) *Brough* v. *Homfray*, *supra*.

(*c*) Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 49, rr. 2, 3.

(*d*) *Ibid.*, s. 49, r. 4. A barometer and thermometer must be placed in conspicuous positions above ground near the entrance to the mine (*ibid.*, s. 49, r. 33).

(*e*) See p. 602, *ante*; *Wales* v. *Thomas* (1886), 16 Q. B. D. 340, 348.

(*f*) See pp. 619 *et seq.*, *post*.

(*g*) Two or more shifts succeeding one another without an interval are regarded as one shift (Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 49, r. 4 (1.)). As to the liability of a mine owner under this rule, see *Black* v. *Fife Coal Co.*, [1909] S. C. 152.

concerned; and no workman may pass beyond such station until the part of the mine beyond it has been examined and stated to be safe. Such inspection must be made with a locked safety lamp (*h*), except in the case of any mine in which inflammable gas has not been found within the preceding twelve months (*i*), and must extend to all working places in which work is temporarily stopped within any ventilating district in which the men have to work (*j*). A report (*k*) specifying the results of such inspection must then be recorded without delay in a book (*l*), kept for the purpose and accessible to the workmen, and must be signed by, and, so far as the same does not consist of printed matter, be in the handwriting of, the person who made the inspection (*m*). A similar inspection must be made in the course of each shift of all parts of the mine in which workmen are to work or pass during that shift, but a report need not be recorded (*n*).

Reports of inspectors.

A competent person or persons appointed by the owner, agent, or manager must, once at least in every twenty-four hours, examine the state of the external parts of the machinery, the state of the guides and conductors in the shaft, the head gear, ropes, chains, and other similar appliances in actual use both above and below ground; and once at least in every week examine the state of the shafts by which persons ascend and descend (*o*).

Examination of machinery.

Power is given to the persons employed in a mine from time to time to appoint two of their number or any two persons (not being mining engineers), who are practical working miners, to inspect the mine at their own cost (*p*). The persons appointed are entitled at least once a month to go to every part of the mine and inspect the shafts, levels, planes, working places, return airways, ventilating apparatus, old workings, and machinery; but if the owner, agent, or manager thinks fit, he or one or more officers of the mine may accompany the persons inspecting (*q*). The owner, agent, or manager and all persons in the mine must give every facility for such inspection. The persons inspecting must sign a report recorded in a book kept at the mine (*r*), and if the report

Periodical inspection on behalf of workmen.

(*h*) As to safety lamps, see p. 614, *post*.

(*i*) Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 49, r. 4.

(*j*) Coal Mines Regulation Act, 1896 (59 & 60 Vict. c. 43), s. 5 (1).

(*k*) The report may be partly in print or lithograph and partly in writing (Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 49, r. 37).

(*l*) The owner, agent, or manager is bound to provide such a book and keep it or a correct copy thereof at the mine. Any inspector or person employed at the mine, or any person with the written authority of such inspector or person, may inspect and take copies of or extracts from such book; but there is no obligation to keep any such book or copy for more than twelve months after the book has ceased to be used for entries (*ibid*., s. 49, r. 37).

(*m*) *Ibid.*, s. 49, r. 4 (i.).

(*n*) *Ibid.*, s. 49, r 4 (ii.). The report of one of such inspections must be recorded in the case of a mine worked continuously throughout the twenty-four hours by a succession of shifts (*ibid.*).

(*o*) *Ibid.*, s. 49, r. 5. A true report of the result of both these weekly and daily examinations must be signed by the person inspecting and entered in a book kept at the mine (*ibid.*; *Scott* v. *Bould*, [1895] 1 Q. B. 9).

(*p*) Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 49, r. 38.

(*q*) *Ibid.*

(*r*) As to books and reports, see note (*l*), *supra*.

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states the existence or apprehended existence of danger the owner, agent, or manager is bound to send a copy forthwith to the inspector of the district (*s*).

Withdrawal of workmen in case of danger from gas.

Inspection of mine or part.

1526. When a mine or any part of a mine is found by the person in charge to be dangerous on account of inflammable gases, or from any other cause, the workmen must be withdrawn, and the mine, or the part found to be dangerous, must be inspected by a competent person, who, if the danger arises from inflammable gas, must inspect the mine or part of the mine with a locked safety lamp, and must in every case make a true report of the condition of such mine or part, to be recorded in a book kept for the purpose and signed by the person making the inspection. No workman, except in so far as is necessary for inquiring into the cause of danger or for the removal thereof, or for exploration, may be re-admitted into such mine or part, until it is stated by the person so appointed not to be dangerous (*t*).

Safety lamps.

1527. Locked safety lamps only may be used in any place in a mine in which there is likely to be any such quantity of inflammable gas as to render the use of naked lights dangerous, or in any working approaching near a place in which there is likely to be an accumulation of inflammable gas (*a*). No safety lamp may be used in any mine or part thereof unless it is provided by the owner of the mine, and no portion of any safety lamp may be removed from the mine while the lamp is in use (*b*). When it is necessary to work the coal in any part of a ventilating district with safety lamps, no one may work with naked lights in another part thereof situated between the place where the lamps are being used and the return airway (*c*). Safety lamps are required to be so constructed that they may safely be carried against the air current ordinarily prevailing in that part of the mine in which they are in use for the time being, even though such current should be inflammable (*d*).

Inspection of lamps.

A competent person, appointed by the owner, agent, or manager, must either at the surface or at the appointed lamp station examine every safety lamp immediately before it is taken into the workings for use, and no safety lamp may be used until it has been so examined and ascertained to be in safe working order and securely locked. A safety lamp may only be unlocked at the appointed lamp station, or for the purpose of firing a shot; and no person (unless appointed for the purpose of examining lamps or

(*s*) Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 49, r. 38. As to the inspector of the district, see note (*n*), p. 608, *ante*.

(*t*) Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 49, r. 7. A report signed by the person who made the inspection must be recorded (*ibid.*). As to the liability of a mine-owner when workmen are not withdrawn from the mine and no inspection is made by the manager for ascertaining the presence of noxious gas, see *Black* v. *Fife Coal Co.*, [1909] S. C. 152.

(*a*) Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 49, r. 8

(*b*) Coal Mines Regulation Act, 1896 (59 & 60 Vict. c. 43), s. 5 (2).

(*c*) Coal Mines Regulation Act, 1887 (50 & 51 Vict. c 58), s. 49, r.

(*d*) *Ibid*, s. 49, r. 9. As to special rules in respect of safety lamps, see p. 621, *post*.

firing shots) may have in his possession any contrivance for opening the lock of a safety lamp, or any lucifer match, or apparatus for striking a light, except within a completely closed chamber attached to the fuse of the shot (*e*). The position of lamp stations for lighting or relighting lamps must not be in the return air (*f*).

Explosives.

1528. An explosive substance may only be used below ground on condition that it is neither stored in the mine (*g*) nor taken therein except in cartridges in a secure case (*h*) or canister containing not more than five pounds (*i*). No workman may have more than one such case or canister in use at one time in any one place (*k*); and no person when charging or stemming for blasting may use or have in his possession any iron or steel pricker, scraper, charger, tamping rod, or stemmer, and only clay or other non-inflammable substance provided by the owner of the mine may be used for stemming (*l*). An explosive may not be forcibly pressed into a hole of insufficient size, and when a hole has been charged the explosive may not be unrammed, and no hole may be bored for a charge at less distance than six inches from any hole where the charge has missed fire (*m*).

Shots.

No shot may be fired in any place in which the use of a locked safety lamp is required, or which is dry and dusty, except by or under the direction of a competent person, appointed by the owner, agent, or manager, and such person may not fire the shot nor allow it to be fired until he has examined both the place where the shot is to be fired and all contiguous accessible places of the same seam within a radius of twenty yards and found such place safe for firing (*n*).

Inspection of place.

If, in any mine, at either of the four inspections recorded last before a shot is to be fired, inflammable gas has been reported to be present in the ventilating district (*o*) in which the shot is to be fired, the shot must not be fired unless a competent person appointed as aforesaid has, after examination of the place, found that such gas has been cleared away and that there is not at or near such place sufficient gas issuing or accumulated to render it unsafe to fire the shot; or unless the explosive employed is

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(*e*) Coal Mines Regulation Act, 1887 (50 & 51 Vict. c 58), s. 49, r. 10.

(*f*) *Ibid.*, s. 49, r. 11.

(*g*) *Ibid.*, s. 49, r. 12 (a). As to explosives generally, see title EXPLOSIVES, Vol. XIV., pp. 355 *et seq.*

(*h*) As to the meaning of "case," see note (*m*), p. 629, *post.*

(*i*) Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 49, r. 12 (b). It is, however, provided that on the application of the owner or manager the Secretary of State may exempt a mine from so much of this rule as forbids taking into it any explosive except in cartridges (*ibid.*).

(*k*) *Ibid.*, r. 12 (c).

(*l*) *Ibid.*, r. 12 (d), as amended by the Coal Mines Regulation Act, 1896 (59 & 60 Vict. c. 43), s. 5 (3).

(*m*) Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 49, r. 12 (e).

(*n*) *Ibid.*, r. 12 (f).

(*o*) "Ventilating district" means such part of a seam as has an independent intake commencing from a main intake air course and an independent return airway terminating at a main return air course; and by *ibid.*, r. 12 (l), where a seam of a mine is not divided into separate ventilating districts, the foregoing provisions relating to such districts shall be read as though the word "seam" were substituted for the words "ventilating district" (*ibid.*, s. 49,

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so used with water or other contrivance as to prevent its inflaming, or is of such a nature that it cannot inflame, gas (*p*).

Dry and dusty places.

A shot may not be fired in a place which is dry and dusty, unless the place of firing and all contiguous accessible places within a radius of twenty yards therefrom are at the time of firing in a wet state from thorough watering, or other treatment equivalent to watering, in all parts where dust is lodged, whether roof, floor, or sides; or, in places where watering would injure the floor or roof, unless the explosive is so used with water or other contrivance as to prevent it from inflaming, or is of such a nature that it cannot inflame, gas or dust (*q*). If such dry and dusty place is part of or contiguous to a main haulage road (*r*) and shows dust adhering to the roof and sides, no shot may be fired unless both the above-mentioned conditions or such as are applicable to the particular place have been observed, and all workmen have been removed from the seam in which the shot is to be fired and from all seams communicating with the shaft on the same level, except the men engaged in firing the shot, and such other persons, not exceeding ten, as are necessarily employed in attending to the ventilating furnaces, steam boilers, engines, winding apparatus, signals or horses, or in inspecting the mine (*s*).

Prohibited explosives.

A Secretary of State, on being satisfied that any explosive is or is likely to become dangerous, may, by order (*t*), of which notice must be given in such manner as he shall direct (*u*), prohibit the use thereof in any mine, or in any class of mines, either absolutely or subject to conditions, and the provisions of the Coal Mines Regulation Act, 1887 (*v*) as to contraventions of general rules apply to contraventions of any such prohibitions (*a*).

Accumulation of water.

1529. Where a place is likely to contain a dangerous accumulation of water, the working approaching thereto may not at any point within forty yards therefrom exceed eight feet in width, and there

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(*p*) Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 49, r. 12 (g).

(*q*) *Ibid.*, s. 49, r. 12 (h).

(*r*) By *ibid.*, r 12 (k), "main haulage road" means a road which has been, or for the time being is, in use for moving trains by steam or other mechanical power.

(*s*) Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 49, r. 12 (i) By *ibid.*, r. 12 (m), so much of *ibid.*, r. 12, as requires the explosive substance taken into the mine to be in cartridges, and so much of the provisions of *ibid*, r. 12 (f), as relates to a dry and dusty place, and the provisions of *ibid*, r. 12 (g), (h), (i), (k) and (l), are not applicable to seams of clay or stratified ironstone which are not worked in connection with any coal seam, and which contain no coal in the working; compare Coal Mines Regulation Act, 1896 (59 & 60 Vict. c. 43), s. 6, as to explosives; and see the text, *infra*.

(*t*) The order in force is that of 21st February, 1910 (St. R. & O., 1910, p. 481), which revoked St. R. & O., 1906, p. 427, and the following amending orders:—St. R. & O., 1907, p. 736, St. R. & O., 1908, pp. 654, 657; St. R. & O., 1909, pp. 592, 595, 596, 599.

(*u*) An order comes into operation as soon as it is made, and is valid though no notice of the order has been given. The provision as to notice is merely directory and not a condition precedent to the validity of the order (*Jones* v. *Robson*, [1901] 1 K. B. 673).

(*v*) 50 & 51 Vict. c. 58, s. 50; see pp. 622 *et seq.*, *post*.

(*a*) Coal Mines Regulation Act, 1896 (59 & 60 Vict. c. 43), s. 6. For penalty for the contravention of general rules under the Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), see p. 623, *post*.

must constantly be kept at a sufficient distance, not being less than five yards in advance, at least one bore-hole near the centre of the working and sufficient flank bore-holes on each side (*b*). Bore-holes.

1530. Every underground plane on which persons travel which is self-acting or worked by an engine, windlass or gin, must be provided, if exceeding thirty yards in length, with some proper means of communicating distinct and definite signals between the stopping places and the ends of the plane, and with sufficient manholes for places of refuge, at intervals of not more than twenty yards, or, if there is not room for a person to stand between the sides of a tub and the sides of the plane (unless the tubs are moved by an endless chain or rope) at intervals of not more than ten yards (*c*). Every road on which persons travel underground (*d*), where the load is drawn by a horse or other animal, must also be provided, at intervals of not more than fifty yards, with such manholes or with places of refuge. Every such place of refuge must be of sufficient length, and at least three feet in width, between the waggons running on the road and the side of such road; and at least two proper travelling ways into every steam engine room and gallery must be provided (*e*). Every manhole and place of refuge must constantly be kept clear, and no person may place anything therein (*f*). Signalling and manholes

1531. Every entrance to any place not in actual use or course of working or extension must be properly fenced across the whole width of the opening so as to prevent persons from inadvertently entering (*g*), and the top of every shaft for the time being out of use or in use only as an air shaft must be securely fenced (*h*). The top and all entrances between the top and bottom, including any sump of every working ventilating or pumping shaft, must also be properly fenced (*i*). Provision is also made for fencing fly-wheels and exposed and dangerous parts of machinery (*k*), and for securing the safety of working or pumping shafts (*l*) and travelling roads and working places (*m*). Fencing.

1532. Where the timbering of the working place is done by workmen employed therein, suitable timber must be provided at the working place, gate end, passbye, siding or other similar place Timbering.

(*b*) Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 49, r. 13.
(*c*) *Ibid.*, s. 49, r. 14.
(*d*) Such a road must be of sufficient dimensions to allow a horse or other animal to pass without rubbing against the roof or timbering (*ibid.*, s. 49, r. 17).
(*e*) *Ibid.*, s. 49, r. 15.
(*f*) *Ibid.*, s. 49, r. 16. As to cross-roads, see *Hughes* v. *Clyde Coal Co.* (1891), 19 R. (Ct. of Sess.) 343.
(*g*) *Ibid.*, s. 49, r. 6.
(*h*) *Ibid.*, s. 49, r. 18.
(*i*) *Ibid.*, s. 49, r. 19. Temporary removal of the fence for repairs or other operations is, however, permitted if proper precautions are taken (*ibid.*); and see *M'Gill* v. *Bowman & Co.* (1890), 18 R. (Ct. of Sess.) 206. As to the leaving of the door unfastened, see *Sinnerton* v. *Merry and Cunninghame* (1886), 13 R. (Ct. of Sess.) 1012. As to fencing abandoned shafts, see p. 603, *ante*, and see p. 585, *ante*.
(*k*) Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 49, r. 31.
(*l*) *Ibid.*, s. 49, r. 20.
(*m*) *Ibid.*, s. 49, r. 21.

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convenient for the workmen. The distance between sprags or holing props where required (*n*) must not exceed six feet or such less distance as the agent or manager orders (*o*).

Shafts.

1533. Where there is a downcast and furnace shaft to the same seam, both of which are provided with apparatus in use for raising and lowering persons, every person employed in the mine may, on giving reasonable notice, have the option of using the downcast shaft (*p*).

Attendance of engineman at shafts.

In any mine usually entered by means of machinery a competent male person not less than twenty-two years of age must be appointed for working the machinery employed in lowering and raising persons, and must attend during the whole time that any person is below ground; and where any shaft, plane, or level is used for the purpose of communication from one part to another part of a mine and persons are taken up or down or along the same by means of any engine, windlass, or gin, driven or worked by steam or any mechanical power or by animal or by manual labour, the person in charge of such engine, windlass, or gin, or of any part of the machinery, ropes, chains, or tackle connected therewith must be a competent male person not less than eighteen years of age (*q*).

Signals in shafts.

Every working shaft used for drawing minerals or lowering or raising persons, if exceeding fifty yards in depth, and not exempted in writing by the inspector of the district, must be provided with guides and some proper means of communicating distinct and definite signals from the bottom of the shaft and from every entrance for the time being in use between the surface and the bottom of the shaft to the surface, and from the surface to the bottom of the shaft, and to every entrance for the time being in use between the surface and the bottom of the shaft (*r*).

Machinery.

1534. General rules are also laid down, in respect of raising and lowering persons to the mine, which provide for a fixed rate of speed in winding in the absence of apparatus to prevent overwinding (*s*), for overhead covers for cages and tubs (*t*), and as to the nature of the chain (*a*) and drum to be employed (*b*). Every machine worked

(*n*) Whether props are required or not is a question of fact to be decided by the court in each case (*Gibbon* v. *Phillips* (1895), 64 L. J. (M. C.) 42).

(*o*) Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 49, r. 22.

(*p*) *Ibid.*, s. 49, r. 23.

(*q*) *Ibid.*, s. 49, r. 24. Where the machinery is worked by an animal, the person under whose direction the driver acts is for the purposes of the rule deemed to be the person in charge of the machinery (*ibid.*). By *ibid.*, s. 49, r. 26, if the winding apparatus in any mine is not provided with some automatic contrivance to prevent overwinding, the cage, when men are being raised, must not be wound up at a speed exceeding three miles an hour, after the cage has reached a point in the shaft to be fixed by special rules. As to the qualifications of a person allowed to work engines for raising material, see *Soutar* v. *Clark* (1904), 7 Fraser (Justiciary Cases), 1.

(*r*) Coal Mines Regulation Act, 1889 (50 & 51 Vict. c. 58), s. 49, r. 25. As to the meaning of "working shaft," see note (*b*), p. 630, *post*.

(*s*) Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 49, r. 26; see note (*q*), *supra*.

(*t*) *Ibid.*, s. 49, r. 27.

(*a*) *Ibid.*, s. 49, r. 28.

(*b*) *Ibid.*, s. 49, r. 29.

by steam, water, or mechanical power and used for lowering or raising persons must have an adequate (*c*) brake or brakes and a proper indicator (in addition to any mark on the rope) showing, to the person working the machine the position of the cage in the shaft (*d*), and every steam boiler must be fitted with a proper safety valve, steam gauge, and water gauge (*e*).

Ambulances.

1535. Where persons are employed underground, ambulances or stretchers with splints and bandages must be kept at the mine ready for immediate use in case of accident (*f*). Moreover, the Secretary of State may by order (*g*) require such provision as he thinks necessary to be made at all mines (*h*) in regard to the supply and maintenance of appliances for use in rescue work; the formation and training of rescue brigades; the supply and maintenance of ambulance appliances, and the training of men in ambulance work (*i*).

Wilful damage.

1536. Wilfully to damage or remove or render useless without proper authority fences, manholes, places of refuge, casings, linings, guides, means of signalling, signals, covers, chains, flanges, horns, brakes, steam gauges, water gauges, safety valves, or other appliances or things provided in the mine in compliance with the statutory requirements (*j*) is an offence expressly forbidden (*k*).

Workman working alone.

1537. No person employed as a coal or ironstone getter may work alone in the face of the workings until he has had two years' experience of such work under the supervision of skilled workmen, or unless he has been previously employed for two years in or about the face of the workings of a mine (*l*).

SUB-SECT. 12.—*Special Rules as to Safety.*

Special rules.

1538. Special rules for the purpose of preventing dangerous accidents and providing for the safety, convenience, and proper discipline of the persons employed must be established in every mine

(*c*) The mine-owner must supply such a brake as the manager deems adequate (*Watkins* v. *Naval Colliery Co.* (1897), *Ltd.*, [1911] 2 K. B. 162, C. A.).

(*d*) Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 49, r. 30.

(*e*) *Ibid.*, s. 49, r. 32.

(*f*) *Ibid.*, s. 49, r. 34.

(*g*) Mines Accidents (Rescue and Aid) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 15), s. 1 (1). The procedure for making, revoking, and altering orders is set forth in *ibid.*, s. 2.

(*h*) That is, all mines to which the Coal Mines Regulation Acts (see note (*d*), p. 593, *ante*) or the Metalliferous Mines Regulation Acts, 1872 and 1875 (see p. 624, *post*), apply (Mines Accidents (Rescue and Aid) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 15), s. 3).

(*i*) *Ibid.*, s. 1 (1). The owner, agent, or manager is liable to a maximum fine of £20 for non-compliance with the order and a fine not exceeding £1 for every day during which such non-compliance continues after conviction (*ibid.*, s. 1 (2)).

(*j*) See pp. 614 et seq., ante.

(*k*) Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 49, r. 35. For the penalty, see p. 623, *post*.

(*l*) Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 49, r. 39.

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for the conduct and guidance of persons acting in the management of or employed in and about such mine (*m*).

Procedure for framing special rules.

1539. The owner, agent, or manager must frame and transmit (*n*) the proposed rules to the inspector of the district (*o*) for approval by a Secretary of State within three months after the commencement of any working for the purpose of opening a new mine or of renewing the working of an old mine (*p*). The proposed rules, with a printed notice specifying that any objection thereto may be sent by any of the persons employed in the mine to the inspector of the district, at his address stated in the notice, must be posted up not less than two weeks before the rules are transmitted to the inspector in some conspicuous place at or near the mine (*q*). A certificate that they have been so posted up must be sent to the inspector with two copies of the rules signed by the person sending them (*r*), and if the rules are not objected to by the Secretary of State within forty days after their receipt by the inspector they are established (*s*). If, however, the Secretary of State is of opinion that the rules or any of them do not sufficiently provide for the prevention of dangerous accidents or the safety or convenience of persons employed in the mine, or are unreasonable, he may, within forty days after their receipt by the inspector, object thereto and propose to the owner, agent, or manager in writing any modifications therein, and if the owner, agent, or manager does not object thereto in writing within twenty days after their receipt, the rules as so modified are established (*t*).

Procedure for framing amendments.

The owner, agent, or manager may propose in writing to the inspector of the district (for the approval of the Secretary of State), and a Secretary of State may propose in writing to the owner, agent, or manager, any amendment of the special rules or any new rules, and the provisions relating to the original rules and modifications thereof by a Secretary of State apply to such amended or new rules (*a*).

Publication and observance of special rules.

The special rules when established as above mentioned (*b*) are

(*m*) Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 51 (1). The efficacy of special rules in existence at the date of the Act is protected (*ibid.*, s. 81). As to special rules in metalliferous mines, see p. 632, *post*.

(*n*) Failure to transmit special rules within the time limited is a statutory offence on the part of the owner, agent, or manager, unless he proves that he has taken all reasonable means (as to which see p. 612, *ante*) by enforcing to the best of his power the statutory provisions to secure such transmission (Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 55). As to legal proceedings, see pp. 622, 623, *post*.

(*o*) See note (*n*), p. 608, *ante*.

(*p*) Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 52 (1).

(*q*) *Ibid.*, ss. 52 (2), 57 (1).

(*r*) A false statement as to posting is a statutory offence (*ibid.*, s. 55). As to legal proceedings, see pp. 622, 623, *post*.

(*s*) Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 52 (3).

(*t*) *Ibid.*, s. 53 (1), (2). The matter is referred to arbitration if the owner, agent, or manager sends his objection to the modifications within the prescribed twenty days, the date of the receipt of the objection by the Secretary of State being the date of reference (*ibid*, s. 53 (3)).

(*a*) *Ibid.*, s. 54 (1), (2).

A copy of the special rules certified by an inspector is evidence of the

signed in duplicate by the inspector of the district (*c*) and are published (*d*), and must be observed in and about the mine, including any extension thereof, in the same manner as if enacted by statute (*e*). If any person bound to observe (*f*) the special rules contravenes or fails to comply with them, he is guilty of a statutory offence; and the owner, agent, or manager is also guilty of such offence unless he proves that he has taken all reasonable means (*g*), by publishing and to the best of his power enforcing the rules and regulations for the working of the mine, to prevent such contravention or non-compliance (*h*).

Particular subjects of special rules.

1540. The power to propose, amend, and modify special rules includes powers with respect to the nature and description of, custody, and mode of using and trimming lights or lamps; the description of and mode of storing and using explosives and making and stemming holes; the time and manner in which shots are to be fired; the number or class of persons, if any, to be permitted to remain in the mine or any part thereof whilst shots are being fired; the watering or efficient damping of the mine or any ways, or places, therein; and, generally, the precautions to be adopted for the prevention of accidents from inflammable gas and coal dust (*i*).

Publication of abstract of statutes and special rules.

1541. For the purpose of making known the provisions of the Coal Mines Regulation Acts (*j*) and the special rules to all persons employed in and about each mine, the owner, agent, or manager is required (1) to cause an abstract of the Coal Mines Regulation Act, 1887 (*k*) (supplied on application by the inspector of the district on behalf of a Secretary of State), and a correct copy of the special rules (with the name of the mine, and the name and

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rules and of the fact that they are duly established and have been signed, but other proof is not excluded (Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 56).

(*c*) *Ibid.*, s. 51 (2).

(*d*) For mode of publication, see the text, *infra*.

(*e*) Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 51 (2). The principle of interpreting statutes, that to avoid a manifest absurdity a construction may be adopted which will carry out the reasonable intention, applies to special rules (*Higham* v. *Wright* (1877), 2 C. P. D. 397, *per* GROVE, J., at p 401); and see title STATUTES.

(*f*) This includes the mine-owner (*Nimmo* v. *Clark and Wilson* (1872), 10 Macph. (Ct. of Sess.) 477). As to violation of special rules by workmen, see *Higginson* v. *Hapley* (1869), 19 L. T. 690; *Frecheville* v. *Souden* (1883), 48 L. T. 612; *Higham* v. *Wright*, *supra*.

(*g*) See note (*l*) p. 597, and note (*v*), p. 612, *ante*.

(*h*) Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 51 (3). For the similar provision with regard to general rules, see p. 612, *ante*.

(*i*) Coal Mines Regulation Act, 1896 (59 & 60 Vict. c. 43), s. 1 (1) *Ibid.*, s. 1 (2), provides that while any special rules made under *ibid.*, s. 1, are in force in any mine, any general rule contained in the Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 49, and any special rule established under that Act, shall, if so far as it is inconsistent with any special rules made under the Coal Mines Regulation Act, 1896 (59 & 60 Vict. c. 43), s. 1, be suspended in relation to that mine. As to the general rules relating to the matters referred to in the text, *supra*, see pp. 614, 615, *ante*.

(*j*) See note (*d*), p. 593, *ante*.

(*k*) 50 & 51 Vict. c. 58.

SECT. 1. Coal Mines.

address of the inspector of the district, and the name of the owner, agent, or manager appended thereto) to be posted up in legible characters in some conspicuous place at or near the mine, where they may be conveniently read by the persons employed, and to renew the same with all reasonable despatch whenever they become obliterated, defaced, or destroyed; and (2) to supply gratis to each person employed in or about the mine who applies at the office at which persons immediately employed by the owner, agent, or manager are paid a printed copy of the abstract and the special rules, keeping every copy of such rules distinct from any rules which depend only on the contract between employer and employed (*l*).

SUB-SECT. 13.—*Legal Proceedings.*

Court having jurisdiction.

1542. All offences under the Coal Mines Regulation Acts (*m*) (in this and the immediately succeeding paragraphs referred to as "the Acts") not declared to be misdemeanours, and all fines and money and costs directed by the Acts (*m*) to be recovered as fines, may be prosecuted and recovered before a court of summary jurisdiction (*n*). Such a court has power to remove a check weigher (*o*). An appeal lies to quarter sessions from any conviction imposing imprisonment or a fine amounting to or exceeding half the maximum fine (*p*).

Prosecution of owners, agents, and managers.

1543. No prosecution under the Acts (*m*) can be instituted against an owner, agent, manager, or under-manager (*q*) of a mine for an offence under the Acts (*m*), not committed by him personally, which can be prosecuted before a court of summary jurisdiction, except by an inspector (*r*) or with the consent in writing of a

(*l*) Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 57. Unless they can prove that reasonable means have been taken to prevent it, the owner, agent, and manager are each guilty of an offence under the Act in the event of any non-compliance with this provision (*ibid.*); and every person pulling down, injuring, or defacing any abstract, notice, proposed special rules or special rules when posted up, or any notice posted up in pursuance of such rules, is guilty of such an offence (*ibid.*, s. 58). As to legal proceedings, see the text, *infra*.

(*m*) See note (*d*), p. 593, *ante*.

(*n*) Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 61 (1). Owners, agents, and managers of any mine, miners and miners' agents, and certain relations of such persons, and directors of a mine-owning company, cannot act as a court or members of a court except by consent of both parties (*ibid.*, s. 69). As to courts of summary jurisdiction, see title MAGISTRATES, Vol. XIX., pp. 571 *et seq.*

(*o*) Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 61 (2). As to check weighers, see p. 598, *ante*.

(*p*) Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 63. For quarter sessions, see title MAGISTRATES, Vol. XIX., pp. 619 *et seq.*

(*q*) See p. 605, *ante*

(*r*) An inspector cannot institute any such prosecution in the case of offences of which the owner, agent, manager, or under-manager is not guilty if the latter proves that he had taken reasonable means to prevent the commission thereof (see pp. 597, 612, 620, *ante*), if the inspector is satisfied that such reasonable means were taken (Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 65). It seems that an inspector may lay an information by an agent if the inspector has himself considered the case and decided that proceedings are proper (*Foster* v. *Fyfe*, [1896] 2 Q. B. 101).

Secretary of State (*s*). Such consent in writing is necessary in any proceedings against a coroner for an offence under the Acts (*t*).

Prosecution of workmen.

1544. Where the owner, agent, or manager of a mine has taken proceedings against any person employed in or about a mine in respect of an offence committed under the Acts (*u*), he must report the result thereof to the inspector of the district within twenty-one days after the hearing of the case (*x*).

False statements.

1545. If it appears that a boy or girl was employed on the representation of his or her parent or guardian that he or she was of the age at which his or her employment would not be in contravention of the Acts (*a*), and under the belief in good faith that he or she was of that age, or if it appears that a person has worked alone as a coal or ironstone getter, on his representation that he has had two years' experience of such work under the supervision of skilled workmen, or that he has been previously employed for two years in or about the face of the workings of a mine, and under the belief in good faith that he has had such experience or has been so previously employed (*b*), the owner, agent, or manager of the mine and employer is exempted from any penalty, and the parent or guardian, or the person who so worked alone as the case may be is (for the misrepresentation) guilty of an offence against the Acts (*c*).

Procedure.

1546. Any complaint or information, except where otherwise provided, must be made or laid within three months from the time when the matter of the complaint or information arose (*d*). Any person charged may, if he thinks fit, be sworn and examined as an ordinary witness (*e*); and the court, if required by any party, is bound to cause minutes of the evidence to be taken and preserved (*f*).

Penalties.

Fine.

1547. The maximum fine for an offence against the Acts (*g*) for which a penalty is not expressly prescribed is £20 in the case of an owner, agent, or manager, and £2 in the case of any other person; but if an inspector has given written notice of the offence a further fine not exceeding £1 for every day after such notice that the offence continues to be committed may be imposed (*h*).

(*s*) Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 65.
(*t*) *Ibid.*, and see title CORONERS, Vol. VIII., pp. 251 *et seq.*
(*u*) See note (*d*), p. 593, *ante*.
(*x*) Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 66.
(*a*) See title INFANTS AND CHILDREN, Vol. XVII., p. 154.
(*b*) See p. 619, *ante*.
(*c*) Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 64.
(*d*) *Ibid.*, s. 62 (i.).
(*e*) *Ibid.*, s. 62 (ii.); and, as to evidence by accused persons generally, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 402 *et seq.*
(*f*) Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 62 (iii.).
(*g*) See note (*d*), p. 593, *ante*.
(*h*) Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 59 (2). Every person employed in or about a mine other than an agent or manager, who is guilty of any act or omission which in the case of an owner, agent, or manager would be an offence against the Acts is deemed guilty of an offence against the Acts (*ibid.*, s. 59 (1)). As to the power of the Secretary of State to direct fines

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The power to exact such further fine does not extend to offences for which a penalty is expressly prescribed (*i*).

Imprisonment.

An owner, agent, manager, under-manager, or person employed in or about a mine is liable to imprisonment with or without hard labour for a period not exceeding three months for an offence which, in the opinion of the court that tries the case, is one reasonably calculated to endanger the safety of the persons employed in the mine, or to cause serious personal injury to any of such persons, or to cause a dangerous accident; but the offence must be wilfully committed by the personal act, personal default, or personal negligence of the person accused (*j*). Any person may be indicted or liable under any other statute than the Coal Mines Regulation Acts (*k*), or otherwise, to any other or higher penalty or punishment, but no person can be punished twice for the same offence (*l*).

Application of fines.

1548. A fine imposed for neglecting to send a notice of any explosion or accident, or for any offence against the Acts (*k*), which has occasioned loss of life or personal injury, may be directed, by a Secretary of State (if he thinks fit), to be paid to or distributed among the persons injured, and the relatives of any persons whose death may have been occasioned by the explosion, accident, or offence, or among some of them; provided (i.) that such persons did not in his opinion occasion or contribute to occasion the explosion or accident, and did not commit and were not parties to the commission of the offence; and (ii.) that the fact of the payment or distribution shall not affect nor be receivable as evidence in any legal proceeding relative to or consequential on the explosion, accident, or offence. Save as aforesaid, all fines recovered under the Acts (*k*) must be paid into the receipt of His Majesty's Exchequer and carried to the Consolidated Fund (*m*).

SECT. 2.—*Metalliferous Mines.*

SUB-SECT. 1.—*In General.*

Metalliferous mines.

1549. The statutory law regulating metalliferous mines is embodied in the Metalliferous Mines Regulation Acts, 1872 and 1875 (*n*), which apply to every mine of whatever description other than a mine to which the Coal Mines Regulation Act, 1887 (*o*), applies (*p*).

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to be paid to or distributed among injured persons and the relations of persons killed, see the text, *infra*.

(*i*) *Stokes* v. *Hill*, [1901] 1 K. B. 493, *per* GAINSFORD BRUCE, J., at p. 496.

(*j*) Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 60.

(*k*) See note (*d*), p. 593, *ante*.

(*l*) Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 68 (1). Power is given to the court trying the case to adjourn the case for proceedings to be taken under any other Act or otherwise if it thinks such proceedings ought to be taken (*ibid.*, s. 68 (2)).

(*m*) *Ibid.*, s. 70; compare Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 1 (5); and see title MASTER AND SERVANT, p. 209, *ante*.

(*n*) 35 & 36 Vict. c. 77; 38 & 39 Vict. c. 39.

(*o*) 50 & 51 Vict. c. 58.

(*p*) Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77), s. 3. The Metalliferous Mines Regulation Acts, 1872 (35 & 36 Vict. c. 77) and 1875 (38 & 39 Vict. c. 39), therefore apply to all mines except coal, stratified ironstone, shale, and fire-clay. As to the meaning of "mine," see

SECT. 2. **Metalliferous Mines.**

Provisions to both coal and metalliferous mines.

In many respects the statutory provisions affecting metalliferous mines are identical, or almost identical with the statutory regulations affecting coal mines (*q*). The provisions forbidding payment of miners' wages in public-houses (*r*), and relating to the appointment (*s*), disqualifications (*t*) and powers (*u*) of inspectors, the notices to be given by inspectors of danger not provided for in the rules (*a*), the annual reports of inspectors (*b*), the proceedings in arbitrations (*c*),

pp. 501, 504, 601, *ante*. A slate quarry worked by underground workings by levels is within the operation of the Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 39) (*Sim* v. *Evans* (1875), 23 W. R. 730). The power of deciding to which group of Acts a particular mine belongs is vested in the Secretary of State (Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77), s. 39). Metalliferous mines are also governed by the Slate Mines (Gunpowder) Act, 1882 (45 & 46 Vict. c. 3); the Notice of Accidents Act, 1906 (6 Edw. 7, c. 53); and the Mines Accidents (Rescue and Aid) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 15). For the restrictions as to the employment of boys, girls, and women in such mines, see title INFANTS AND CHILDREN, Vol. XVII., p. 156; and for the general legislation affecting mines, see note (*d*), p. 593, *ante*.

(*q*) See pp. 593 *et seq.*, *ante*.

(*r*) Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77), s. 9, which is identical with the Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 11; see p. 597, *ante*.

(*s*) Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77), s. 15, which is substantially identical with the Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s 39, see p. 608, *ante*. The provision as to the preference in the appointment of inspectors in Wales and Monmouthshire of candidates having a knowledge of the Welsh language (see note (*n*), p. 608, *ante*) is enacted as regards metalliferous mines by the Quarries Act, 1894 (57 & 58 Vict. c. 42), s. 2 (3). Inspectors appointed or acting under the Coal Mines Regulation Acts (see note (*d*), p. 593, *ante*) may act under the Metalliferous Mines Regulation Acts, if so directed by a Secretary of State (Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77), s. 15); see note (*n*), p. 608, *ante*.

(*t*) Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77), s. 16. This section is identical with the Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 40 (see p. 609, *ante*), except that the latter provision expressly prohibits an inspector from being a partner or having any interest direct or indirect in any mine in the district under his charge, or being a miner's agent or a mine-owner.

(*u*) Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77), s. 17. This section is identical with the Coal Mines Regulation Act, 1887 (50 & 51 Vict. c 58), s. 41 (see p 609, *ante*), except that the latter provision requires the inspector to examine and inquire into the care and treatment of the horses and other animals used in the mine.

(*a*) Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77), s. 18, which, apart from the substitution therein of twenty days for ten days as the period for sending objections to the Secretary of State, and for complying with the requisitions of the inspector's notice after the expiration of the time for objections, and (in the case of arbitration) of twenty days after the making of the award for the time fixed by the award, is identical with the Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 42; see pp. 609, 610, *ante*.

(*b*) Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77), s. 20, the provisions of which are repeated in the Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), ss. 43, 44, and 46; see pp. 610, 611, *ante*.

(*c*) Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77), s. 21; compare Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 47. The main differences between the two provisions are that the Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77), allows twenty-one days instead of fourteen days for the appointment of an arbitrator, and fourteen days instead of seven days in the case of an arbitrator refusing or neglecting to act, and for the appointment of a substituted arbitrator, respectively, and does not contain any provision for the dispute being heard at the same time by the arbitrators and umpire. Moreover, under the Coal Mines Regulation Act,

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and coroner's inquests (*d*), with certain variations in matters of detail (*e*), apply equally to both classes of mines.

SUB-SECT. 2.—*Management.*

Returns as to minerals worked.

1550. The owner (*f*) or agent (*g*) of every mine is required on or before the 1st February in every year to send to the inspector of the district a correct return (in a form to be prescribed by a Secretary of State) (*h*) specifying for the year ending on the preceding 31st December the quantity in statute weight of the mineral dressed and of the undressed mineral sold, treated, or used, and also the number of persons ordinarily employed in and about the mine, below and above ground, distinguishing the different classes and ages of the persons so employed whose hours of labour are regulated by the Metalliferous Mines Regulation Act, 1872 (*i*). The inspector of the district is required (on behalf of a Secretary of State) to furnish

As to persons employed.

1887 (50 & 51 Vict. c. 58), the umpire must be a county court judge, a police or stipendiary magistrate, a recorder of a borough, or a registrar of a county court, whereas under the Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77), he must be a practical mining engineer or a person accustomed to the working of mines.

(*d*) Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 87), s. 22, with which the Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 48, is identical in terms, except that it reduces the length of notice to the inspector of an inquest in case of an accident or explosion which has not occasioned the death of more than one person to twenty-four hours from forty-eight hours, and authorises relatives of persons killed by explosion or accident, and any person appointed by order in writing of the majority of the workmen employed at the mine, to attend the inquest and examine any witness, either in person or by counsel, solicitor, or agent, subject to the order of the coroner (*ibid.*, s. 48 (8)); see title CORONERS, Vol. VIII., p. 246, and see p. 608, *ante*.

(*e*) These variations are indicated in notes (*s*) to (*c*), p. 625, *ante*, and note (*d*), *supra*.

(*f*) "Owner" means any person or body corporate who is the immediate proprietor or lessee or occupier of any mine or of any part thereof, and does not include a person or body corporate who merely receives a royalty, rent, or fine from a mine, or is merely the proprietor of a mine subject to any lease, grant, or licence for the working thereof, or is merely the owner of the soil and not interested in the minerals of the mines (Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77), s. 41); and for the definition of owner of a coal mine, compare the Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 75; and see the cases cited in note (*p*), p. 595, *ante*. A local authority in whom a disused shaft used as a public well is vested is not an owner within the above definition (*Knuckey* v. *Redruth Rural Council*, [1904] 1 K. B. 382). Owners in fee who are entitled to royalties from a lessee may be owners within the above definition, though the lease is still in force (*Evans* v. *Mostyn* (1877), 2 C. P. D. 547); but a lessee who merely collects royalties for the benefit of his lessor is not an owner (*Arkwright* v. *Evans* (1880), 49 L. J. (M. C.) 82).

(*g*) "Agent" means any person having on behalf of the owner care or direction of any mine or any part thereof (Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77), s. 41); compare Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 75; see p. 595, *ante*.

(*h*) "Secretary of State" throughout the Act means one of his Majesty's principal Secretaries of State (Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77), s. 41). The Home Secretary is charged with the administration of the Act.

(*i*) 35 & 36 Vict. c. 77; see Metalliferous Mines Regulation Act, 1875 (38 & 39 Vict. c. 39), s. 1. The return must also include such particulars as may be prescribed under the Notice of Accidents Act, 1906 (6 Edw. 7, c. 53), s. 1; and see p. 607, *ante*; and as to lines or sidings being considered for the purpose of the return as part of the mine, see also note (*d*), p. 607, *ante*.

forms for the purpose of such returns on application, and every owner or agent of a mine who fails to comply with the above provision or knowingly makes a return which is false in any particular is guilty of a statutory offence (*k*).

Notice of accidents.

1551. When in any mine any accident, of the nature already specified (*l*), occurs, notice (*m*) in writing of such accident, and of any loss of life or personal injury caused thereby, must be sent forthwith to the inspector of the district by the owner or agent in such form and accompanied by such particulars as the Secretary of State prescribes (*n*). Where any such injury results in death, notice in writing of the death must be sent to the inspector of the district (on behalf of the Secretary of State) within twenty-four hours after the owner or agent became acquainted therewith; and failure to act in compliance with this provision is a statutory offence (*o*).

Plan of workings.

1552. The owner or agent of every mine in which more than twelve persons are ordinarily employed below ground is required to keep in the office of the mine (or in the principal office of the mines belonging to the same owner in the district) an accurate plan of the workings, showing such workings up to at least six months previously, other than workings which were last discontinued at a date more than twelve months before the 1st January, 1873; and he must produce the plan to an inspector for examination at one of the aforesaid offices, and, if requested, mark thereon the progress of the workings up to the time of such production (*p*).

(*k*) Metalliferous Mines Regulation Act, 1875 (38 & 39 Vict. c. 39), s. 1. In mines employing not more than twelve persons underground the returns specifying the quantity of mineral produced are to be made by the barmaster or other local officer (if any) employed to collect the dues or royalty; and where there is such a barmaster or other officer the owner or agent is not required to send any returns specifying the number of persons employed in or about such mine (*ibid.*).

(*l*) See p. 607, *ante*.

(*m*) All notices must be in writing or in print, or partly in writing and partly in print. All notices and documents required to be served or sent by or to an inspector or Secretary of State may be either delivered personally, or served and sent by post by a prepaid letter, and if served and sent by post will be deemed to have been served and received respectively at the time when the letter containing the same would be delivered in the ordinary course of post. For proving such service or sending it is sufficient to prove that the letter containing the notice was properly addressed and put into the post (Metalliferous Mines Act, 1872 (35 & 36 Vict. c. 77), s. 40).

(*n*) Notice of Accidents Act, 1906 (6 Edw. 7, c. 53), s. 2 (2). By *ibid.*, s. 5 (1), the Secretary of State has power to extend the provisions of the Act requiring notice to be given to the inspector, whether personal injury or disablement is caused or not; see pp. 607, 608, *ante*. By an order made hereunder the provisions have been extended to all cases of ignition of gas or dust below ground other than ignition of gas in a safety lamp, of fire below ground, of breakage of ropes, chains, and gear for lowering or raising men, of overwinding when men are being lowered or raised, and of any inrush of water from old workings (Stat R. & O., 1906, p. 490). As to the duties of coroners in case of such accidents, see title CORONERS, Vol. VIII., pp. 245, 246.

(*o*) Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77), s. 11.

(*p*) *Ibid.*, s. 19. It is a statutory offence if the owner or agent fails to keep such plan, or wilfully refuses to produce or allow it to be examined, or wilfully withholds any portion thereof, or conceals any part of the workings, or

SECT. 2. Metalliferous Mines.

SUB-SECT. 3.—*New and Abandoned Mines.*

Notice of opening and abandonment of mines.

1553. It is an offence if an owner or agent fails to give notice to the inspector of the district, within two months of the event, when — (1) any working is commenced for the purpose of opening a new shaft for any mine; (2) a shaft (*q*) of any mine is abandoned or the working thereof discontinued; (3) the working of a shaft of any mine is recommenced after any abandonment or discontinuance for a period exceeding two months; or (4) any change occurs in the name of, or in the name of the owner or agent of, a mine, or in the officers of any incorporated company which is the owner of a mine (*r*).

Fencing abandoned shafts.

Where and at whatever time any mine is abandoned or the working thereof discontinued, the owner and every other person interested in the minerals of the mine (*a*), must cause the top of the shaft and any side entrance from the surface to be securely fenced (*b*) for the prevention of accidents. Subject to any contract to the contrary, the owner is liable, as between himself and other persons interested in the minerals, to carry this provision into effect, and to pay costs incurred by any other person interested in the minerals in carrying it into effect, and where such abandonment has occurred in the case of a mine opened before the 1st January, 1873 (*c*), the obligation applies only to such shaft or side entrance as is situate within fifty yards of any highway, road, footpath, or place of public resort, or in open and uninclosed land, or, not being situate as aforesaid, is required by an inspector to be fenced on the ground that it is specially dangerous (*d*).

Plans of abandoned mines.

Where any mine, in which more than twelve persons have

produces an imperfect or inaccurate plan, unless he shows that he was ignorant of such concealment, imperfection, or inaccuracy, and also if he fails within twenty days, or such further time as may be shown to be necessary, after the requisition of the inspector, to make or cause such plan to be made. The inspector may further (whether a penalty for such offence has or has not been inflicted) require the owner or agent to cause an accurate plan, such as is prescribed by *ibid.*, s. 19, to be made within a reasonable time, at the owner's expense, on a scale of not less than two chains to one inch, or on such other scale as that on which the plan used in the mine is constructed (*ibid.*).

(*q*) "Shaft" includes "pit" (*ibid.*, s. 41).

(*r*) *Ibid.*, s. 12, however, only applies to any working or mine in which more than twelve persons are ordinarily employed below ground, and, in the case of a partnership, working a mine within the stannaries of Devon and Cornwall, if notice of every change in the purser of the partnership is sent as required by *ibid.*, s. 12, notice of a change in the members of the partnership need not be sent in pursuance thereof (*ibid.*). The provision applies to mines abandoned before the Act came into operation (*Stott* v. *Dickinson* (1876), 34 L. T. 291).

(*a*) See *Evans* v. *Mostyn* (1878), 2 C. P. D. 547; and note (*f*), p. 626, *ante*.

(*b*) *Foster* v. *Owen* (1892), 62 L. J. (M. C.) 7; and see titles BOUNDARIES, FENCES, AND PARTY WALLS, Vol. III., p. 133; NUISANCE; and compare the similar provisions affecting coal mines, see p. 617, *ante*.

(*c*) The Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77), received the Royal assent on the 10th August, 1872, and came into force on the 1st January, 1873.

(*d*) *Ibid.*, s. 13. Any person who fails to act in conformity with this provision is guilty of a statutory offence. These provisions do not exempt any person from any liability under any other Act or otherwise. As to legal proceedings, see p. 633, *post*.

ordinarily been employed below ground, is abandoned, the owner at the time of the abandonment must send to a Secretary of State an accurate plan (*e*), on a scale of not less than two chains to one inch (or on such other scale as that on which the plan last used in the mine is constructed), showing the boundaries of the working up to the time of the abandonment, with the view of its being preserved by the Secretary of State, but no person other than an inspector may inspect or copy such plan within ten years of its receipt by the Secretary of State without the licence of such Secretary of State (*f*).

SUB-SECT. 4.—*General Rules as to Safety.*

General rules as to safety.

1554. General rules have to be observed so far as reasonably practicable (*g*) in every metalliferous mine (*h*). These general rules, though not identical with the general rules prescribed by statute for coal mines (*i*), are very similar in their scope.

Ventilation.

1555. An adequate amount of ventilation must be constantly produced (*k*) to such an extent that the shafts, winzes, sumps, levels, underground stables and working places, and the travelling roads thereto and therefrom are in a fit state for working and passing therein (*l*).

Explosives.

1556. No gunpowder or other explosive or inflammable substance may be stored in the mine or taken into it except in a case (*m*) or canister containing not more than four pounds. No workman may have in use at one time in any one place more than one of such cases or canisters, or (except in mines exempted by the Secretary of State), when charging holes for blasting, use or have in his possession in the mine underground any iron or steel pricker, or use any iron or steel tamping rod or stemmer for ramming either the wadding or the first part of the tamping or stemming on the powder. A charge of powder which has missed fire may not be unrammed (*n*). Any slate mine (*o*) may, however, be exempted by a Secretary of State from the operation of the foregoing provisions with respect to use of gunpowder or other explosives on the application of the owner, agent, or manager, transmitted through the inspector of the district (*p*).

(*e*) "Plan" includes a map and section, and a correct copy or tracing of any original plan as so defined (Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77), s. 41).

(*f*) *Ibid.*, s. 14. Every person failing to comply with *ibid.*, s. 14, is guilty of a statutory offence (*ibid.*). As to legal proceedings, see p. 633, *post*.

(*g*) See note (*o*), p. 611, *ante*.

(*h*) Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77), s. 23.

(*i*) See pp. 611 *et seq.*, *ante*.

(*k*) See *Knowles* v. *Dickinson* (1860), 2 E. & E. 705; *Hall* v. *Hopwood* (1879), 49 L. J. (M. C.) 17.

(*l*) Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77), s. 23 (1).

(*m*) The case must be of a solid and substantial nature (*Foster* v. *Diphwys Casson Slate Co.* (1887), 18 Q. B. D. 428).

(*n*) Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77), s. 23 (2).

(*o*) As to slate mines worked by underground workings by levels, see note (*p*), p. 624, *ante*.

(*p*) Slate Mines (Gunpowder) Act, 1882 (45 & 46 Vict. c. 3), s. 2 (1), (2). The

SECT. 2. Metalliferous Mines.

Underground roads and planes.

1557. Every underground plane, of the nature already specified (*q*), must be provided with proper means of signalling and with places of refuge (*r*).

Every road on which persons travel underground, where the produce of the mine, in transit on the road, exceeds ten tons in any one hour or any part thereof, and where the load is drawn by a horse or other animal, must be provided, at intervals of not more than one hundred yards, with sufficient spaces for places of refuge, each of which must be of sufficient length, and of at least three feet in width between the waggons running on the road and the side of the road (*s*).

Fencing and casing shafts.

1558. The top of every shaft which was opened before the commencement of the actual working for the time being of the mine and has not been used during such actual working (if so required in writing by the inspector of the district), the top of every other shaft which for the time being is out of use or used only as an air shaft, and the top and all entrances between the top and bottom of every working or pumping shaft must be properly fenced (*t*). Where the natural strata are not safe, every working or pumping shaft must be securely cased, lined, and otherwise made secure; and where one portion of a shaft is used for the ascent and descent of persons by ladders (*u*) or a man-engine, and another portion thereof for raising the mineral gotten, the first-mentioned portion must be cased or otherwise securely fenced off from the last mentioned portion (*a*).

Signalling in shafts.

1559. Every working shaft in which persons are raised must, if exceeding fifty yards in depth and not exempted in writing by the inspector of the district, be provided with guides and proper means of communicating signals of the nature and manner already specified (*b*).

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exemption may at any time be revoked by the Secretary of State, but the revocation does not come into force until written or printed notice thereof has been posted up at the mine for twenty-four hours. A list of the exemptions so granted and revoked must be set forth in the annual report of the inspector of the district (Slate Mines (Gunpowder) Act, 1882 (45 & 46 Vict. c. 3), s. 2 (3), (4)). As to such annual reports, see p. 610, *ante*.

(*q*) See p. 617, *ante*.

(*r*) Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77), s. 23 (3).

(*s*) *Ibid.*, s. 23 (4). A Secretary of State may, if he thinks fit, require the inspector to certify whether the produce of the mine in transit on the road does or does not ordinarily exceed the weight as aforesaid (*ibid.*). Every manhole and space for refuge must be constantly kept clear, and no person may place anything in a manhole or space so as to prevent access thereto (*ibid.*, s. 23 (5)).

(*t*) But the temporary removal of the fence for the purpose of repairs or other operations is permitted, if proper precautions are used (Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77), s. 23 (7)).

(*u*) As to ladders, see p. 631, *post*.

(*a*) Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77), s. 23 (6), (7), (8), (9). As to liability for neglect to fence, see *Re Williams* v. *Groucott* (1863), 4 B. & S. 149; *Forster* v. *Newhaven Harbour Trustees* (1897), 61 J. P. 629; *Stott* v. *Dickinson* (1876), 34 L. T. 291.

(*b*) Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77), s. 23 (10); and see p. 618, *ante*. For definition of a "working shaft," see *Foster* v. *North Hendrel Lead Mining Co.*, [1891] 1 Q. B. 71.

A sufficient cover overhead must be used when lowering or raising persons in every working shaft, except where it is worked by a windlass, or where the person is employed about the pump or some work of repair in the shaft, or where a written exemption is given by the inspector of the district (*c*). Covers for shafts.

1560. No single linked chain may be used for lowering or raising persons in any working shaft or plane except for the short coupling chain attached to the cage or load. The drum of every machine used for lowering or raising persons is required to be made with flanges or horns, and also, if the drum is conical, such other appliances, as will prevent the rope from slipping; and there must be attached to every machine worked by steam, water or mechanical power, and used for lowering or raising persons, an adequate break, and a proper indicator (in addition to any mark on the rope) for showing the person who works the machine the position of the cage or load in the shaft (*d*). Every fly-wheel and all exposed and dangerous parts of the machinery are to be and must be kept securely fenced (*e*), and every steam boiler must be provided with a proper steam gauge and water gauge to show respectively the pressure of steam and the height of water in the boiler, and with a proper safety valve (*f*). Machinery.

A ladder permanently used for the ascent or descent of persons may not be fixed in a vertical nor overhanging position, but must be inclined at the most convenient angle which the space in which the latter is fixed allows and have substantial platforms at intervals of not more than twenty yards (*g*). Ladders.

1561. If more than twelve persons are ordinarily employed in the mine below ground, sufficient accommodation must be provided above ground near the principal entrance of the mine (but not in the engine-house nor boiler-house) for enabling the persons employed conveniently to dry and change their dress (*h*). Dressing rooms.

1562. Every person who contravenes or fails to comply with any of the aforesaid general rules is guilty of a statutory offence; and in the event of any such contravention or non-compliance by any person, the owner or agent of the mine is each guilty of an Liability for disobedience to rules.

(*c*) Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77), s. 23 (11). As to contravention of this provision by miners through use of a skip or open box, see *Frecheville* v. *Souden* (1833), 48 L. T. 612).

(*d*) Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77), s. 23 (12), (13), (14); *Foster* v. *Owen* (1892), 62 L. J. (M. C.) 7; *Arkwright* v. *Evans* (1880), 49 L. J. (M. C.) 82; *Stokes* v. *Arkwright* (1897), 66 L. J. (Q. B.) 815; *Devonshire (Duke)* v. *Stokes* (1897), 76 L. T. 424.

(*e*) Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77), s. 23 (17).

(*f*) *Ibid.*, s. 23 (18). Wilful damage to, or the unauthorised removal or rendering useless of, any fencing, casing, lining, guide, means of signalling, signal, cover, chain, flange, horn, brake, indicator, ladder, platform, steam gauge, water gauge, safety valve, or other appliance or thing provided in any mine in compliance with the Act is forbidden (*ibid.*, s. 23 (19)); compare *ibid.*, ss. 31, 32; and see p. 619, *ante*).

(*g*) Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77), s. 23 (15).

(*h*) *Ibid.*, s. 23 (16).

SECT. 2. Metalliferous Mines.

offence, unless he proves that he had taken all reasonable means to prevent it (*i*).

SUB-SECT. 5.—*Special Rules as to Safety.*

Special rules as to safety.

1563. The owner or agent (*k*) of a metalliferous mine (*l*) may propose special rules for the conduct and guidance of the persons acting in the management of, or employed in or about, any mine so as to prevent dangerous accidents, and to provide for the safety and proper discipline of the persons employed in or about the mine, but it is not compulsory to do so (*m*). Except in a few matters of detail (*n*) the provisions as to special rules in a metalliferous mine are identical with those affecting coal mines (*o*), with such variations as are rendered necessary by the fact that special rules are compulsory in the latter case (*p*), but not in the former. Thus, under both codes of provisions the special rules must be transmitted to the inspector (*q*) after being posted up in the mine (*r*), and are either accepted or objected to by the Secretary of State, and any dispute about the modifications therein which the Secretary of State proposes to introduce are decided by arbitration (*s*). The provisions as to establishment (*t*), certification as evidence (*u*), amendment (*x*), and publication (*a*) of special rules are for all practical purposes identical under both codes, and the penalties imposed are the same (*b*); but, as regards metalliferous mines, the Secretary of State has express power from time to time to propose in writing any special rules to the owner or agent of a mine in which there are none (*c*).

(*i*) Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77), ss. 23 (19), 31.

(*k*) For definitions of "owner" and "agent," see notes (*f*) and (*q*), p. 626, *ante*; and see notes (*p*) and (*q*), p. 595, *ante*. There is no mention of the "manager" in the Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77), ss. 24—30; compare p 604, *ante*.

(*l*) For definition of mine, see note (*d*), p. 601, *ante*.

(*m*) Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77).

(*n*) For instance, special rules for a metalliferous mine need not be signed by the inspector in duplicate (*ibid.*, s. 1), nor is it necessary to send two copies of the proposed special rules to the inspector (*ibid.*, s. 25); nor is it expressly provided that failure to transmit the proposed special rules within the time appointed is a statutory offence (*ibid.*, s. 25); compare Coal Mines Regulation Act (50 & 51 Vict. c. 58), s. 55; see p. 620, *ante*.

(*o*) See pp. 619 *et seq.*, *ante*.

(*p*) See p. 620, *ante*.

(*q*) Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77), s. 25; and see p. 620, *ante*.

(*r*) Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77), s. 25, 26; see p. 620, *ante*.

(*s*) Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77), s. 26; see note (*t*), p. 620, *ante*.

(*t*) Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77), ss. 24—26; see p. 620, *ante*.

(*u*) Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77), s. 30 see note (*b*), p. 620, *ante*.

(*x*) Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77), s. 27; see p. 620, *ante*.

(*a*) Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77), s. 28; see pp. 620, 621, *ante*.

(*b*) Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77), ss. 24, 29; see pp. 621, 622, *ante*.

(*c*) Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77), s. 27; compare pp. 619, 620, *ante*.

SUB-SECT. 6.—*Legal Proceedings.*

SECT. 2. Metalliferous Mines.

1564. The regulations as regards legal proceedings and penalties affecting metalliferous mines (*d*) are for all practical purposes identical with those affecting coal mines (*e*). The maximum penalty for an offence against the Metalliferous Mines Regulation Act, 1872 (*f*), is in the case of an owner or agent (*g*) £20, and in the case of any other person £2, and a further penalty not exceeding £1 for every day during the continuance of any offence after the inspector has given written notice of such offence (*h*). The cases in which a sentence of imprisonment with or without hard labour may be imposed (*i*), the provisions as to appeals (*k*), the prosecution of offences and recovery of penalties (*l*), the persons who can prosecute or authorise the prosecution of an owner or agent (*m*), the power of the court to adjourn proceedings to enable the offender to be proceeded against under any other Act (*n*), and the power of the Secretary of State to direct the application of penalties (*o*) are, except for occasional verbal differences, common to both classes of mines. Certain modifications in the statutory provisions as regards legal proceedings are made as regards mines in the Isle of Man (*p*).

Legal proceedings.

Penalties.

Imprisonment.

(*d*) These regulations are contained in the Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77), ss. 31—38 inclusive, as varied by the repeal of *ibid*, s. 32, clauses 1 (in part), 2, 3, 4 and 5, and *ibid.*, s. 34 (2) (3), by the Summary Jurisdiction Act, 1884 (47 & 48 Vict. c. 43), s. 4; and see, generally, title MAGISTRATES, Vol. XIX., pp. 642 *et seq.*

(*e*) See pp. 622—624, *ante.*

(*f*) 35 & 36 Vict c. 77.

(*g*) No express mention of a manager is made in the provisions of the Metalliferous Mines Act, 1872 (35 & 36 Vict. c. 77), dealing with legal proceedings.

(*h*) Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77), s. 31. Every person employed in or about a mine, other than an owner or agent, who is guilty of any act or omission which in the case of an owner or agent would be an offence against the Act is deemed to be guilty of an offence against the Act (*ibid.*).

(*i*) *Ibid.*, s. 32; see p. 624, *ante.*

(*k*) Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77), s. 32, as repealed in part by the Summary Jurisdiction Act, 1884 (47 & 48 Vict. c. 43); see note (*d*), *supra.*

(*l*) Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77), ss. 33, 34, as repealed in part by the Summary Jurisdiction Act, 1884; see note (*d*), *supra.*

(*m*) Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77), s. 35; see p. 622, *ante*, and *Foster* v. *Fyffe*, [1896] 2 Q. B. 104, there cited.

(*n*) Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77), s. 37; see note (*l*), p. 624, *ante.*

(*o*) Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77), s. 38; see p. 624, *ante.*

(*p*) Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77), s. 43; Metalliferous Mines (Isle of Man) Act, 1891 (54 & 55 Vict. c. 47). In the Isle of Man any prosecution in respect of an offence punishable on summary conviction under the Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77), other than a prosecution against an owner or agent of a mine, may be in the name of an inspector or superintendent or inspector of police or of a person injured or aggrieved; and in any such prosecution the owner of the mine is as regards any offence in relation to his mine deemed to be the person aggrieved (Metalliferous Mines (Isle of Man) Act, 1891 (54 & 55 Vict. c. 47), s. 1 (5)). The other modifications are principally confined to defining the meaning of the principal Act with relation to the judicial system of the Isle.

SECT. 3. Quarries.

SECT. 3.—*Quarries.*

Quarries.

1565. The regulation of quarries (*q*) is provided for by the Quarries Act, 1894 (*r*), which makes applicable to quarries certain provisions of the Metalliferous Mines Regulation Acts, 1872 and 1875 (*s*), with modifications (*t*). Thus the provisions as to the place of paying wages (*a*), as to sending notice of accidents to the inspector (*b*), as to the appointment, disqualification, and powers of inspectors (*c*) and their duty to give notice of danger (*d*) and to make annual and special reports (*e*), arbitration (*f*), coroner's inquests (*g*), power to make special rules, and the provisions relating to such special rules when made (*h*), penalties, imprisonment, and legal proceedings (*i*), and service of notices (*k*), are all made applicable to quarries.

Application of mining legal code.

Fencing.

1566. Every quarry—a term which includes every pit or opening made for the purpose of getting stone, slates, lime, chalk, clay, gravel, or sand, but does not include any natural opening (*l*)—

(*q*) "Quarry" is defined by the Quarries Act, 1894 (57 & 58 Vict. c. 42), s. 1, as every place, not being a mine, in which persons work in getting slate, stone, coprolites, or other minerals, and any part of which is more than twenty feet deep; compare the definition in the Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), Sched. VI., Part II. As to the application to quarries of the statutory legislation relating to factories, see title FACTORIES AND SHOPS, Vol. XIV., pp. 440, 472, 502. An underground slate mine is a mine, and not a quarry, for the purposes of the Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77) (*Sim* v. *Evans* (1875), 23 W. R. 730), but it is otherwise for the purposes of assessment of income tax; see title INCOME TAX, Vol. XVI., p. 625. A heap of furnace slag is not (*Scott* v. *Midland Rail. Co.* (1897), 13 T. L. R. 398), but a gravel pit or sand pit may be (*Scott* v. *Midland Rail. Co.*, [1901] 1 K. B. 317), a quarry within the meaning of the Quarries Act, 1894 (57 & 58 Vict. c. 42).

(*r*) The Secretary of State has power to decide whether a quarry is one to which the Act applies (Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77), s. 39, as applied by the Quarries Act, 1894 (57 & 58 Vict. c. 42), s. 2 (1) and Schedule).

(*s*) 35 & 36 Vict. c. 77; 38 & 39 Vict. c. 39.

(*t*) Quarries Act, 1894 (57 & 58 Vict. c. 42), s. 2 (1). The Metalliferous Mines (Isle of Man) Act, 1891 (54 & 55 Vict. c. 47), s. 1, is applicable to quarries in the Isle of Man (*ibid.*). The schedule to the Quarries Act, 1894 (57 & 58 Vict. c. 42) enumerates the sections of the Acts which are made applicable to quarries and the modifications to be made in such sections.

(*a*) See pp. 597, 625, *ante*.

(*b*) See pp. 607, 625, *ante*. In the application of the Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77), s. 11, to quarries the word "explosive" is substituted for the word "powder" (Quarries Act, 1894 (57 & 58 Vict. c. 42), Schedule). The Notice of Accidents Act, 1906 (6 Edw. 7, c. 53) (see pp. 607, 608, *ante*), also applies to quarries; but the Mines Accidents (Rescue and Aid) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 15), apparently does not; see *ibid.*, s. 3 (1); and see p. 619, *ante*.

The inspectors under the Metalliferous Mines Regulation Acts (see p. 625, *ante*) are the inspectors of quarries (Quarries Act, 1894 (57 & 58 Vict. c. 42), s. 2 (2)).

(*d*) See pp. 609, 625, *ante*.

(*e*) See pp. 610, 625, *ante*.

(*f*) See p. 625, *ante*.

(*g*) See pp. 607, 626, *ante*.

(*h*) See pp. 618 *et seq.*, 632, *ante*. Special rules made by an owner who has subsequently discontinued to work a quarry do not come again into force when a new owner commences working (*Gordon* v. *Anderson*, [1910] S. C. (J.) 268).

(*i*) See pp. 622, 623, 633, *ante*.

(*k*) See p. 593 *et seq.*, *ante*, *passim*.

(*l*) Quarries (Fencing) Act, 1887 (50 & 51 Vict. c. 19), s. 1.

which is dangerous to the public and is in open or uninclosed land within fifty yards of a highway, and is not separated therefrom by a secure and sufficient fence, must be kept reasonably fenced (*m*). SECT. 3. Quarries.

Part XIII.—Local Rights and Customs.

SECT. 1.—*Cornwall and Devon.*

SUB-SECT. 1.—*Tin-bounding in Cornwall.*

1567. In Cornwall (*n*), as elsewhere in England, *primâ facie*, the The custom of tin-bounding.

(*m*) Quarry (Fencing) Act, 1887 (50 & 51 Vict. c. 19), s. 3. A quarry not so fenced is a nuisance liable to be dealt with summarily in manner provided by the Public Health Act, 1875 (38 & 39 Vict. c. 55); and see title NUISANCE, and p. 585, *ante*.

(*n*) The cost-book principle of conducting mining operations, which, though more frequently met with in Cornwall and Devon, has at times existed in other parts of England (*Clarke and Chapman* v. *Hart* (1858), 6 H. L. Cas. 633 (Cumberland); *Re Mixon Copper Mining Co., Edwards' Case* (1860), 1 L. T. 399 (Staffordshire); *Re Appletreewick Lead Mining Co.* (1874), L. R. 18 Eq. 95 (Yorkshire)), in Wales (*Re Welsh Potosi Mining Co.* (1858), 27 L. J. (CH.) 311), and in Ireland (*Kilbricken Case* (undated), cited in Tapping's Readwin Prize Essay on the Cost Book Principles, p. 7), belongs rather to the law of companies or partnership (*Kittow* v. *Liskeard Union* (1874), L. R. 10 Q. B. 7; *Sibley* v. *Minten* (1857), 27 L. J. (CH.) 53) than to the law of mines, and will be found dealt with in title COMPANIES, Vol. V., pp. 654 *et seq.* As to the general law of partnership, see title PARTNERSHIP. In addition to the authorities cited in title COMPANIES, Vol V., pp. 654 *et seq.*, reference may be made to the following cases:—*Thomas* v. *Hobler* (1861), 4 De G. F. & J. 199 (a cost-book company is bound only by rules etc. entered in the cost-book and embodied therein); *Hylart* v. *Parker* (1858), 4 C. B. (N. S.) 209 (the shareholders of a cost-book mine cannot stipulate by their rules that unpaid calls shall be recovered as a debt due from the defaulting shareholder to the purser); *Escott* v. *Gray* (1878), 47 L. J. (Q. B.) 606 (a creditor of a cost-book mining company cannot bring an action against a shareholder to enforce a call); *Peel* v. *Thomas* (1855), 15 C. B. 714 (each member of a mining company worked on the cost-book principle, being a partner in the concern, is liable as such for goods supplied for the working of the mine); *Thomas* v. *Clark* (1856), 18 C. B. 662 (a transferee of shares in a cost-book mine (transfers must be registered) is not liable for debts of the concern contracted before the registration of his transfer); *Newton* v. *Daly* (1858), 1 F. & F. 26 (where an order has been entered for goods on credit, the question for the jury is whether the secretary of the cost-book company has authority to pledge the company's credit for necessaries); *Geake* v. *Jackson* (1867), 36 L. J. (C. P.) 108 (in an action against a shareholder for coals, evidence as to the cost-sheet has been held as evidence against him of coals so delivered); *Re Welsh Potosi Lead and Copper Mining Co., Lofthouse's Case* (1857), 2 De G. & J. 69, C. A. (where a shareholder has given notice, according to rules, of his ceasing to be a member of a cost-book company subsequently registered, he has been held not liable to be placed on the list of contributories on the winding-up of the company); *Re Welsh Potosi Mining Co.* (1858), 27 L. J. (CH.) 311 (the name of a shareholder who has given notice to relinquish his shares should not appear on the list of contributories or on the register on the winding up of the company); *Re Wrysgan Slate Quarrying Co.; Ex parte Birch* (1859), 28 L. J. (CH.) 894 (where the amount paid by a shareholder, who relinquished his shares on paying his proportion of liabilities, was fixed by the purser without the sanction of the committee, the shareholder was held not liable to be placed on the list of contributories); *Re Great Cambrian Mining and Quarrying Co., Bowen's Case* (1856), 4 W. R. 800 (where a transferee has been a contributory in respect of shares transferred with the usual formalities, the transferor cannot also be held liable in respect of such shares); *Taylor* v. *Iflil* (1863), 8 L. T. 148

SECT. 1. Cornwall and Devon.

How right is acquired.

ownership of the mines is vested in the owner of the freehold (*o*). This right of ownership is, however, modified by the custom of tin-bounding. Under this custom, if a tin mine (*p*) lies within waste land or inclosed land in which the custom was exercised before inclosure and the property either of an individual or forming part of one of the seventeen ancient assessionable manors (*q*), and is not worked by the owner of the surface, a tinner (*r*) may give three months' notice to the lord of his intention to cut tin-bounds (*s*). During the three months the owner may himself cut the bounds for his own use. If he does not do so, the tinner may, at three successive Stannary Courts (*t*), cause proclamation to be made of the limits of the bounds, the names of his partners, and other particulars, and if no objection is successfully made, the court awards a writ to the bailiff of the court to deliver possession of the tin-bounds to the tin-bounder, who thereupon has the exclusive right to search for and work all tin and tin ore within the bounds (*a*) on paying to the owner of the soil one-fifteenth of the mineral worked, except in places where by special custom a different share is payable (*b*).

(the transferee takes his shares with past as well as future liabilities, independent of any special contract); *Re Court Grange Silver Lead Co., De Castro's Case* (1856), 2 Jur. (N. S.) 1203 (a transferee is not liable to be placed on the list of contributories where there has been merely an agreement to take shares but no registration); *King's Case* (1871), 6 Ch. App. 196 (the secretary of an unregistered mining company is not liable to be placed on the list of contributories on winding up in respect of shares bought by him in the name of a nominee to avoid publicity, the transfer being duly registered); *Re Wrysgan Slate Quarrying Co., Ex parte Humby* (1859), 28 L. J. (CH.) 875 (a registered shareholder who has disposed of his shares and handed over the certificates, no other person having registered himself in respect of such shares, remains liable to be a contributory); *Re Pennant and Craigwen Consolidated Lead Mining Co., Mayhew's Case* (1854), 5 De G. M. & G. 837, C. A. (a transferee held to be placed properly on the list of contributories though no notice in writing was given nor formal acknowledgment made according to the rules).

(*o*) *Rogers* v. *Brenton* (1847), 10 Q. B. 26, 50.

(*p*) The custom only applies to tin. If any copper is found in the course of working, the tinner is not entitled to it (*Rogers* v. *Brenton*, *supra*). As to the nature of such a custom, see title CUSTOM AND USAGES, Vol. X., pp. 224 *et seq.*

(*q*) Laws of the Stannaries, p. 34. As to the assessionable manors, see title CONSTITUTIONAL LAW, Vol. VII., p. 261.

(*r*) *I.e.*, any person employing himself in tin mining (*Rogers* v. *Brenton*, *supra*, at p. 50), and see Laws of the Stannaries, p. 35.

(*s*) Laws of the Stannaries, p. 91.

(*t*) *Ibid.*, p. 56.

(*a*) *Rogers* v. *Brenton*, *supra*, at p. 27; *Ivimey* v. *Stocker* (1865), 2 Drew. & Sm. 537, 542; *Rowe* v. *Brenton* (1828), cited in Smirke's Report of *Vice* v. *Thomas* (1842). The custom is recognised in the Charter 33 Edw. 1, and regulated by laws passed at convocations of the Stannaries. For the charter and these laws, see Pearce, Laws and Customs of the Stannaries, and the collection known as Laws of the Stannaries. As to the area which may be included within the bounds, see *Rogers* v. *Brenton*, *supra*, at p. 66, n.

(*b*) Laws of the Stannaries, p. 34. This payment is called "toll-tin." For special customs to render less than a fifteenth share, see *Rowe* v. *Brenton* (1828), 8 B. & C. 737; *Crease* v. *Sawle* (1842), 2 Q. B. 862, 865, 866, Ex. Ch.; *Crease* v. *Barrett* (1835), 1 Cr. M. & R. 919, 925; *R.* v. *Crease* (1840), 11 Ad. & El. 677. As to an action for account in respect of toll-tin, see *Trelawny* v. *Williams* (1705), 2 Vern. 483. The lord is liable to be rated in respect of his share (*R.* v. *St. Agnes* (*Inhabitants*) (1789), 3 Term Rep. 480; *Crease* v. *Sawle*, *supra*; *Van Mining Co.* v. *Llanidloes Overseers* (1876), 1 Ex. D. 310).

1568. The bounds must be marked by twenty-four turfs or stones, six to each corner, and there may also be side-bounds, which appear to be triangular extensions bounded by lines drawn from any two of the corners (*c*).

Marking the bounds.

A tin-bounder who has been in possession for a year and a day cannot be disturbed except by verdict (*d*), but to preserve his rights he must renew the bounds within a year and a day (*e*), and work *bonâ fide*, although not necessarily without intermission (*f*). Omission to renew the bounds before the proper date is not fatal if they are renewed before rights have been acquired by another (*g*). The loss of side-bounds does not prejudice the rights of the tin-bounders in the lands within the corner bounds (*h*). Part owners or keepers of bounds who fraudulently forfeit by non-renewal and then renew in their own names are held to renew for the benefit of those defrauded (*i*).

Renewal of bounds.

If a tin-bounder neglects to work, other tinners may, on giving notice and making certain payments, enter and work (*k*).

Neglect to work.

1569. The interest acquired by the tin-bounder is a chattel real (*l*), which devolves and can be dealt with as such, and is liable to debts (*m*). When he has entered and worked, his interest is such that possession might have been recovered in an action of ejectment (*n*).

Nature of interest acquired.

1570. A tin-bounder has the right in the course of his workings to do certain things necessary for getting the tin (*o*). He may take water within the bounds (*p*) other than pot-water for houses or water enjoyed by an ancient mill (*q*), but he may not make surface trenches on any land to convey water to any stannary (*r*). He may make adits through waste land, but not through land held in severalty, and one tin-bounder may not use another's adit without leave (*s*). A tin-bounder who obstructs streams must clear them in

Incidental rights and liabilities of tin-bounders

(*c*) Laws of the Stannaries, p. 87.
(*d*) *Ibid.*, p. 21.
(*e*) *Ibid.*, p. 57. The owner of the soil is entitled to require the tin-bounders to show the corners of their bounds and to state the date of renewal (*ibid.*, pp. 91, 95).
(*f*) *Rogers* v. *Brenton* (1847), 10 Q. B. 27.
(*g*) Laws of the Stannaries, p. 20.
(*h*) *Ibid.*, p. 57.
(*i*) *Ibid.*, pp. 89, 90.
(*k*) *Ibid.*, p. 90.
(*l*) *Ivimey* v. *Stocker* (1866), 1 Ch. App. 396, 404.
(*m*) Laws of the Stannaries, p. 58; *Rogers* v. *Brenton*, *supra*.
(*n*) *Vice* v. *Thomas* (1842), Smirke's Report; *Rogers* v. *Brenton*, *supra*; compare *Doe* d. *Falmouth* (*Earl*) v. *Alderson* (1836), 1 M. & W. 210 (a case in which there had been no entry, and which appears to have turned on a point of evidence or pleading).
(*o*) *Gaved* v. *Martyn* (1865), 19 C. B. (N. S.) 732. Workings may not be made in a highway (Laws of the Stannaries, p. 60).
(*p*) *Gaved* v. *Martyn*, *supra*; *Carlyon* v. *Lovering* (1857), 1 H. & N. 784. Rights to water enjoyed for the necessary period by tin-bounders are acquired for the benefit of the freehold (*Ivimey* v. *Stocker*, *supra*).
(*q*) Laws of the Stannaries, p. 104.
(*r*) *Bastard* v. *Smith* (1836), 5 Ad. & El. 827; see *Ivimey* v. *Stocker*, *supra*, at p. 405.
(*s*) Laws of the Stannaries, p. 46. Tin found by a tinner in making an adit outside his bounds may not be appropriated by him (*ibid.*).

SECT. I. Cornwall and Devon.

order to prevent flooding (*t*), and there are statutory restrictions as to working beside certain streams in order to protect the harbours of Dartmouth, Plymouth, Teignmouth, Falmouth, and Fowey (*a*). A tin-bounder who encroaches on the bounds of others is liable in damages, and a tin-bounder who suspects his neighbour of breaking bounds may obtain an order for inspection, and if necessary an injunction until trial (*b*).

Co-adventurers.

1571. Tin bounds are often worked by co-adventurers. In such case any adventurer, who does not co-operate in the working after receiving notice from the owners of one-half in value, may be excluded from the working and be only entitled to the accustomed farm (*c*). The adventurers have rights of contribution against each other (*d*).

SUB-SECT. 2.—*Tin-bounding in Devon.*

The custom.

1572. Under the Devonshire custom a tinner may work tin existing in any lands in Devon other than orchards, gardens, houses, or grain or corn lands, or any wood or grove where the working would necessitate the overthrowing of twenty timber trees of twenty years' growth (*e*). Tin may, however, be worked in the excepted lands with the consent of the owner and occupier, and if such consent is given, the owner and occupier are entitled in equal shares to one-tenth of the produce (*f*).

Renewal of the bounds.

1573. Tin bounds must be renewed yearly between the feasts of St. Peter ad Vincula and St. Michael the Archangel (*g*).

Nature of interest.

1574. The interest of a tinner in his bounds is a fee simple estate (*h*), and devolves upon his heir (*i*), or it may be devised or conveyed (*k*).

SUB-SECT. 3.—*Stannaries Court.*

In Cornwall.

1575. In addition to their peculiar customs the Cornish tin miners had their peculiar court, known as the Stannaries Court, the powers of which are now exercised by the county court of Cornwall (*l*). The court is a court of both common law and

(*t*) Law of the Stannaries, p. 105.
(*a*) Stat. (1531-2) 23 Hen. 8, c. 8: stat. (1535-6) 27 Hen. 8, c. 23.
(*b*) Laws of the Stannaries, pp. 97, 98. As to injuntion, see title INJUNCTION, Vol. XVII., pp. 197 *et seq.*
(*c*) Laws of the Stannaries, p. 96.
(*d*) *Ibid.*, pp. 59, 60.
(*e*) Pearce, Laws and Customs of the Stannaries, p. 248. The penalty for working in contravention of this provision is £5 and treble damages (*ibid.*).
(*f*) *Ibid.*, p. 249.
(*g*) Pearce, Laws and Customs of the Stannaries, p. 200; *i.e.*, 1st August and 29th September.
(*h*) *Ibid.*, pp. 196, 202, 215.
(*i*) *Ibid.*, p. 194.
(*k*) *Ibid.*, p. 196.
(*l*) Stannaries Court (Abolition) Act, 1896 (59 & 60 Vict. c. 45), s. 1, and order made thereunder dated 16th December, 1896; see titles COUNTY COURTS, Vol. VIII., pp. 686, 687; COURTS, Vol. IX., p. 204. The constitution and jurisdiction of the Stannary Court as regards companies is dealt with in title COMPANIES, Vol. V., pp. 659 *et seq.*

equity (*m*). Its jurisdiction extends to actions between miners (*n*) (except actions relating to land, life, or limb) (*o*), whether or not the cause of action arose out of the working of mines (*p*) within the stannaries, and also to actions between miners and strangers, but in such cases only to actions arising out of mining within the stannaries, unless the stranger consents and submits to the jurisdiction.

Extension of jurisdiction to Devon.

1576. The jurisdiction of the court in matters relating to and connected with mines and the working thereof has been extended to Devon by statute (*q*).

Procedure.

1577. In cases within the county court jurisdiction the procedure is according to the county court rules (*r*). In cases exceeding the county court jurisdiction special provision is made in certain cases (*s*), and where these provisions do not apply the practice and procedure of the High Court is followed (*t*).

SECT. 2.—*Derbyshire Lead Mines and Mineral Customs.*

SUB-SECT. 1.—*In General.*

Districts.

1578. In Derbyshire lead is principally found in two districts, the Hundred of the High Peak, in which there is a district called the King's Field or Fee, with seven liberties or townships (*a*), and an adjoining district, the Wapentake of Wirksworth, also comprising a district called the King's Field, with eight manors or liberties (*b*)

(*m*) As to the jurisdiction generally, see Charter 33 Edw. 1, of which the relevant parts are set out in the report of *Newton* v. *Nancarrow* (1850), 15 Q. B. 144; 4 Co. Inst. 232, and the Appendix to Smirke's Report of *Vice* v. *Thomas* (1842). Originally there was a court exercising a common law jurisdiction, known as the Steward's Court, in each stannary, and a court for all the stannaries wherein the vice-warden exercised an original equitable jurisdiction. These courts were consolidated by the Stannaries Act, 1836 (6 & 7 Will. 4, c. 106). There appears to have been some doubt as to equitable jurisdiction prior to the last-named Act; see *Vice* v. *Thomas* (1842), Smirke's Report.

(*n*) See *Adams* v. *Stanneries* (*Lord Warden*) (1633), Cro. Car. 333, and *Reignol* v. *Taylor* (1702), 7 Mod. Rep. 103.

(*o*) Charter 33 Edw. 1, "*exceptis placitis terræ et vitæ et membrorum.*"

(*p*) Originally the jurisdiction was confined to tin mines, but by the Stannaries Act, 1836 (6 & 7 Will. 4, c. 106), ss. 4, 7, it was extended to any mine worked for lead, copper, or other metal, or metallic mineral, and operations connected therewith; and by the Stannaries Act, 1855 (18 & 19 Vict. c. 32), s. 1, it was provided that, in cases where non-metallic minerals were found in the same mine or intermixed with metallic minerals, the whole should be within the jurisdiction, and plumbago was declared to be a metallic mineral.

(*q*) Stannaries Act, 1855 (18 & 19 Vict. c. 32), s. 32.

(*r*) County Court Rules, 1903, Ord. 51, r. 8; see title COUNTY COURTS, Vol. VIII., pp. 448 *et seq.*

(*s*) County Court Rules, 1903, Ord. 51, rr. 10 *et seq.*

(*t*) *Ibid.*, r. 26; see title PRACTICE AND PROCEDURE.

(*a*) Namely, Castleton, Bradwell, Hucklow, Winster, Moniash, Taddington, and Upper Haddon; see High Peak Mining Customs and Mineral Courts Act, 1851 (14 & 15 Vict. c. 94) (preamble). This statute is hereinafter referred to as the "High Peak etc. Act, 1851 (14 & 15 Vict. c. 94)."

(*b*) Namely, Crich, Ashford, Stoney Middleton and Eyam, Hartingdon, Litton, Peak Forest, Tideswell, and Youlgreave; see Derbyshire Mining Customs and Mineral Courts Act, 1852 (15 & 16 Vict. c. clxiii.), (preamble). This statute is

SECT. 2. Derbyshire Lead Mines and Mineral Customs.

1579. The King's Field was originally Crown property in the right of the Duchy of Lancaster, and with other districts was from time immemorial subject to customs by which any subject of the realm was entitled to search and mine for lead on payment of certain mineral duties (*c*).

Ownership of property.

The mineral duties belong, according to the districts in which the mines are situated, to the Crown, its lessees, or private owners (*d*). The land inclosing the mines belongs to private persons, the grants of the soil operating subject to the customary duties and rights (*e*).

Customs defined by statute.

1580. The mineral laws and customs are defined and regulated by statute (*f*) and administered by special courts called the Great and Small Barmote Courts (*g*).

Evidence of customs.

Strict construction of rights and customs.

1581. To prove a custom with respect to rights of miners in one manor in Derbyshire evidence of customs in an adjoining manor is admissible (*h*). The rights and customs exercisable by the miners are of an onerous character with regard to the landowners and must be construed strictly (*i*).

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hereinafter referred to as the "Derbyshire etc. Act, 1852 (15 & 16 Vict. c. clxiii.)." It was given the force of a public Act by the Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 9.

(*c*) Preambles to High Peak etc. Act, 1851 (14 & 15 Vict. c. 94); Derbyshire etc. Act, 1852 (15 & 16 Vict. c. clxiii.). See also *Wake* v. *Redfearn* (1880), 43 L. T. 123.

(*d*) *Ibid.* (both Acts); *Wake* v. *Hall* (1883), 8 App. Cas. 195, 211.

(*e*) *Ibid.*

(*f*) The High Peak etc. Act, 1851 (14 & 15 Vict. c. 94), defines the customs in the King's Field and other parts of the High Peak, while the Derbyshire etc. Act, 1852 (15 & 16 Vict. c. clxiii.), defines the customs in the Wapentake of Wirksworth and eight manors. New customs and rules were also defined in 1859 under the High Peak etc. Act, 1851 (14 & 15 Vict. c. 94), s. 56. These are referred to in this part of the title as the "Rules of 1859." The objects of the two above-mentioned enactments (which each by s. 2 define, in slightly different terms, "mine," "vein," "mineral property," "ore" and other terms) are substantially the same—namely, settling the customs of each district and establishing and regulating the jurisdiction of the local courts; but it should be noted that each district has its independent local customs and rights, and its distinct courts, juries, and officers; see *Wake* v. *Redfearn*, *supra*, at p. 125. For cases on customs decided before the passing of these statutes, see *Beresford* v. *Bacon* (1686), 2 Lut. 1317; *Lynn-Regis Corporation* v. *Taylor* (1684), 3 Lev. 160; *Rowls* v. *Gells* (1776), 2 Cowp. 451; *A.-G.* v. *Wall* (1760), 4 Bro. Parl. Cas. 665.

(*g*) As to the functions and jurisdiction of the Great and Small Barmote Courts, see title COURTS, Vol. IX., pp. 140, 141. Among other duties the officials of these courts, known as barmasters, execute steward's warrants (High Peak etc. Act, 1851 (14 & 15 Vict. c. 94), s. 13); attend views of mines (*ibid.*, s. 13); record transfers of interests in mines (*ibid.*, s. 14); measure ore raised (*ibid.*, Sched. I. (3), (7)); mark out rights of way and water and allot surface ground (*ibid.*, Sched. I. (4), (5)); secure the payment of the duties of "lot" and "cope" (*ibid.*, Sched. I. (8), (9)); lay out "meers" and examine mines for causes of forfeiture (*ibid.*, Sched. I. (10), (19)). Their functions vary slightly under the High Peak etc. Act, 1851 (14 & 15 Vict. c. 94), and the Derbyshire etc Act, 1852 (15 & 16 Vict. c. clxiii.). As to "lot" and "cope," see p. 643, *post*; as to "meers," see p. 641, *post*.

(*h*) *Ely* (*Dean and Chapter*) v. *Warren* (1741), 2 Atk. 189; *Anglesey* (*Marquis*) v. *Hatherton* (*Lord*) (1842), 10 M. & W. 218, 234, 237; see *Rowe* v. *Brenton* (1828), 8 B. & C. 737, 758.

(*i*) *Wake* v. *Redfearn*, *supra*, at p. 126.

SUB-SECT. 2.—*Rights of Mining.*

SECT. 2. Derbyshire Lead Mines and Mineral Customs.

Customs established by statute.

1582. Every subject (*j*) of the realm may by the local customs enter and search for lead ore in any part of the lands where the custom prevails (churches, burial grounds, dwelling-houses, orchards, gardens, and highways excepted), under the obligation of making good any damage done if no vein of ore is found. Subject to certain conditions and obligations, the miner may also follow a vein or search for lead ore under the excepted places (*k*).

Right of search etc.

Relations between landowner and miner.

1583. The rights of landowner and miner are correlative. There is no privity of title between them. The miner is entitled to the use of the land in order to get lead, and, while the mine is being worked to various other easements and rights, but he has no absolute right in perpetuity (*l*). The landowner is entitled to all that remains when the lead has been extracted, and to the full property in the land when the mine is abandoned (*m*).

Meers.

1584. In the High Peak district (*n*), when a person discovers a new vein, he is entitled to a strip of land called a "meer," varying in area according to the district (*o*), along the vein, one on each side of the point where the vein was discovered (*p*). The point is known as the "founder" (*q*). The third meer, which the barmaster may set out at the end of the first or second meer, belongs to the owner of the mineral duties of "lot" and "cope" (*r*).

When the first two meers are freed (*s*), the finder may claim all the subsequent meers at either extremity (*t*). If the third meer is not worked by the owner of the mineral duties the finder of the

(*j*) Including the owner of the soil in which the mine is situate (*Wake* v. *Hall* (1880), 7 Q. B. D. 295, 298, C. A.), or a lessee from the Crown of mineral rights (*Arkwright* v. *Evans* (1880), 49 L. J. (M. C.) 82, 86); but anyone may contract himself out of his customary rights (*Wright* v. *Pitt* (1870), L. R. 12 Eq. 408, 416). A landowner has no greater nor better right to work mines under his land than any other person. If he works them at all, he can only do so upon the customary terms and on payment of the customary royalties (*Wake* v. *Hall* (1880), 7 Q. B. D. 295, C. A.).

(*k*) High Peak etc. Act, 1851 (14 & 15 Vict. c. 94), Sched. I. (1); Derbyshire etc. Act, 1852 (15 & 16 Vict. c. clxiii.), Sched. I. (1); see *Gilbert* v. *Tomison* (1824), 4 Dow. & Ry. (K. B.) 222.

(*l*) *Wake* v. *Hall* (1883), 8 App. Cas. 195, 206, 214.

(*m*) High Peak etc. Act, 1851 (14 & 15 Vict. c. 94), Sched. I. (2); *Wake* v. *Redfearn* (1880), 43 L. T. 123, 126; *Stokes* v. *Arkwright* (1897), 66 L. J. (Q. B.) 845; *Devonshire* (*Duke*) v. *Stokes* (1897), 76 L. T. 424. The customs in the High Peak and other districts vary slightly (Derbyshire etc. Act, 1852 (15 & 16 Vict. c. clxiii.), Sched. I. (2)).

(*n*) In other districts the custom varies slightly; see Derbyshire etc. Act, 1852 (15 & 16 Vict. c. clxiii.), Sched. I. (10), (11), (18); *Rowls* v. *Gells* (1776), 2 Cowp. 451).

(*o*) High Peak etc. Act, 1857 (14 & 15 Vict. c. 94), Sched. I. (18): Derbyshire etc. Act, 1852 (15 & 16 Vict. c. clxiii.), Sched. I. (18). Thus a meer in High Peak measures thirty-two yards, in Wirksworth twenty-nine yards, and in Youlgreave twenty-eight yards (*ibid.*).

(*p*) *Ibid.*, Sched. I. (10), (11), (18) (both Acts).

(*q*) *Ibid.*, s. 2 (both Acts).

(*r*) *Ibid.*, Sched. I. (10) (both Acts). As to "lot" and "cope," see p. 643, *post*.

(*s*) As to "freeing," see p. 642, *post*.

(*t*) High Peak etc. Act, 1851 (14 & 15 Vict. c. 94), Sched. I. (10); Derbyshire etc. Act, 1852 (15 & 16 Vict. c. clxiii.), Sched. I. (10).

SECT. 2. Derbyshire Lead Mines and Mineral Customs.

original vein may purchase the meer at a price fixed by the steward or barmaster and the grand jury, or may work through it, reserving the ore found there (less expenses) for the owner of the mineral duties (*a*).

Setting out "meers."

1585. One of the duties of the barmaster is, in the presence of two of the grand jury, to measure and set out meers (*b*), this operation being called the "gift" (*c*), and to record gifts in the barmaster's book (*d*).

The "gift."

"Freeing."

A meer may not be set out until ore has been raised and the first customary payment, consisting of a dish of ore of a certain measure (*e*), has been made to the owner of the mineral duties (*f*). This is called "freeing" the mine. Similar dishes are payable for every third and subsequent meer reached by the miner (*g*), but only a proportionate amount of a dish if less than a meer is taken (*h*). No ore may be sold or disposed of before being measured by a barmaster (*i*).

A meer when freed becomes an estate of inheritance (*k*).

SUB-SECT. 3.—*Forfeiture and Trespass.*

Forfeiture and trespass.

1586. The penalty for working a mine before it is freed, or for committing a trespass (*l*) in the third meer (*m*), is forfeiture to the owner of the mineral duties, enforceable by proceedings in the Small Barmote Court in the name of the barmaster (*n*). The non-working of a mine or vein for no sufficient reason is also a cause of forfeiture, in which case it may be given by the barmaster to any person willing to work it (*o*).

Forfeiture to co-owners.

Where a person has shares in a mine and refuses to join the owners of the other shares in working it, or to pay his proportion

(*a*) High Peak etc. Act, 1851 (14 & 15 Vict. c. 94), Sched. I. (10); Derbyshire etc. Act, 1852 (15 & 16 Vict. c. clxiii.), Sched. I. (10). See also Rules of 1859, to be found in Rogers' Law of Mines, Minerals, and Quarries, 2nd ed., pp. 579 *et seq.*, r. 6; *Wake* v. *Hall* (1880), 7 Q. B. D. 295, 298, C. A.

(*b*) High Peak etc. Act, 1851 (14 & 15 Vict. c. 94), Sched. I. (10); Derbyshire etc. Act, 1852 (15 & 16 Vict. c. clxiii.), Sched. I. (10).

(*c*) *Ibid.*, s. 2 (both Acts).

(*d*) *Ibid.*, Sched. I. (10) (both Acts).

(*e*) *Ibid.*, Sched. I. (3) (both Acts).

(*f*) *Ibid.*, Sched. I. (11) (both Acts).

(*g*) *Ibid.* (both Acts).

(*h*) *Ibid.*, Sched. I. (18) (both Acts).

(*i*) *Ibid.*, Sched. I. (8) (both Acts).

(*k*) *Doe* d. *Thomson* v. *Pearce* (1812), Peake, Add. Cas. 242.

(*l*) As to trespass, see, further, High Peak etc. Act, 1851 (14 & 15 Vict. c. 94), Sched. I. (16); Derbyshire etc. Act, 1852 (15 & 16 Vict. c. clxiii.), Sched. I. (16); and as to "views" to ascertain whether a trespass has been committed, and recovery of ore from trespassers, see High Peak etc. Act, 1851 (14 & 15 Vict. c. 94), Sched. I. (22—25), (28); Derbyshire etc. Act, 1852 (15 & 16 Vict. c. clxiii.), Sched. I. (23)—(26), (29).

(*m*) See p. 641, *ante*.

(*n*) High Peak etc. Act, 1851 (14 & 15 Vict. c. 94), Sched. I. (12); Derbyshire etc. Act, 1852 (15 & 16 Vict. c. clxiii.), Sched. I. (12). As to Small Barmote Courts, see title COURTS, Vol. IX., p. 140.

(*o*) High Peak etc. Act, 1851 (14 & 15 Vict. c. 94), Sched. I. (19); Derbyshire etc. Act, 1852 (15 & 16 Vict. c. clxiii.), Sched. I. (19), (20); Rules of 1859 r. 7; *Wake* v. *Hall*, *supra*, at p. 299.

of the expenses, he is liable to forfeit his share to the other co-owners (*p*).

SUB-SECT. 4.—*Incidental Rights of Miners.*

1587. A miner is entitled, while his mine is being worked, and without paying compensation to landowner or occupier, to a right of way (limited to purposes and persons connected with the mine) from the mine to the nearest highway, and also to the nearest stream, spring, or natural pond, and to take water therefrom, such rights to be marked out by the barmaster and two of the grand jury (*q*). Rights of way and water.

Similarly, without payment of compensation to landowner or occupier, he is entitled to the exclusive use of such surface land as is thought necessary by the barmaster and two of the grand jury for the purposes of the mine (*r*). But he is not entitled to use surface land in one district for mining purposes incidental to mining in another district (*s*). Surface room

Buildings necessary for the purposes of the mine may be erected on the surface, and modern appliances may be used for working the lead (*t*). Buildings and machinery may be removed by the miner or compensation claimed where a mine is forfeited for not being worked (*a*). Conversely a landowner may require a miner, on abandoning his mine, to remove his buildings and restore the surface (*b*). Buildings etc. Removal of buildings.

SUB SECT. 5.—*Mineral Duties.*

1588. The mineral duties called "lot" and "cope" vary in amount in different districts, the former—a duty rendered in kind—being one-thirteenth or one-ninth part of the ore raised, and the latter fourpence or sixpence for every load of ore measured by the barmaster. These duties are payable by the miners to the owners of mineral duties, the Crown, or its lessees, or other owners (*c*), the duty of lot being taken by the barmaster when the ore is measured (*d*), and payment of cope, if necessary, recovered by action in the county court or Small Barmote Court (*e*). Duties of lot and cope.

(*p*) High Peak etc. Act, 1851 (14 & 15 Vict. c. 94), Sched. I. (20); Derbyshire etc. Act, 1852 (15 & 16 Vict. c. clxiii.), Sched. I. (21); Rules of 1859, rr. 8, 10.

(*q*) High Peak etc. Act, 1851 (14 & 15 Vict. c. 94), Sched. I. (1); Derbyshire etc. Act, 1852 (15 & 16 Vict. c. clxiii.), Sched. I. (4); see also *Wake* v. *Hall* (1880), 7 Q. B. D. 295, 298, C. A.

(*r*) High Peak etc. Act, 1851 (14 & 15 Vict. c. 94), Sched. I. (5); Derbyshire etc. Act, 1852 (15 & 16 Vict. c. clxiii.), Sched. I. (5).

(*s*) *Wake* v. *Redfearn* (1880), 43 L. T. 123. It is doubtful whether a miner may use surface land in the same district as that in which he is mining, where it is not immediately over the lead vein actually being worked (*ibid.*, at p. 127).

(*t*) High Peak etc. Act, 1851 (14 & 15 Vict. c. 94), Sched. I. (5); Derbyshire etc. Act, 1852 (15 & 16 Vict. c. clxiii.), Sched. I. (5); *Wake* v. *Hall* (1883), 8 App. Cas. 195, 212.

(*a*) *Wake* v. *Hall* (1880), 7 Q. B. D. 295, 303, C. A.

(*b*) *Wake* v. *Hall* (1883), 8 App. Cas. 209, 210.

(*c*) High Peak etc. Act, 1851 (14 & 15 Vict. c. 94), Sched. I. (9); Derbyshire etc. Act, 1852 (15 & 16 Vict. c. clxiii.), Sched. I. (9). As to the measurement of loads, see *ibid.*, Sched. I. (3), (7) (both Acts).

(*d*) *Ibid.* (both Acts); see also *A.-G.* v. *Wall* (1760), 4 Brd. Parl. Cas. 665.

(*e*) High Peak etc. Act, 1851 (14 & 15 Vict. c. 94), Sched. I. (9); Derbyshire

SECT. 2. SUB-SECT. 6.—*Creation and Transfer of Rights.*

Derbyshire Lead Mines and Mineral Customs.

Title.

1589. Gifts from the barmaster are deemed the origin of title, though the mine may have been worked prior to the gift. Where priority of title is disputed, the longest continued ownership, a question of fact for the jury, prevails (*f*). Questions of title and all disputes arising in the working of mines are determinable in the Small Barmote Court (*g*).

Transfer in the High Peak, and in other districts.

1590. A simple entry in the barmaster's book is sufficient to effect a transfer of an interest in mines or veins in the High Peak (*h*). Interests in mines or veins in other districts may be transferred by transferor and transferee executing a transfer in a specified form, but an entry of such transfer must be made in the barmaster's book (*i*).

An entry must also be made, in the case of the bankruptcy of any person entitled to a mine or vein in that district, of the appointment of his trustee (*k*), and of the material parts of the probate of a will whereby any such mine or vein is devised (*l*).

SUB-SECT. 7.—*Miscellaneous Rights.*

Relievers.

1591. Persons who "relieve" or unwater a mine are entitled by custom, so long as the relief continues, to such portion of the ore gotten as the barmaster and grand jury determine. Such portion is recoverable, according to value, in the High Court or county court (*m*).

Tithe ore.

1592. In certain districts, by custom (*n*), a custom enforceable by action for an account but not of common right (*o*), a proportion of the ore gotten is payable by way of tithe.

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etc. Act, 1852 (15 & 16 Vict. c. clxiii.), Sched. I. (9); see *Devonshire (Duke)* v. *Stokes* (1897), 76 L. T. 424, 425.

(*f*) High Peak etc. Act, 1851 (14 & 15 Vict. c. 94), Sched. I. (15); Derbyshire etc. Act, 1852 (15 & 16 Vict. c. clxiii.), Sched. I. (15). As to consolidation of titles, see High Peak etc. Act, 1851 (14 & 15 Vict. c. 94), Sched. I. (27); Derbyshire etc. Act, 1852 (15 & 16 Vict. c. clxiii.), Sched. I. (26); *Wake* v. *Hall* (1883), 8 App. Cas. 195, 202.

(*g*) High Peak etc. Act, 1851 (14 & 15 Vict. c. 94), Sched. I. (16); Derbyshire etc. Act, 1852 (15 & 16 Vict. c. clxiii.), Sched. I. (16). As to the title to veins which meet and cross or approach one another, but are parted by a "rither" more than three feet (in the Wapentake of Wirksworth six feet) thick, see *ibid.*, Sched. I. (13), (14) (both Acts). As to the barring of claims, see High Peak etc. Act, 1851 (14 & 15 Vict. c. 94), Sched. I. (21); Derbyshire etc. Act, 1852 (15 & 16 Vict. c. clxiii.), Sched. I. (22).

(*h*) High Peak etc. Act, 1851 (14 & 15 Vict. c. 94), Sched. I. (6).

(*i*) Derbyshire etc. Act, 1852 (15 & 16 Vict. c. clxiii.), Sched. I. (6); see Rules of 1859, r. 2.

(*k*) Rules of 1859, r. 3.

(*l*) *Ibid.*, r. 4.

(*m*) High Peak etc. Act, 1851 (14 & 15 Vict. c. 94), Sched. I. (26); Derbyshire etc. Act, 1852 (15 & 16 Vict. c. clxiii.), Sched. I. (27); see *Arkwright* v. *Gell* (1839), 5 M. & W. 203, 228, 229.

(*n*) *Brown* v. *Vermuden* (1676), 1 Cas. in Ch. 272, 282; *Pindar* v. *Jackson* (1694), 1 Wood, 315 (the tenth dish of lead ore gotten in Wirksworth, Hartington, and Eyam); *Burton* v. *Spencer* (1733), 2 Wood, 336 (ninepence per load of nine dishes in Stoney Middleton); see Derbyshire etc. Act, 1852 (15 & 16 Vict. c. clxiii.), s. 67.

(*o*) *Buxton* v. *Hutchinson* (1688), 2 Vern. 46. Tithe ore is not payable

1593. A mine which is being worked must be fenced by the miner (*p*), but if the mine has been abandoned the landowner must fence it (*q*). Fences.

SECT. 3.—*Gloucestershire.*

SUB-SECT. 1.—*In General.*

1594. The Gloucestershire customs are exercisable in that part of the county lying to the west of the Severn known as the Hundred of St. Briavels (*r*), which includes the Forest of Dean (*s*) and certain other districts (*t*). Area in which custom exercisable.

The surface of the Forest of Dean, with the exception of certain legalised encroachments (*a*), belongs to the Crown (*b*), and the surface of the remainder of the hundred belongs partly to the Crown and partly to private owners (*c*). Ownership of surface.

The mines in and under the forest and the other districts included in the hundred, with certain possible exceptions (*d*), belong to the Crown (*e*), subject to the rights of the free miners (*f*) under the customs. Ownership of mines.

1595. The customs are of immemorial antiquity, but until regulated by statute were uncertain and undefined, and in part inapplicable to modern conditions (*g*). The rights of the Crown, the free miners, and surface owners interested are now, however, Nature of customs.

out of mines in Matlock or Bradbourne (*Chappel* v. *Ward* (1671), 1 Wood, 113).

(*p*) High Peak etc. Act, 1851 (14 & 15 Vict. c. 94), Sched. I. (5); Derbyshire etc. Act, 1852 (15 & 16 Vict. c. clxm.), Sched. I. (5); see also *Sybray* v. *White* (1836), 1 M. & W. 435.

(*q*) *Arkwright* v. *Evans* (1880), 49 L. J. (M. C.) 82, 87; *Devonshire* (*Duke*) v. *Stokes* (1897), 76 L. T. 424; *Stokes* v. *Arkwright* (1897), 66 L. J. (Q. B.) 845. See pp. 585, 603, *ante*, and title BOUNDARIES, FENCES, AND PARTY WALLS, Vol. III., p. 130.

(*r*) See the Dean Forest (Mines) Act, 1838 (1 & 2 Vict. c. 43), preamble.

(*s*) The boundaries of the forest were finally settled by stats. (1640) 16 Car. 1, c. 15, and (1668) 20 Car. 2, c. 3.

(*t*) In addition to the Forest of Dean the hundred includes the parishes of Hewelsfield, St. Briavels, Newland, Staunton, English Bicknor, Ruardean, Mitcheldean, Abinghall, Flaxley and Little Dean, parts of the parishes of Westbury-on-Severn, Lea, and Newnham, the Manor of Rodley and the district called Hinder's Lane, and Dockham (see Wood, Laws of the Dean Forest, p. 4).

(*a*) See Dean Forest (Mines) Act, 1838 (1 & 2 Vict. c. 43).

(*b*) *Ibid.*, preamble; Wood, Laws of the Dean Forest, p. 5.

(*c*) *Ibid.*

(*d*) Noxon Park, Kidnalls and Sneyd Woods and Mailscot; see the fourth report of the Dean Forest Commissioners, 1831.

(*e*) Dean Forest (Mines) Act, 1838 (1 & 2 Vict. c. 43), preamble.

(*f*) All persons, born and abiding within the Hundred of St. Briavels, of the age of twenty-one years and upwards who have worked for a year and a day in a coal or iron mine within the hundred are free miners (Dean Forest (Mines) Act, 1838 (1 & 2 Vict. c. 43), s. 14), provided they are registered as such; see p. 646, *post*. Persons who fulfil similar requirements with regard to stone quarries are also called "free miners" (Dean Forest (Mines) Act, 1838 (1 & 2 Vict. c. 43), s. 15), but the rights of the classes of free miners are confined to miners of coal and iron and quarries respectively (*ibid.*, s. 23).

(*g*) Dean Forest (Mines) Act, 1838 (1 & 2 Vict. c. 43), preamble.

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regulated by statute (*h*), and certain awards made by Commissioners in the exercise of statutory powers (*i*).

SUB SECT. 2.—*Gavellers.*

The gaveller.

1596. The officer who represents the Crown in its dealings with the free miners is known as the gaveller, an office now vested in the First Commissioner of Woods, Forests, and Land Revenues (*k*), who can by deed appoint as his deputies persons skilled in mining (*l*). The gaveller or deputy-gaveller is required to keep a register of free miners (*m*), and no one, unless registered, is accounted a free miner (*n*).

SUB-SECT. 3.—*Gales.*

Nature of gales.

1597. A free miner of coal or iron has the right to require a grant to himself (*o*) of specified veins of coal or iron in a specified situation (*p*). The grant, as also the subject-matter of the grant, is known as a "gale." No gale may be made of any inclosed land belonging to the Crown (*q*). Grants of gales are made in accordance with the order of application (*r*). The gaveller is not bound to grant a gale if he is of opinion that it would interfere with an

(*h*) Dean Forest (Mines) Act, 1838 (1 & 2 Vict. c. 43); Dean Forest (Amendment) Act, 1861 (24 & 25 Vict. c. 40); Dean Forest (Mines) Act, 1871 (34 & 35 Vict. c. 85).

(*i*) Three separate awards were made in 1841 by the Commissioners under the Dean Forest (Mines) Act, 1838 (1 & 2 Vict. c. 43), relating respectively to coal mines, iron mines, and quarries. These awards defined the existing gales, and the galees at the time were confirmed in their possessions (see *ibid.*, s. 27, and the first schedule to each of the awards). The second schedule to each of these awards contains a series of regulations with regard to the class of mines dealt with in the award. An award was made by the Commissioners under the Dean Forest (Mines) Act, 1871 (34 & 35 Vict. c. 85), modifying and explaining certain clauses in the awards of coal and iron mines made in 1841. After the making of the awards the previous customs ceased to be valid (Dean Forest (Mines) Act, 1838 (1 & 2 Vict. c. 43), s. 31).

(*k*) Dean Forest (Mines) Act, 1838 (1 & 2 Vict. c. 43), s. 13. By the Acts already referred to (see p. 645, *ante*) certain powers and duties are conferred and imposed upon the Commissioners of Woods, Forests and Land Revenues. These functions can now be discharged by the officer in charge of the forest alone (Dean Forest (Amendment) Act, 1861 (24 & 25 Vict. c. 40), s. 27). As to the Commissioners of Woods, Forests, and Land Revenues (hereafter referred to as "the Commissioners"), see title CONSTITUTIONAL LAW, Vol. VII., pp. 122 *et seq.*

(*l*) Dean Forest (Mines) Act, 1838 (1 & 2 Vict. c. 43), s. 13.

(*m*) *Ibid.*, ss. 16, 17.

(*n*) *Ibid.*, s. 21. The gaveller or deputy-gaveller may refuse to register any person who does not produce satisfactory evidence of his claim (*ibid.*, s. 17), but in case of such refusal there is an appeal to quarter sessions within four months of such refusal (*ibid.*, ss. 19, 20). Registration is proved by an extract from the register signed by the gaveller or deputy-gaveller (*ibid.*, s. 22).

(*o*) Grants of coal and iron can only be made to free miners (*ibid.*, s. 23). Renewals of quarry leases may, however, be granted to persons who are not free miners (Dean Forest (Mines) Act, 1871 (34 & 35 Vict. c. 85), s. 34).

(*p*) The application must specify the veins and situation of the proposed grant (Award of Coal Mines, 1841, Sched. II., r. 11; Award of Iron Mines, 1841, Sched. II., r. 11). Only the Crown has the right to make such grants (*A.-G.* v. *Mathias* (1858), 4 K. & J. 579).

(*q*) Dean Forest (Mines) Act, 1838 (1 & 2 Vict. c. 43), s. 64.

(*r*) *Ibid.*, s. 60.

existing gale, or that, from its situation and extent, it is not adapted for obtaining the mineral in the best manner (*s*). SECT. 3, Gloucestershire.

1598. The extent of the gale is determined by the gaveller, and in setting out the metes and bounds the gaveller must have regard to the probable cost of winning the mineral and the quantity of mineral likely to be obtained (*t*). Every grant of a gale must specify the extent of the gale (*a*). Area of gale.

1599. The grant is made subject to any special rules and regulations thought necessary by the gaveller (*b*), and provides for the working of a minimum quantity of mineral in each year (*c*), with liberty to make up short workings in any subsequent year (*d*). An underlying seam may be galed although an upper seam has been previously galed and the upper seam may be sunk through by the galee of the lower seam (*e*). A free miner is not entitled to the grant of more than three gales at any one time, or to a fresh grant until the existing gale is exhausted (*f*), unless he surrenders a gale as not containing sufficient mineral to be workable (*g*). The grant, to be effectual, must be enrolled in the books of the gaveller or deputy-gaveller, and a copy is given to the free miner (*h*). Nature of grant of gale. Enrolment.

1600. The right granted by a gale of coal or iron mines is of the nature of real estate limited to the galee, his heirs and assigns (*i*), but conditional upon the due payment of the rents, royalties, and dues (*k*) reserved, and due performance and observance of the rules and regulations contained in the awards (*l*) and any special rules and regulations contained in the grant (*m*). Non-compliance by the miner in any of these respects will render the gale liable to forfeiture (*n*). Nature of right conferred by grant.

1601. Gales may be transferred either *inter vivos* or by will to any person or persons (*o*). A memorial in statutory form (*p*) of Transfer of gales. Memorial.

(*s*) Dean Forest (Mines) Act, 1838 (1 & 2 Vict. c. 43), s. 62.
(*t*) *Ibid.*, s. 56; Award of Coal Mines, 1841, Sched. II., r. 11; Award of Iron Mines, 1841, Sched. II., r. 11.
(*a*) Dean Forest (Mines), Act, 1838 (1 & 2 Vict. c. 43), s. 56.
(*b*) *Ibid.*; Dean Forest (Amendment) Act, 1861 (24 & 25 Vict. c. 40), s. 27.
(*c*) Award of Coal Mines, 1841, Sched. II., r. 13; Award of Iron Mines, 1841, Sched. II., r. 13.
(*d*) Award of Coal Mines, 1841, Sched. II., r. 14; Award of Iron Mines, 1841, Sched. II., r. 14; Award of Dean Forest Mining Commissioners, 1871, r. 3.
(*e*) *Goold* v. *Great Western Deep Coal Co.* (1865), 2 De G. J. & Sm. 600.
(*f*) Dean Forest (Mines) Act, 1838 (1 & 2 Vict. c. 43), s. 61.
(*g*) *Ellway* v. *Davis* (1873), L. R. 16 Eq. 294; see *James* v. *R.* (1877), 5 Ch. D. 153, C. A.
(*h*) Dean Forest (Mines) Act, 1838 (1 & 2 Vict. c. 43), s. 57.
(*i*) Dean Forest (Amendment) Act, 1861 (24 & 25 Vict. c. 40), s. 1. The galees are liable to be rated to the relief of the poor (*Morgan* v. *Crawshay* (1871), L. R. 5 H. L. 304). As to poor relief, see title POOR LAW.
(*k*) See pp. 648, 649, *post*.
(*l*) Dean Forest (Mines) Act, 1838 (1 & 2 Vict. c. 43), s. 29.
(*m*) *Ibid.*, s. 56.
(*n*) *Ibid.*, s. 29. As to relief by the court, which cannot be granted after the expiration of six months, see *Re Brain* (1874), L. R. 18 Eq. 389. The specific remedy of forfeiture does not, however, bar an action for damages (*Ross* v. *Ruyge-Price* (1876), 1 Ex. D. 269).
(*o*) Dean Forest (Mines), Act, 1838 (1 & 2 Vict. c. 43), s. 23.
(*p*) Dean Forest (Amendment) Act, 1861 (24 & 25 Vict. c. 40), s. 10, and Schedule

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every transfer by deed must be registered in the books of the gaveller within three months from its date (*q*), or such extended period as the Commissioners shall for reasonable cause allow (*r*), and if not so registered is void (*s*). Registration may be refused if rent is unpaid (*t*), or until a previous transfer by will or descent is also registered (*a*). A memorandum of the entry is endorsed on certificate of the grant of the gale (*b*) or previous transfer (*c*).

Leases.

1602. The Commissioners may grant leases upon such terms as they think fit for thirty-one years of not more than six acres of waste land for mining purposes, and such lease may contain provisions for renewal so long as the mine is worked (*d*).

Mines under inclosed lands outside forest.

1603. Where mines situated under inclosed lands outside the forest belonging to private persons are galed, the surface owner is entitled to half the profits (*e*), and any owner of inclosed land is entitled to compensation assessed by the gaveller or deputy-gaveller for surface damage (*f*). No steam engine nor dwelling-house may be erected on inclosed lands without the consent of the owners (*g*).

Licences.

1604. The Commissioners may grant licences to sink pits and use other rights and easements in Crown inclosures (*h*).

SUB-SECT. 4.—*Rents and Royalties.*

To whom and by whom due.

1605. Galeage rents (*i*) and royalties are usually due to the Crown in respect of each gale (*k*), and are payable by the person in possession or receipt of the proceeds of the gale, whether as owner, lessee,

(*q*) Dean Forest (Mines) Act, 1838 (1 & 2 Vict. c. 43), s. 58.
(*r*) *Ibid.*, s. 59
(*s*) Dean Forest (Amendment) Act, 1861 (24 & 25 Vict. c. 40), s. 14.
(*t*) *Ibid.*, s. 9.
(*a*) *Ibid.*, s. 11.
(*b*) Dean Forest (Mines) Act, 1838 (1 & 2 Vict. c. 43), s. 58.
(*c*) Dean Forest (Amendment) Act, 1861 (24 & 25 Vict. c. 40), s. 12.
(*d*) Dean Forest (Mines) Act, 1838 (1 & 2 Vict. c. 43), s. 25; Dean Forest (Amendment) Act, 1861 (24 & 25 Vict. c. 40), s. 6.
(*e*) Dean Forest (Mines) Act, 1838 (1 & 2 Vict. c. 43), s. 67.
(*f*) *Ibid.*, s. 68. The compensation may be payment of a gross or annual sum (Dean Forest (Amendment) Act, 1861 (24 & 25 Vict. c. 40), s. 16). The statutory provisions do not extend to damage by subsidence, as a galoe has no power to let down the surface (*Allaway* v. *Wagstaff* (1859), 4 H. & N. 681).
(*g*) Dean Forest (Mines) Act, 1838 (1 & 2 Vict. c. 43), s. 69.
(*h*) *Ibid.*, s. 65; Dean Forest (Amendment) Act, 1861 (24 & 25 Vict. c. 40), s. 15.
(*i*) Galeage rents are dead rents which the Commissioners under the Dean Forest (Mines) Act, 1838 (1 & 2 Vict. c. 43), had power to reserve (*Seymour* (*Lord*) v. *Morrell* (1851), 17 L. T. (o. s.) 139). Dead rents and royalties may also be reserved on making subsequent grants (Dean Forest (Mines) Act, 1838 (1 & 2 Vict. c. 43), s. 56). Galeage rents are payable on the 31st December, and royalties on the 30th June and the 31st December in each year (Dean Forest (Mines) Act, 1871 (34 & 35 Vict. c. 8), s. 35). No galeage rent is payable, in the case of coal mines, for the first two years, and in the case of iron mines for the first four years, after the grant of the gale, unless the minerals are actually wrought (Award of Coal Mines, 1841, Sched. II., r. 5; Award of Iron Mines, 1841, Sched. II., r. 5).
(*k*) As to the ancient rights of the Crown to share the profits of a gale, see Dean Forest (Mines) Act, 1838 (1 & 2 Vict. c. 43), s. 41; *Doe* d. *Thomson* v. *Pearce* (1812), Peake, Add. Cas. 242; *A.-G.* v. *Jackson* (1846), 5 Hare, 355, 362, 363.

or otherwise (*l*). The dead rents and royalties in respect of a gale made subsequent to the Awards of 1841 must be specified in the grant (*m*); and in case of dispute the amount is determined by arbitration (*n*). The rents and royalties of any gale may be revised every twenty-one years reckoning from the 24th June next following the grant (*o*), and in case of dispute the amount of the revised rents and royalties must be fixed by arbitration (*p*). The rents and royalties are recoverable by distress (*q*) or in an action (*r*) by the gaveller on behalf of the Commissioners (*s*).

How determined.

Reversion of rent and royalty.

Recovery of rent and royalty.

SUB-SECT. 5.—*Working.*

1606. A galee must commence to open the mine within five years of the date of the grant, but in case of accident or other unforeseen impediment the gaveller may give an extension of time (*t*).

Commencement.

In working a gale the general regulations must be complied with. The mine must be worked in a workmanlike manner (*a*); proper accounts and plans must be kept, which the gaveller or deputy-gaveller or agents are at liberty to inspect (*b*); pits and level mounds must be in situations determined by the gaveller (*c*); the gaveller and his agents must be permitted to enter and inspect the mine (*d*), and the person working must leave such barriers as may be directed by the gaveller or deputy-gaveller (*e*). In one respect the obligations of a person working a gale are more onerous than those imposed by the general law. A person working a gale drained by a steam engine and situate near and to the rise of another must pump so as to prevent water flowing from the one mine into the other (*f*).

How worked.

(*l*) Dean Forest (Amendment) Act, 1861 (21 & 25 Vict. c. 40), s. 4.

(*m*) Dean Forest (Mines) Act, 1838 (1 & 2 Vict. c. 43), s. 56. A parol agreement to pay a larger rent than that specified is not enforceable (*A.-G.* v. *Jackson* (1846), 5 Hare, 355, 362, 363).

(*n*) Dean Forest (Mines) Act, 1838 (1 & 2 Vict. c. 43), s. 56. As to the arbitration, see *ibid.*, ss. 47 *et seq.*

(*o*) Dean Forest (Mines) Act, 1838 (1 & 2 Vict. c. 43), ss. 27, 46; Dean Forest (Amendment) Act, 1861 (24 & 25 Vict. c. 40), s. 7.

(*p*) Dean Forest (Mines) Act, 1838 (1 & 2 Vict. c. 43), ss. 27, 47, 48; Dean Forest (Amendment) Act, 1861 (24 & 25 Vict. c. 40), s. 8; Dean Forest (Mines) Act, 1871 (34 & 35 Vict. c. 85), s. 37.

(*q*) Stat. (1819) 59 Geo. 3, c. 86, s. 7; Dean Forest (Mines) Act, 1838 (1 & 2 Vict. c. 43), s. 52; Dean Forest (Amendment) Act, 1861 (24 & 25 Vict. c. 40), s. 4; Dean Forest (Mines) Act, 1871 (34 & 35 Vict. c. 85), s. 36.

(*r*) Stat. (1819) 59 Geo. 3, c. 86, s. 8; and the provisions cited in note (*h*), p. 648, *ante*. If the amount is below £50, proceedings may be taken in the county court (Dean Forest (Amendment) Act, 1861 (24 & 25 Vict. c. 40), s. 5). As to proceeding by action for account, see *A.-G.* v. *Jackson* (1846), 5 Hare, 355, 368.

(*s*) *Seymour* (*Lord*) v. *Morrell* (1851), 17 L. T. (o. s.) 139.

(*t*) Award of the Forest of Dean Mining Commissioners, 1871, s. 2.

(*a*) Award of Coal Mines, 1841, Sched. II., r. 9; Award of Iron Mines, 1841, Sched. II., r. 9.

(*b*) *Ibid.*, r. 16.

(*c*) *Ibid.*, r. 10.

(*d*) *Ibid.*, r. 17.

(*e*) Award of Coal Mines, 1841, Sched. II., r. 16. The gaveller may permit the working of any barrier directed to be left on such terms as he shall think fit (Dean Forest (Amendment) Act, 1861 (24 & 25 Vict. c. 40), s. 24).

(*f*) Award of Coal Mines, 1841, Sched. II., r. 19; Award of Iron Mines, 1841, Sched. II., r. 18.

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On the abandonment or disuse of a gale the surface must be restored (*g*). The duty of performing and observing the rules and regulations is a personal obligation on the person for the time being in receipt of the proceeds of the gale, whether as galee, lessee, or underlessee (*h*).

SUB-SECT. 6.—*Surrender of Gale.*

How surrendered.

1607. A gale (*i*) or part of a gale (*k*) may be surrendered on giving notice, and the gaveller may accept or surrender on such terms as he thinks fit. A galee whose gale is drained by a steam engine or other machinery, and lies to the rise of another, must give to the gaveller or deputy-gaveller, and also to the owner of the gale lying to the deep, three months' notice of his intention to discontinue working his engine (*l*).

SUB-SECT. 7.—*Quarries.*

Right to leases only.

1608. Free miners in quarries are only entitled to call for grants of leases for the term of twenty-one years and not for gales in fee simple (*m*). A renewal of a quarry lease may be made to a person not a free miner (*n*). Lessees of quarries in their working must observe certain general rules and regulations (*o*).

Leases for getting clay etc.

The Commissioners have also power to grant leases to any person or persons for a term of twenty-one years for getting clay or sand or land in any open or uninclosed lands or in any pit level or quarry, and may also grant leases of portions of surface for the erection of kilns to burn the clay (*p*).

(*g*) Award of Coal Mines, 1841, Sched. II., r. 12; Award of Iron Mines, 1841, Sched. II., r. 12.

(*h*) Dean Forest (Amendment) Act, 1861 (24 & 25 Vict. c. 40), s. 4.

(*i*) Award of Coal Mines, 1841, Sched. II., r. 6; Award of Iron Mines, 1841, Sched. II., r. 6; Dean Forest (Amendment) Act, 1861 (24 & 25 Vict. c. 40), ss. 19, 20.

(*k*) Dean Forest (Mines) Act, 1871 (34 & 35 Vict. c. 85), s. 33.

(*l*) Award of Coal Mines, 1841, Sched. II., r. 8; Award of Iron Mines, 1841, Sched. II., r. 8.

(*m*) Dean Forest (Mines) Act, 1838 (1 & 2 Vict. c. 43), s. 83. As to confirmation of gales existing prior to the Act which are held for fee simple estates, see *ibid.*, s. 27; and Quarry Award, 1841.

(*n*) Dean Forest (Mines) Act, 1871 (34 & 35 Vict. c. 85), s. 34.

(*o*) Award of Quarries, 1841, Sched. II.

(*p*) Dean Forest (Mines) Act, 1838 (1 & 2 Vict. c. 43), s. 84; Dean Forest (Amendment) Act, 1861 (24 & 25 Vict. c. 40), s. 17.

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See ECCLESIASTICAL LAW.

MINISTRY AND CABINET.

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MISREPRESENTATION AND FRAUD.

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Part I.—Preliminary.

1609. Misrepresentation, as a cause of action, or ground of defence, forms a distinct and separate chapter of English jurisprudence. Fraudulent misrepresentation, which is one (and the larger and more important) of its two species, is also one of the infinite varieties of fraud. The legal conceptions, therefore, of misrepresentation and fraud, to a certain extent, overlap. It seems desirable to consider, in the first instance, the law relating to actionable misrepresentation, both fraudulent and innocent (*a*), leaving for subsequent and separate treatment the subject of fraud as manifested in forms and by instruments other than fraudulent misrepresentation (*b*). Misrepresentation as a head of English civil law.

1610. Misrepresentation, as such, must be distinguished from "mistake" (in its legal sense), as such (*c*); from mere non-disclosure, as such (*d*); and from breach of warranty or other representation assuming the form of a promise or contractual engagement (*e*). Distinguished from mistake etc.

1611. There are certain legal consequences of misrepresentation, besides liability to civil proceedings at the suit of the person to From estoppel etc.

(*a*) This forms the subject of pp. 658—758, *post*.

(*b*) See pp. 759—762, *post*.

(*c*) "Mistake," in law, means misapprehension or misconception of some fact material to a transaction, by both parties thereto (bilateral), or by one only (unilateral), which has not been induced by any misrepresentation of either party; see title MISTAKE.

(*d*) For this class of case, see p. 760, *post*. There is, however, a type of non-disclosure (consisting of such omission, concealment, or suppression of known material facts as to render false a representation already made) which amounts in law to misrepresentation, and is accordingly dealt with as such at pp. 681 *et seq.*, *post*.

(*e*) See pp. 661—663, *post*.

PART I. Preliminary.

whom the misrepresentation has been made. Estoppel *in pais* is one (*f*); criminal responsibility, where the misrepresentation amounts to a false pretence, and in certain other cases, is another (*g*).

General proposition.

1612. The main proposition underlying the whole law of actionable misrepresentation may be stated, broadly and summarily, as follows. Any false representation made by one person (who may conveniently be called "the representor") to another (who may be called "the representee") (*h*), with the object and result of inducing the representee either to enter into a contract or binding transaction with the representor, or to alter his position in any other way to his prejudice, is the subject of civil proceedings, at the suit of the representee, for the purpose of rescinding such contract or transaction; or, where the misrepresentation is fraudulent, of relief in the form of an action for damages. It results from the above statement that, before discussing the remedies available in respect of misrepresentation, it is essential to analyse in order the constitutive legal concepts involved, and to examine, first, what statements amount in law to representations (*i*); secondly, when a representation becomes a misrepresentation (*k*); thirdly, from the point of view of the mind of the representor, when a misrepresentation is fraudulent, and when innocent (*l*); and, lastly, from the point of view of the effect on the mind or material interests of the representee, what in law amounts to inducement (*m*), materiality (*n*), alteration of position (*o*), and damage (*p*).

Leading conceptions.

Part II.—Representation.

SECT. 1.—*What Constitutes in Law a Representation.*

Constituent elements of representation.

1613. A representation is a statement, made by, or on behalf of, a representor to, or with the intention that it shall come to the notice of, a representee, which relates, by way of affirmation,

(*f*) Estoppel is a rule of evidence, not a cause of action. As to estoppel by representation or otherwise *in pais*, see title ESTOPPEL, Vol. XIII., pp. 322, 376—413.

(*g*) Most cases of fraudulent misrepresentation would entail criminal responsibility, either at common law or (more frequently) by statute; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 688 *et seq.*; and p. 762, *post*.

(*h*) By the use of the terms "representor" and "representee" (which, though novel, are framed strictly on the analogy of "promisor" and "promisee," "mortgagor" and "mortgagee," "obligor" and "obligee," "bailor" and "bailee," "vendor" and "vendee," "pledgor" and "pledgee" etc. etc.) a great deal of reduplication of language and cumbrous involution of sentences will be avoided.

(*i*) See the text, *infra*, and pp. 659—672, *post*.

(*k*) See pp. 677 *et seq.*, *post*.

(*l*) See pp. 687 *et seq.*, *post*.

(*m*) See pp. 695 *et seq.*, *post*.

(*n*) See pp. 698 *et seq.*, *post*.

(*o*) See pp. 703 *et seq.*, *post*.

(*p*) See pp. 705 *et seq.*, *post*.

denial, description, or otherwise, to a matter of fact; and "matter of fact" means either an existing fact or a past event. There are thus two distinguishing marks of a representation. It is essential, in the first place, that the statement be a communication, and secondly, that it relate to a fact, present or past. Much more than this is required to make the statement actionable, but unless it fulfils the above conditions, it does not carry with it even the possibility of ever becoming so. Nothing can be a misrepresentation, still less an actionable misrepresentation, which never was a representation at all.

SECT. 1. What Constitutes in Law a Representation.

1614. It takes two to make a representation, as it does to make a contract. There must be a representor and a representee, who must be distinct from one another in substance as well as in name. Where the persons claiming to have been deceived by a statement are practically the same as those who are alleged to have made it, there is no representation of which the law can take cognisance (*q*).

Must be between two distinct persons.

1615. Next, the statement must relate to a matter of fact, as above defined (*r*). If it relates to the representor's, or a third person's, intention, opinion, expectation, or other condition of mind, or to a matter of law, or merely puts forward the indefinite generalities of exaggeration, difficult questions arise as to whether, and in what sense and to what extent, it can be deemed a statement of fact.

Must relate to a fact.

SECT. 2.—*Statements of Intention, or otherwise relating to the Future.*

SUB-SECT. 1.—*In General.*

1616. A statement as to the representor's, or as to a third person's, intention, readiness, or capacity to do or abstain from doing anything, or of his expectation or apprehension as to any matter *in futuro*, is an implied statement of the then existence of such intention, readiness, capacity, expectation, or apprehension, and, therefore, in that sense, and to that extent, is a representation, but no further or otherwise; and any statement as to a matter *in futuro* which was either intended or expressed by the parties to constitute, or which can only be construed as constituting, a promise, is not in law a representation. The above proposition can only be established by considering *seriatim* and separately the four species of statement to which it relates, namely (1) statements of the representor's own intention; (2) statements as to the future

Where statement of intention is a representation.

(*q*) *Ambrose Lake Tin and Copper Mining Co., Ex parte Taylor, Ex parte Moss* (1880), 14 Ch. D. 390, 396, 397, C. A.

(*r*) This proposition is elementary, and is either stated, or (much more frequently) assumed in all the cases cited in the notes to pp. 660—671, *post*. The expression "statement of existing fact" has been avoided as a definition of representation, because, though adequate for the purpose for which it is generally used (namely, to distinguish this class of statement from a statement *de futuro*), it is not strictly a complete definition, since it would exclude both a statement of a past event and (if taken quite literally) a negation of a fact.

SECT. 2. Statements of Intention, or otherwise relating to the Future.

which can only be treated as promises; (3) statements of a third person's intention; and (4) other statements *de futuro*.

SUB-SECT. 2.—*Statements of Representor's own Intention.*

Statement of representor's own intention.

1617. The existence or non-existence of an intention in the mind of a man at any given moment is as much a fact as the existence or non-existence of any other thing. Any statement, therefore, of such existence or non-existence is a representation. The proof of falsity may be difficult, but this difficulty does not make the statement any the less one of fact (*s*). There is no representation as to the matter said to be intended, because this is a *faciendum* and not a *factum*, and to so much of the statement as regards the future the terms "facts," "truth," and "falsity" are wholly inapplicable. The mere circumstance that the expressed intention is not fulfilled does not establish its non-existence at the date of the representation, or render that representation actionable (*t*), which shows that the only fact stated, in virtue of which there was any representation at all in law, is the impliedly stated fact that the representor actually had the intention he professed to have (*a*).

(*s*) *Edyington* v. *Fitzmaurice* (1885), 29 Ch. D. 459, C. A., *per* BOWEN, L.J., at p. 483 ("it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be substantiated, it is as much fact as anything else. A misstatement of the state of a man's mind is a misrepresentation of fact"); *Angus* v. *Clifford*, [1891] 2 Ch. 449, C. A., *per* BOWEN, L.J., at p. 470 ("a man may tell a lie about the state of his own mind, just as much as he can tell a lie about the weather, or the state of his own digestion").

(*t*) *Hemingway* v. *Hamilton* (1838), 4 M. & W. 115; *Benham* v. *United Guarantie and Life Assurance Co.* (1852), 7 Exch. 744, 752, 753; *Jorden* v. *Money* (1854), 5 H. L. Cas. 185; *Bold* v. *Hutchinson* (1855), 5 De G. M. & G. 558, 565 ("if a person merely says 'I will leave my daughter 10,000*l.*', it does not amount to a misrepresentation if he does not leave her that sum"); *Beattie* v. *Ebury* (*Lord*) (1872), 7 Ch. App. 777, 804. There are, however, cases in which the non-fulfilment of the intention may be some evidence, strong or weak, according to all the circumstances of the individual case, that the intention never existed at all (*Clydesdale Bank* v. *Paton*, [1896] A. C. 381, 386—388, 395).

(*a*) Accordingly, in the above sense, and to the above extent, the following statements have been held, or assumed, to constitute representations:—Statements (implied from the act of ordering goods) of a then present intention of paying for them (*Bristol* (*Earl*) v. *Wilsmere* (1823), 1 B. & C. 514; *Load* v. *Green* (1846), 15 M. & W. 216; *White* v. *Garden* (1851), 10 C. B. 919; *Clough* v. *London and North Western Rail. Co.* (1871), L. R. 7 Exch. 26, Ex. Ch.; *Re Shackleton, Ex parte Whittaker* (1875), 10 Ch. App. 446, *per* MELLISH, L.J., at pp. 449, 450 ("I think that S. when he went for the goods must be taken to have made an implied representation that he intended to pay for them, and if it were clearly made out that at that time he did not intend to pay for them, I should consider that a case of fraudulent misrepresentation was shown"); and *Re Eastgate, Ex parte Ward*, [1905] 1 K. B. 465, 466, 467): statements that the representor was prepared to lend, or pay, or hand over moneys (*Barwick* v. *English Joint Stock Bank* (1867), L. R. 2 Exch. 259, 264, 265, Ex. Ch.; *Ramshire* v. *Bolton* (1869), L. R. 8 Eq. 294; *Blake* v. *Albion Life Assurance Society* (1878), 4 C. P. D. 94; *Babcock* v. *Lawson* (1880), 5 Q. B. D. 284, C. A.): statements as to the objects to which the subscriptions to an issue of shares or debentures of a company were intended to be applied (*Re Deposit and General Life Assurance Co., Ayre's Case* (1858), 25 Beav. 513; *Edgington* v. *Fitzmaurice*, *supra*, at pp. 479, 480, 482, 483; *Aaron's Reefs* v. *Twiss*, [1896] A. C. 273, 283—285, 286): a statement of an intention to relinquish

SUB-SECT. 3.—*Statements as to the Future which are Promises and not Representations.*

SECT. 2. Statements of Intention, or otherwise relating to the Future.

Capable of being regarded as a promise.

1618. Contrasted with and distinguishable (though often with difficulty) from the above class is the type of statement which is either shown (by evidence or argument) to have been intended by the representor, and accepted by the representee, as a promise (if anything), and a promise only; or which, whatever the parties meant and intended at the time, can only be treated as such on plain principles of construction. In all such cases the words amount in law either to a promise, or to nothing which is enforceable at all. To such an issue the question of the promisor's intention, or statement of intention, at the time of making the promise is just as irrelevant as (conversely) the question of the fulfilment or non-fulfilment of a declared intention is to an issue of misrepresentation of the existence of such intention (*b*). The two causes of action, though small distinction was drawn between them by judges and pleaders of early times, are now recognised as being absolutely exclusive of one another, both in principle (*c*) and in practical consequences (*d*).

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business in favour of the representor's son (*Biddle and Loyd* v. *Levy* (1815), 1 Stark. 20): an expression of intention to make a lane giving access to property sold and a new street (*Beaumont* v. *Dukes* (1822), Jac. 422, 424): a statement as to an intended mode of keeping accounts (*Benham* v. *United Guarantie and Life Assurance Co.* (1852), 7 Exch. 744): a statement of the use which the representor intended to make of demised premises (*Feret* v. *Hill* (1854), 15 C. B. 207): a statement that the representor had power to stop the sale of certain goods under an execution, and would stop it (*Cooper* v. *Joel* (1859), 1 De G. F. & J. 240): a statement that a company intended to commence operations with a certain number of steamships of a certain type (*Hallows* v. *Fernie* (1868), 3 Ch. App. 467): a statement that a company was minded to take a third of a certain insurance risk (*Traill* v. *Baring* (1864), 4 De G. J. & Sm. 318, C. A.): a statement that the holder of a policy of life insurance would, in compliance with certain conditions, become entitled to a free policy (*Kettlewell* v. *Refuge Assurance Co.*, [1908] 1 K. B. 545, C. A.; affirmed "without giving any reasons" by the House of Lords, *sub nom. Refuge Assurance Co.* v. *Kettlewell*, [1909] A. C. 243): and a statement that the representor was minded to extricate the representee from difficulties and losses, and to act as his friend and benefactor (*Curtis* v. *Bottomley* (1911), *Times*, 1st August, C. A.). Similar statements of intention, or readiness, or capacity, have been held to constitute a "pretence" in criminal law, the essential elements of which are the same as those of a representation; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 693—695, and *R.* v. *Bancroft* (1909), 26 T. L. R. 10, C. C. A.

(*b*) See note (*t*), p. 660, *ante*.

(*c*) *Behn* v. *Burness* (1863), 3 B. & S. 751, 753, Ex. Ch., where a representation is defined as "a statement . . . . made by one party to the other, before or at the time of making the contract, of some matter or circumstance relating to it, and which is not an integral part of the contract"; and *Re Robinson, Ex parte Burrell* (1876), 1 Ch. D. 537, 552, C. A. ("necessary to distinguish, when an alleged ground of false representation is set up, between a representation of an existing fact and a promise to do something in the future").

(*d*) For instance, he who promises or warrants undertakes for the exact and literal performance of that which he promises or warrants, but he who makes a statement of fact undertakes only for the absence of untruth which misleads; that is, for the absence of any substantial untruth of sufficient materiality to be capable of inducing, and which does induce. All these matters are made of absolutely no importance by the act of the parties themselves in the case of a contract or warranty, the very object of which is to exclude the possibility of their ever being agitated thereafter (*Pawson* v. *Watson* (1778), 2 Cowp. 785,

SECT. 2. **Statements of Intention, or otherwise relating to the Future.**

When only capable of being so construed.

1619. In determining whether the words used in any particular case amount to a representation or a promise, the law regards the substance rather than the form, having in view the primary object of all rules of interpretation, namely, to effectuate the intention of the parties, or (more correctly) the intention which each was justified in supposing, and supposed, the other to have. It frequently happens that language which contains promissory expressions is shown, nevertheless, to have been intended as a statement of an existing intention (*e*). Even a recital in a contract may admit of being construed as a representation, and not as a part or term of the contract (*f*). Conversely, not only may the truth of an existing fact be the subject of a contract or warranty, but, though the party uses words expressive of "intention," it may be apparent from other expressions, or the surrounding circumstances, that what he really meant, and the other party understood to be conveyed, was a promise or offer, and nothing else (*g*). The courts have always been at great pains to adopt, where possible, the construction which will not leave the party, whose legitimate expectations have been defeated, without any remedy at all (*h*); but, where the language employed and the other circumstances of the case have clearly indicated a promise or offer, and not a statement of present intention, they have not shrunk from their duty so to decide, though in some cases the result has been a denial of all relief to the one party and an absolution of the other from all consequences of conduct which was at least morally censurable, either because there was no consideration for the promise, or because a statute stood in the way of its enforceability, or because it was too vague to be the subject of specific performance, or was not sufficiently proved. In the majority of the cases, however, the promise was proved, and held to be enforceable. But whatever the respective results, in all of them the statements made were held to be promises, or nothing; not representations (*i*).

788, 790; *Thomson* v. *Weems* (1884), 9 App. Cas. 671). As to the question of materiality being excluded by an express warranty or term of a contract, see generally, note (*c*), p. 694, *post*.

(*e*) "That which is in form a promise may be in another aspect a representation" (*Clydesdale Bank* v. *Paton*, [1896] A. C. 381, 394).

(*f*) *Behn* v. *Burness* (1863), 3 B. & S. 751, 754, Ex. Ch.; and see title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 463.

(*g*) *Hammersley* v. *de Biel* (*Baron*) (1845), 12 Cl. & Fin. 45, H. L.

(*h*) Thus, on the one hand, there has been a tendency in the so-called "making good" cases (as to which see pp. 721 *et seq.*, *post*), to construe a promise which, as such, would fail (being obnoxious to some statutory provision) as a representation; on the other hand, in the "misrepresentation of authority" cases (see pp. 723 *et seq.*, *post*), the inclination has been to treat implied representations of existing authority as implied undertakings that such authority exists, because otherwise in many cases the representee might fail, from his inability to prove fraud.

(*i*) The cases referred to, nearly all of which were cases of proposals or promises made to an intended husband to devise or bequeath property to the promisor's daughter, are the following:—*Hammersley* v. *de Biel* (*Baron*), *supra*; *Maunsell* v. *Hedges* (1854), 4 H. L. Cas. 1039; *Jorden* v. *Money* (1854), 5 H. L. Cas. 185; *Moorhouse* v. *Colvin* (1851), 15 Beav. 341; *Bold* v. *Hutchinson* (1855), 5 De G. M. & G. 558; *Re Home Counties and General*

SECT. 2. Statements of Intention, or otherwise relating to the Future.

1620. Where the statement to be construed is in writing, or its terms, if orally made, are not in dispute, the question whether it is in law a representation or a promise is ordinarily for the court (*k*); in other cases it may be, or in the course of the case may become, a question of fact. There is no objection to a party resting his case on both of the above constructions, as long as he recognises in his pleading that they are strictly alternative to, and exclusive of, one another, and require different facts for their support (*l*); but he cannot set up a case compounded of elements selected from both causes of action, as, for instance, by alleging that the opposite party had made a contract with him which, at the time of making it, he fraudulently intended to break (*m*).

Whether representation or promise: how far question of law and how far question of fact.

SUB-SECT. 4.—*Statements of a Third Person's Intention.*

1621. If a statement by a person of his own intention may be a representation, *a fortiori* a statement by him of a third person's intention may be so, for the latter lends itself, in the case of doubt, more readily to this construction, and less naturally assumes the aspect of a contractual obligation (*n*). Accordingly, whenever the representor attributes an intention not to himself, but to a third person, without more, the statement is always deemed a representation, and not a guarantee (*o*), even when accompanied and fortified

Statement of third person's intention.

Life Assurance Co., Ex parte Woollaston (1859), 7 W. R. 645; *Laver* v. *Fielder* (1862), 32 Beav. 1; *Coverdale* v. *Eastwood* (1872), L. R. 15 Eq. 121; *Dashwood* v. *Jermyn* (1879), 12 Ch. D. 776; *Maddison* v. *Alderson* (1883), 8 App. Cas. 467; *Synge* v. *Synge*, [1894] 1 Q. B. 466, C. A.; *Clydesdale Bank* v. *Paton*, [1896] A. C. 381, 391; and *Re Fickus, Farina* v. *Fickus*, [1900] 1 Ch. 331. See also *Chadwick* v. *Manning*, [1896] A. C. 231, P. C. (a statement, by conduct and inaction, of an intention to waive a stipulated right to indemnity held to be, if anything, a promise and not a representation, for the purposes of estoppel).

(*k*) *Behn* v. *Burness* (1863), 3 B. & S. 751, 754, Ex. Ch.

(*l*) *Denton* v. *Great Northern Rail. Co.* (1856), 5 E. & B. 860, where the plaintiff asserted (1) that the railway company had promised him in their time-table that a certain train would run at a certain hour, and (2) that, if not, they represented as a fact that such a train was running at the time indicated therein.

(*m*) This was the halting between two opinions which characterised and vitiated the affirmative defence set up in *Hemingway* v. *Hamilton* (1838), 4 M. & W. 115.

(*n*) *R.* v. *Gordon* (1889), 23 Q. B. D. 354, C. C. R., *per* WILLS, J., at p. 360: ("suppose that by an arrangement for the settlement of litigation a man was to pay a sum of money, and when the time came he said, 'I shall not pay until I know that A. has the intention of acceding to this arrangement.' Suppose B., who was to get the money, then told him that A. had that intention, and he believed B. and paid the money upon the faith of B.'s assurance, and all the while B. knew that A.'s intention was exactly the contrary to what he had stated. I should have thought that the allegation as to A.'s intention was one of an existing fact").

(*o*) *Hamar* v. *Alexander* (1806), 2 Bos. & P. (N. R.) 241 (with which compare the other "credit" cases cited in notes to pp. 731, 732, *post*); *Barley* v. *Walford* (1846), 9 Q. B. 197 (statement that persons, entitled to registered design, intended to proceed against the plaintiff for infringement); *Re Hull and London Life Assurance Co., Gibson's Case, Kemp's Case, Hudson's Case* (1858), 2 De G. & J. 275, C. A. (statement that two named persons would execute a deed of settlement); *Hallows* v. *Fernie* (1868), 3 Ch. App. 467 (statement that certain persons had consented to become directors of company, treated as a statement of fact, but not proved to have been false).

SECT. 2. Statements of Intention, or otherwise relating to the Future.

by such expressions as "I durst be bound for him" (*p*), "we do not hesitate to guarantee" (*q*), if they can fairly be regarded as mere figurative forms of vernacular speech (*r*).

SUB-SECT. 5.—*Other Expressions de Futuro.*

Statements of expectation, hope or fear.

1622. Mere general and indefinite anticipations of the future success or prosperity of any business or undertaking are not statements of fact in any sense (*s*); but if a man expresses his own, or another's, expectation of a definite result or event, with specific dates or details, his statement is a representation in the same sense and to the same extent as any statement would be of his own, or another's, intention, or, indeed, any other state of mind; that is to say, he is understood in law to assert the fact that the expectation exists at the time in the mind of himself or the third person, but not to hold forth that the hopes or fears expressed will be realised (*t*).

When such statements may be representations.

1623. There are, however, instances of statements as to the future which, even though expressed in the future tense, may yet import an existing state of things, and consequently be treated as representations for all purposes. Thus a statement, by one who had insured another against being drawn for the militia under the provisions of a statute, that "all ballotings under the Act would cease" on a certain day, may be treated as a statement of fact as to existing statutory procedure (*a*); statements that a mine will yield so much, and that a dividend of 33 per cent. is so confidently anticipated that the directors "do not hesitate to guarantee it," are statements of the present state and capacity of the mine, and of the present flourishing condition of the company, respectively (*b*); whilst a statement that certain costs will be paid out of a designated fund is a statement *de præsenti*, namely, that the costs are so payable (*c*).

(*p*) *Hamar* v. *Alexander* (1806), 2 Bos. & P. (N. R.) 241.

(*q*) *Gerhard* v. *Bates* (1853), 2 E. & B. 476, *per* COLERIDGE, J., at p. 482.

(*r*) Such as the common phrases "I will warrant," "I will be bound to say," or "I will go bail," that such and such a thing is so.

(*s*) *Beaumont* v. *Dukes* (1822), Jac. 422, where PLUMER, M.R., at p. 424, after pointing out that "the subject of the representation" before the court "was not a future project contemplated by a third person," goes on to say: "if that had been the case . . . . it would only be holding out a hope as to the future conduct of a third person not under his control, and it would be the fault of the bidder, if he relied on so loose and vague a report"; *Bellairs* v. *Tucker* (1884), 13 Q. B. D. 562.

(*t*) *Wilkes* v. *Glover* (1804), 1 Bos. & P. (N. R.) 14, *per* MANSFIELD, C.J., at p. 16 (statement by shipper that he "expects the captain to sail to-morrow," imports that he who writes knows the ship to be in such a condition as to give a just expectation of her sailing at that time); *Kurberg's Case*, [1892] 3 Ch. 1, 11, C. A. (statement of expectation is a statement that the party does actually expect as stated).

(*a*) *Duffell* v. *Wilson* (1808), 1 Camp. 401.

(*b*) *Gerhard* v. *Bates*, *supra*.

(*c*) *Mathias* v. *Yetts* (1882), 46 L. T. 497, 503, C. A.

SECT. 3.—*Statements of Opinion, Belief, and Information.*

SUB-SECT. 1.—*In General.*

Statements of opinion etc.

1624. The proposition, or assumption, that statements of opinion can never be statements of fact, is quite incorrect and unsustainable (*d*). In the first place, an expression of opinion, just as much as any expression of intention or other condition of mind, involves a statement of at least one fact, namely, the fact that the person to whom the opinion is attributed, whether the representor or another, actually entertains the opinion so attributed (*e*). Secondly, if a man chooses to express, in the form of a statement of fact, that which he merely believes as opinion or information only, the statement is, as against him, for all purposes and in every sense a representation. Lastly, if what he states is fact, his statement is not the less a representation, because he clothes it in the language of opinion, belief, or information, or in language susceptible of being so construed by interested ingenuity (*f*).

SUB-SECT. 2.—*Statements of Representor's Own Opinion etc.*

Implied representation of the existence of the opinion etc.

1625. The principles already enunciated with reference to statements of a man's own intention (*g*) apply, *mutatis mutandis*, to statements of a man's own opinion, belief, or information. In this, as in that, class of statement, the mere subsequent occurrence of events which are in disaccord with, in the sense of failing to realise or justify, the declared condition of mind, does not falsify the statement (*h*), but disproof of the existence of the declared condition of mind does, because this was the fact, and the only fact, which the statement (impliedly) asserted (*i*).

(*d*) *Smith* v. *Land and House Property Corporation* (1884), 28 Ch. D. 7, C. A., *per* BOWEN, L.J., at p. 15: ("it is often fallaciously assumed that the statement of an opinion cannot involve the statement of a fact").

(*e*) See the observations of BOWEN, L.J., cited in note (*s*), p. 660, *ante*, which are applicable to every "state of mind." As to statements of "intention," see pp. 659 *et seq.*, *ante*.

(*f*) As to the first of these rules, see the text, *infra*; as to the second and third, see pp. 666, 667, *post*.

(*g*) See p. 660, *ante*.

(*h*) *New Brunswick and Canada Railway and Land Co.* v. *Conybeare* (1862), 9 H. L. Cas. 711 (statement of opinion of directors in prospectus that there was no probability of a rival railway line being constructed, not falsified by subsequent construction of such a line); *Melbourne Banking Corporation* v. *Brougham* (1882), 7 App. Cas. 307, 319, 320, P. C. (bank's valuation of a security held not to be a misrepresentation merely because it turned out to be incorrect, there being no proof that the valuation was made otherwise than *bonâ fide*).

(*i*) *Luddy's Trustee* v. *Peard* (1886), 33 Ch. D. 500, where a solicitor, having purchased his client's interest under a will from the client's trustee in bankruptcy, and so having come under a duty of disclosure to such client and trustee, and having both formed an opinion of his own, and taken another opinion, to the effect that the interest in question was absolute, was held liable for non-disclosure of these opinions, thereby leaving the client under the impression that his interest was contingent only, and where, therefore, the solicitor would *a fortiori* have been held liable for misrepresentation, if, instead of merely suppressing the existence of the opinions, he had misstated their effect (as to effect of non-disclosure in such case, see title FRAUDULENT AND VOIDABLE CONVEYANCES, Vol. XV., pp. 108, 109); *Cann* v. *Wilson* (1888), 39 Ch. D. 39,

SECT. 3. Statements of Opinion, Belief, and Information.

Difficulty of proof does not affect the rule.

1626. The implication from any expression of opinion of an assertion that the representor holds the opinion expressed, is not affected by the circumstance that it is often difficult to prove or disprove the state of a man's mind on any given occasion (*k*), or by the circumstance that in many cases, where the parties are equally inexpert in the matters to which the opinion relates, no inducement can be shown, since no importance is attached to, or reliance placed upon, either the implied statement that the representor holds the opinion, or the opinion itself (*l*).

SUB-SECT. 3.—*Statements of a Third Person's Opinion etc.*

Statement of a third person's opinion.

1627. Precisely the same principles apply to statements of a third person's opinion or belief. Thus, a statement as to the belief of the owners of a vessel with respect to her safety in a marine insurance case (*m*), or a description of the effect of counsel's opinion (*n*), or a version in a prospectus of a report or valuation of an expert (*o*), are all statements of fact to the extent already indicated in the case of statements of the representor's own opinion or belief, but not further or otherwise.

SUB-SECT. 4.—*Statements of Matters of Opinion etc. as Fact.*

Matters of opinion etc. stated as fact.

1628. If a man, having a genuine opinion or possessing information on any matter (*p*), chooses, nevertheless, to state it as a fact, the statement is a representation pure and simple, and its falsity is established by mere proof of the incorrectness of the opinion or information so stated (*q*). But, if he states his opinion or

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a decision which has been overruled on the question of contractual privity, but not on the question under discussion in the text, where CHITTY, J., treated a valuation as an implied representation of the fact that there had been an actual valuation and exercise of professional judgment and skill, and as falsified by proof that there had never been any real valuation at all. As to information, see *Boyd and Forrest* v. *Glasgow and South Western Rail. Co.*, [1911] S. C. 33, 73.

(*k*) *Angus* v. *Clifford*, [1891] 2 Ch. 449, C. A., *per* BOWEN, L.J., at p. 470, as cited at note (*s*), p. 660, *ante*.

(*l*) *Smith* v. *Land and House Property Corporation* (1884), 28 Ch. D. 7, C. A., *per* BOWEN, L.J., at p. 15: ("in a case where the facts are equally well known to both parties, what one of them says to the other is frequently nothing but an expression of opinion. The statement of such an opinion is in a sense a statement of fact, about the condition of a man's own mind, but only of an irrelevant fact, because it is of no consequence what the opinion is").

(*m*) *Rickards* v. *Murdock* (1830), 10 B. & C. 527 (a non-disclosure case, the decision in which, however, would equally, and more strongly, apply to a case of representation).

(*n*) *Luddy's Trustee* v. *Peard* (1886), 33 Ch. D. 500; *Re Roberts, Roberts* v. *Roberts*, [1905] 1 Ch. 704, C. A.

(*o*) *Re Mount Morgan (West) Gold Mine, Ltd., Ex parte West* (1887), 56 L. T. 623, 624.

(*p*) The cases where a man states as fact that about which he has no opinion at all constitute a separate class, where the statement is still more obviously one of fact in every sense. These cases are dealt with at pp. 688, 689, *post*.

(*q*) *Haycraft* v. *Creasy* (1801), 2 East, 92, where the defendant, in a case of representation as to a person's credit, took upon himself to assert that he was speaking of his own knowledge and not from mere hearsay, and where Lord KENYON, C.J., in holding, at pp. 102—104, that this was for all purposes a statement of fact, was right, and the other members of the court, who seem to have differed from him on this point, were expressing views at variance with authority; *A.-G.* v. *Ray* (1874), 9 Ch. App. 397, *per* JAMES, L.J., at p. 405, where

information merely as such, he makes no representation of its correctness, or of anything except the fact that he has such opinion or information (*r*).

SUB-SECT. 5.—*Statements of Matters of Fact as Opinion etc.*

Matters of fact stated as opinion etc.

1629. There is equally a representation to all intents in the converse case, that is, when what is really matter of fact is stated in the form of opinion, or in language which, it may be suggested afterwards, must (in the light of all the circumstances of the case) be construed as pointing to mere belief, judgment, or inference as the foundation of the statement (*s*). Further, there are types of expressions of opinion which at least involve the implied statement of fact that the representor knows facts which justify the opinion, or knows no facts which show it to be unjustifiable (*t*).

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the defendant innocently put before the Government, when purchasing an annuity, statements as to the birth and parentage of a certain person which were based on misrepresentation, but without describing her facts as information only; *Hart* v. *Swaine* (1877), 7 Ch. D. 42 (a mere inference stated as a fact); *Brownlie* v. *Campbell* (1880), 5 App. Cas. 925, 936, 945, 953 (statement as a positive fact of that which was merely the outcome of an imperfect recollection, held a representation that the fact was so); *Pritty* v. *Child* (1902), 71 L. J. (K. B.) 512 (professional "water-finder's" statement, made positively and not in the form of an opinion, that water could be found on certain land at a certain depth, held to be a pure statement of fact).

(*r*) *Moens* v. *Heyworth* (1842), 10 M. & W. 147, where a seller of a cargo of coffee stated to the purchaser that it had been invoiced to him as of first shipping quality, and Lord ABINGER, C.B., refused to put the question to the jury whether he (the seller) had himself represented it to be of that quality, and *Craig* v. *Phillips* (1876), 3 Ch. D. 722, where a prospectus repeated information supplied by the vendor, but stated it expressly as information only, and it was held that there had been no representation that the information was in accordance with the facts, and no misrepresentation, therefore, merely on proof that it was not.

(*s*) Thus, in *Pasley* v. *Freeman* (1789), 3 Term Rep. 51, a case of representation as to credit, it was argued unsuccessfully that "whether" the person in question "deserved credit depended on the opinion of many, for credit consists in the good opinion of many"; see also the other cases of this description cited in notes to pp. 731, 732, *post*, and compare *Smith* v. *Land and House Property Corporation* (1884), 28 Ch. D. 7, C. A. (statement that person was "a most desirable tenant"); it may be taken to be now well settled that, generally, statements as to the credit or reputation of another are statements of fact; see also *Ferguson* v. *Wilson* (1904), 6 F. (Ct. of Sess.) 779, 783 (statement of profits of a business).

(*t*) It was vainly contended that the above-mentioned statement in *Smith* v. *Land and House Property Corporation*, *supra* (see note (*s*), *supra*), was a mere expression of opinion: ("if the facts are not equally well known to both sides, then a statement of opinion by one who knows the facts best involves very often a statement of a material fact, for he impliedly states that he knows facts which justify his opinion" (*ibid.*, *per* BOWEN, L.J., at p. 15)): "the vendors, by describing him as such, stated in substance that they knew no fact which showed him not to be a desirable tenant" (*ibid.*, *per* FRY, L.J., at p. 17). It was on this principle, no doubt, though not so expressed in terms, that the defendant in *Jones* v. *Keene* (1841), 2 Mood. & R. 348, was held liable for having stated, though in the form of a valuation and opinion, that a life policy was worth so much, when he knew that in fact the person whose life was insured had just died; compare *Willes* v. *Glover* (1804), 1 Bos. & P. (N. R.) 514. Where, however, an opinion is expressed which purports to be founded on facts separately stated, the statement of facts is a representation pure and simple, and the expression of opinion is only an implied representation of the existence and genuineness of the opinion (*Parsons* v. *Barclay & Co., Ltd. and Goddard* (1910), 103 L. T. 196, C. A.).

SECT. 4.
Statements of Law.

SECT. 4.—*Statements of Law.*

SUB-SECT. 1.—*In General.*

Statements of law.

1630. It is customary to regard a statement of law as a separate species of statement: but being an expression of opinion, it is really nothing but an instance or form of the species which has just been considered; and any such statement constitutes a representation in precisely the same sense, to the same extent, and for the same reasons, as an expression of opinion on any other science, art, business, or topic. There may, moreover, be the same difficulty as to proving or disproving the existence of the opinion in the mind of him to whom it is attributed (*a*), and, further, the same, or in most cases an even greater, difficulty in establishing that the representee relied upon it (*b*), but these matters do not in this, any more than in the case of any other, statement of opinion, affect the question whether, and to what extent, such statements are statements of fact.

Necessity to distinguish two species.

It is necessary, however, to distinguish between two forms of statement, one in which law and fact are inextricably intermingled, and which is deemed purely a statement of fact, though often incorrectly described as a statement of law, and the other, properly and strictly described as a statement of law, which consists of a legal inference from facts separately stated or common to both parties, or an abstract legal proposition.

SUB-SECT. 2.—*Statements of Mixed and Indivisible Law and Fact.*

Statements of fact, involving law, are representations.

1631. Most statements of fact involve, as their basis, some proposition of law, and most statements of law (so called) made by one person to another, with the object and result of inducing him to act thereon, presuppose statements of fact, or at all events the existence of particular facts, with which they are inextricably intermingled, and in their application to which alone they have any significance. All such are pure statements of fact (*c*). So also are statements which are susceptible of either meaning, and which (where such susceptibility is owing to the ambiguous or ambidextrous language used, whether from remissness or fraud, by the representor) are construed *contra proferentem* (*d*).

(*a*) See note (*s*), p. 660, *ante*.

(*b*) *West London Commercial Bank* v. *Kitson* (1884), 13 Q. B. D. 360, C. A., *per* BOWEN, L.J., at p. 362: ("where there is a representation made as to a mere matter of law, it is, in nineteen cases out of twenty, made by a person who does not know the law better than the person to whom it is made, and at whose risk it is taken and acted on").

(*c*) In *Eaglesfield* v. *Londonderry* (*Marquis*) (1876), 4 Ch. D. 693, C. A., at pp. 702, 703, JESSEL, M.R., illustrates, by a variety of instances taken from the ordinary transactions of life, how extremely difficult it is to state any fact without at the same time impliedly stating an underlying proposition of law; compare the observation of Lord WESTBURY, L.C., in *Cooper* v. *Phibbs* (1867), L. R. 2 H. L. 149, 170.

(*d*) Examples of statements falling within the proposition of the text, and construed accordingly as representations, are *Jones* v. *Edney* (1812), 3 Camp. 285, where an auctioneer at the sale of a public-house by auction stated that Lord ELLENBOROUGH, C.J., had recently decided that "tying" clauses in leases

SUB-SECT. 3.—*Statements of Inferences or Propositions of Law separately from the Facts.*

SECT. 4. Statements of Law.

Statements of law separately from fact, how far representations.

1632. It is only when the facts are separately stated, or are admitted and common to both parties, and one of the parties pronounces an opinion to the other as to the legal inference to be drawn from these facts, or as to their legal effect or incidents, that there is a statement of law in the true sense of the term (*e*). In all such cases the matter stated is only matter of opinion on law, and the expression of such opinion is not a representation otherwise than as impliedly stating the fact that the person to whom the opinion is attributed actually holds it (*f*). But to this extent, and in this sense, it does amount to a representation, in however abstract and general a form the proposition of law may be expressed (*g*).

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of such property were invalid, and that the house was therefore a "free" house, which might mean either that Lord ELLENBOROUGH had so ruled (which would be fact), or that he (the auctioneer) had so inferred from a perusal of his judgment (which might be law); *Cory* v. *Gertcken* (1816), 2 Madd. 40, where an attorney told the trustees of a marriage settlement that they could safely advance money to his client, who was in fact an infant; *Reynell* v. *Sprye*, *Sprye* v. *Reynell* (1852), 1 De G. M. & G. 660, C. A. (a statement that the representee took no interest under a certain will, but that his heir might possibly do so); *West London Commercial Bank* v. *Kitson* (1884), 13 Q. B. D. 360, C. A. (a statement as to the powers of a company under its private Act of Parliament, which BOWEN, L.J., at p. 363, described as in principle not distinguishable from a statement that a man has in his possession "a particular bound copy of Dr. Johnson's dictionary"); and *Cooper* v. *Phibbs* (1867), L. R. 2 H. L. 149 (usually classed as a "mistake" case, though it appears from the judgment of Lord CRANWORTH, L.C., at p. 164, that there was a representation too), in which, at p. 170, Lord WESTBURY, L.C., expressed his opinion that "a private right of ownership is a matter of fact," and not the less so because "it may be the result also of matter of law." Similarly, statements by insurance companies as to the validity of their policies in certain events, or on compliance with certain conditions, have been construed, whenever it was possible, as representations of the existing practice or regulations of the companies rather than as propositions of the general law of insurance (*British Workman's and General Assurance Co.* v. *Cunliffe* (1902), 18 T. L. R. 425, 502, C. A.; here the Divisional Court took this view, but it is doubtful whether the Court of Appeal agreed with it, though they affirmed the decision itself; *Kettlewell* v. *Refuge Assurance Co.*, [1908] 1 K. B. 545, 550, 551, C. A.): *secus*, where only the latter construction is possible, as in *Harse* v. *Pearl Life Assurance Co.*, [1904] 1 K. B. 558, C. A.

(*e*) *Cooper* v. *Phibbs*, *supra*, at p. 170; *Eaglesfield* v. *Londonderry* (*Marquis*) (1876), 4 Ch. D. 693, 702, 703, C. A.

(*f*) The following are cases where there was held to have been a "statement of law" in the strict sense mentioned in the text, *supra*:—*Rashdall* v. *Ford* (1866), L. R. 2 Eq. 750 (a statement that the company would shortly, in virtue of facts and documents common to both parties, have power to issue debentures); *Beattie* v. *Ebury* (*Lord*) (1872), 7 Ch. App. 777 (statement by acts and conduct, if it had been made, which was not proved, that a company had power to overdraw, held to be, if anything, a statement of law); *Harse* v. *Pearl Life Assurance Co.*, *supra* (statement deemed an enunciation of a general principle of the law of life insurance).

(*g*) *Rashdall* v. *Ford*, *supra*; *West London Commercial Bank* v. *Kitson*, *supra*, *per* BOWEN, L.J., at pp. 362, 363: "I am not prepared to say, and I doubt, whether, if a man wilfully misrepresented the law, he would be allowed in equity to retain any benefit he got by such misrepresentation." See also *British Workman's and General Assurance Co.* v. *Cunliffe* (1902), 18 T. L. R. 502, C. A., where it was apparently held that the representors were

SECT. 5. Statements as to Documents.

SECT. 5.—*Statements as to Documents.*

Statements as to documents.

1633. A document is a thing. Its existence or non-existence is a fact. Its actual tenor and wording is fact. Its purport, effect, or object is fact. Its nature, character, class, or description is fact. Consequently, it has never been questioned that statements as to any of these four matters in connection with documents are pure statements of fact, and, as such, wholly and for all purposes representations (*h*).

SECT. 6.—*Exaggeration, Puffing etc.*

When exaggeration is not representation.

1634. Mere general laudation by a man of his own wares, inventions, projects, undertakings, or other vendible commodities or rights, if he confines himself to indiscriminate puffing and pushing, and does not condescend to particulars, is not representation, because in such a case he states no issuable fact, so to speak, and puts forward nothing by which any rational being can claim to have been misled or influenced. *Simplex commendatio non nocet.* The

liable on the ground that they had made a fraudulent misrepresentation of a principle or rule of the general law, though the word "fraud" was not used. As to what statements of law are representations for the purposes of estoppel *in pais*, see title ESTOPPEL, Vol. XIII., pp. 378, 379.

(*h*) Statements with reference to the existence of a document are so obviously statements of fact that no authorities need be cited. It may be noted, however, that BOWEN, L.J., in *West London Commercial Bank* v. *Kitson* (1884), 13 Q. B. D. 360, C. A., at p. 363, appears to think that even a representation as to the powers conferred on a company by its special Act may be regarded as a statement of the existence of a document. As to statements with reference to the actual wording or tenor of an instrument, whether by putting forward what purports to be a version or abstract, or by reading over, or translating etc., see *Thoroughgood's Case* (1584), 2 Co. Rep. 9 a; *Anon.* (1684), Skin. 159; *Beadles* v. *Burch* (1839), 10 Sim. 332; *Clapham* v. *Shillito* (1844), 7 Beav. 146; *Billage* v. *Southee* (1852), 9 Hare, 534, reported *sub nom. Billing* v. *Southee*, 21 L. J. (CH.) 472; *Mahomed Kala Mea* v. *A. V. Harperink* (1908), 25 T. L. R. 180, P. C. The following are cases of statements of the effect, purport, or object of a document:—*Hirschfeld* v. *London, Brighton and South Coast Rail. Co.* (1876), 2 Q. B. D. 1; *Arkwright* v. *Newbold* (1881), 17 Ch. D. 301, 318, C. A.; *Re Mount Morgan (West) Gold Mine, Ltd., Ex parte West* (1887), 56 L. T. 622, 624; *Stewart* v. *Kennedy* (No. 2) (1890), 15 App. Cas. 108; *Components Tube Co.* v. *Naylor*, [1900] 2 I. R. 1; *Re Roberts, Roberts* v. *Roberts*, [1905] 1 Ch. 704, C. A.; *Mahomed Kala Mea* v. *A. V. Harperink, supra; Moss & Co.* v. *Swansea Corporation* (1910), 74 J. P. 351. As to statements relating to the legal effect of documents, see p. 669, *ante*. Statements as to the nature, class, character, or description of an instrument formed the subject of *Thoroughgood's Case, supra; Edwards* v. *Brown* (1831), 1 Cr. & J. 307; *Kennedy* v. *Green* (1834), 3 My. & K. 699; *Hoghton* v. *Hoghton* (1852), 15 Beav. 278; *Curson* v. *Belworthy* (1852), 3 H. L. Cas. 742; *Lewellin* v. *Cobbold* (1853), 1 Sm. & G. 376; *Lee* v. *Angas* (1866), 7 Ch. App. 79, n.; *Foster* v. *Mackinnon* (1869), L. R. 4 C. P. 704; *Hunter* v. *Walters, Curling* v. *Walters, Darnell* v. *Hunter* (1871), 7 Ch. App. 75; *National Provincial Bank of England* v. *Jackson* (1886), 33 Ch. D. 1, C. A.; *King* v. *Smith*, [1900] 2 Ch. 425; *Bagot* v. *Chapman*, [1907] 2 Ch. 222; *Howatson* v. *Webb*, [1908] 1 Ch. 1, C. A.; and *Carlisle and Cumberland Banking Co.* v. *Bragg*, [1911] 1 K. B. 489, C. A. It will be seen hereafter (see note (*t*), p. 739, *post*) that this fourth class of statement is deemed a statement of so vital a nature that, when false and otherwise actionable, the instrument is not voidable, as in the other three kinds of statement, but absolutely void *ab initio*, and the subject of a plea of *non est factum*. As to this plea, see also title DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 404 *et seq.*

vauntings, sanguine anticipations, high colours, and exaggerations of the advertiser, the prospectus-monger, the auctioneer, or the inventor, are not *per se* statements of fact (*i*).

SECT. 6. Exaggeration, Puffing etc.

1635. Where, however, instead of basing the exaggeration or puffery upon facts separately stated (in which case each of the two things stands on its own footing, and whilst the one is not a representation at all, the other is wholly and solely so), the representor intermingles it with facts, punctuates it by details, or quantifies it by figures, the whole of the compound statement is deemed a pure and simple representation, to an action on which, if the facts are proved to have been misstated, it is no answer to say that the allegations as to these facts were buried under a mass of indefinite and laudatory generalities (*k*).

When it is representation.

Part III.—How Representations may be Made.

SECT. 1.—*In General.*

1636. A representation may be made in any of the forms in which any other communication may be made. It may be express or implied. When express, the signs used may be either permanent or transitory. When implied, the implication may arise

Modes of representation.

(*i*) *Fenton* v. *Browne*, *Browne* v. *Fenton* (1807), 14 Ves. 144 (leasehold property described as "nearly equal to freehold"); *Scott* v. *Hanson* (1829), 1 Russ. & M. 128 (where fourteen acres of land were described as "uncommonly rich water meadowland," and it was held by Lord LYNDHURST, L.C., that the mere description of the vague quality of "uncommon richness" was not a statement of fact, but, at p. 131, that the remaining words imported a definite statement of fact that the land was at least water-meadow land; therefore as to twelve of the acres, which were not "uncommonly rich," there was, nevertheless, no misrepresentation, but as to the other two, which were not water-meadow land at all, there was); *Nedley* v. *Lock* (1838), 8 C. & P. 527 ("warm protestations" of a person's influence and power); *Jennings* v. *Broughton* (1854), 5 De G. M. & G. 126, C. A. (prospectus painted in "glowing and exaggerated colours"); *R.* v. *Watson* (1857), 4 Jur. (N. S.) 14, C. C. R. (mere "exaggeration of the prisoner's prosperity" held not to be a false pretence); *Dimmock* v. *Hallett* (1866), 2 Ch. App. 21 (description of farms as "fertile and improvable at a moderate cost" held mere laudatory phraseology; but statements as to their tenancy and occupation treated as statements of fact); *Cargill* v. *Bower* (1878), 10 Ch. D. 502 (sanguine anticipations in a prospectus); *McKeown* v. *Bouchard-Peverel Gear Co.* (1896), 65 L. J. (CH.) 735, C. A. (another case of "puffery" in a prospectus).

(*k*) *Central Rail. Co. of Venezuela* (*Directors etc.*) v. *Kisch* (1867), L. R. 2 H. L. 99, 113 (where, though it was recognised that "some high colouring and even exaggeration is to be expected" in a prospectus, the statements went far beyond mere colouring); *Bile Bean Manufacturing Co.* v. *Davidson* (1906), 8 F. (Ct. of Sess.) 1131 (though "mere puffing" and "exaggeration, however gross, of the merits and virtues of a remedy will not do," and such phrases as "incomparable," "unique," "worth a guinea a box," come to nothing, yet it is otherwise where statements are made as to imaginary discoveries of imaginary new ingredients in the drug sold); compare *Scott* v. *Hanson*, *supra*; *Dimmock* v. *Hallett*, *supra*.

SECT. 1. In General.

either from express representations in their relation to and bearing upon one another, or from acts and conduct.

SECT. 2.—*Express Representations.*

Express permanent signs.

1637. The usual permanent symbols by which a representation is conveyed are words and figures written or printed or produced by any other equivalent means; but plans and drawings (*l*), maps (*m*), pictures and photographs (*n*) and the like, may serve the same purpose and quite as effectually.

Express transitory signs.

1638. Speech is the most ordinary form of transitory symbol for the communication of a statement, but gestures and demeanour may supplement spoken language, or even stand in its place (*o*).

SECT. 3.—*Implied Representations (Acts and Conduct).*

Implied representations.

1639. The type of representation which is implied from direct and express representations (such as statements of existing intention, opinion, or belief), or from absolute representations coupled with silence as to matters which it was the duty of the representor not to suppress, is discussed elsewhere (*p*). It is proposed here to deal with, and attempt some rough classification of, the other type of implied representation, namely, that which is inferred from acts and conduct.

Acts and conduct in sales and purchases.

1640. In cases of contracts of sale, or delivery of property pursuant to a contractual or other obligation, the following implications of a representation from acts and conduct may be made. On the one hand the purchaser of goods by the mere act of ordering them is deemed to represent that he has the present intention of paying for them (*q*). On the other hand, he who assumes to sell property impliedly represents thereby that it exists and has some value (*r*); he who delivers or hands over or produces documents in certain circumstances may be held

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(*l*) *Beaumont* v. *Dukes* (1822), Jac. 422; *Denny* v. *Hancock* (1870), 6 Ch. App. 1, 11—14; and *Re Arnold, Arnold* v. *Arnold* (1880), 14 Ch. D. 270, 282, 284, C. A., were cases in which plans of property sold played an important part in the representation. See also *Pearson (S.) & Son, Ltd.* v. *Dublin Corporation*, [1907] A. C. 351 (representation contained in, *inter alia*, plans and drawings prepared by the defendants' engineer).

(*m*) *Re Mount Morgan (West) Gold Mine, Ltd., Ex parte West* (1887), 56 L. T. 622 (as to the map accompanying a prospectus).

(*n*) *Newman* v. *Pinto* (1888), 57 L. T. 31, C. A. (deceptive pictures or emblematic designs); *Slingsby* v. *Bradford Patent Truck and Trolley Co.*, [1906] W. N. 51, C. A. ("sketches" of buildings alleged to be "photographed").

(*o*) In *Walters* v. *Morgan* (1831), 3 De G. F. & J. 718, Lord CAMPBELL, L.C., said, at p. 724, that "a nod or a wink, or a shake of the head, or a smile" may constitute a representation, throwing upon a purchaser a duty of disclosure which otherwise would not arise. This case and the passage from Lord CAMPBELL'S judgment was cited and relied upon by CHITTY, J., in *Turner* v. *Green*, [1895] 2 Ch. 205, at p. 209; compare the observations in *Webb* v. *Rorke* (1806), 2 Sch. & Lef. 661, 668.

(*p*) See pp. 659 *et seq.*, *ante*, and pp. 681 *et seq.*, *post*.

(*q*) See some of the cases cited in note (*a*), p. 660, *ante*.

(*r*) *Colt* v. *Woollaston* (1723), 2 P. Wms. 154, 156, 157; *Richardson* v. *Sylvester* (1873), L. R. 9 Q. B. 34; *Ajello* v. *Worsley*, [1898] 1 Ch. 274.

impliedly to represent thereby that they are genuine (*s*); and the seller of an article presenting a certain appearance to the senses of the purchaser is deemed to state, in so acting, that the article is in fact what it purports to be, and that there has been no concealment or covering up of defects, or other device or manœuvre whereby the outward semblance of the article is made to lie as to its substance and reality (*t*). Conversely, a buyer of property who by acts and conduct conceals the merits, or depreciates the value, of that which is offered to him for sale is as much guilty of implied misrepresentation as the seller who, by the like means, conceals its faults (*a*). In the case of sales of a marketable commodity any person who "rigs the market" or "makes a market" in the shares or other commodity by procuring persons to enter into pretended bargains in such market at fictitious prices, is making a false representation by acts and conduct that the bargains and prices are real (*b*).

(*s*) *Edinburgh United Breweries* v. *Molleson*, [1894] A. C. 96, 111 (handing over of books which D. was entitled to have examined by an accountant as a condition of the sale of a business, held an implied representation that they were genuine); *Marnham* v. *Weaver* (1899), 80 L. T. 412 (putting forward as security fictitious leases from the party to himself under an *alias*, deemed an implied misrepresentation of their genuineness); *Boyd and Forrest* v. *Glasgow and South Western Rail. Co.*, [1911] S. C. 33, 72, 73, 74 (a "journal of bores" held to involve a representation that it was a true record of borings actually taken).

(*t*) *Jones* v. *Bowden* (1813), 4 Taunt. 847 (sale of sea-damaged pimento by bulk samples, which showed no damage, this being only apparent on unpacking, and sending out advertisements of the sale too late to enable purchasers to inspect; acts and conduct of sellers treated as an implied representation that the pimento was sound); *Lovell* v. *Hicks* (1836), 2 Y. & C. (EX.) 46, 53—55 (sale of an invention for baking bread without the use of spirit or ferment, where the seller gave a demonstration which appeared to satisfy the description, but in the conduct of which spirit and a special ferment had been secretly introduced; acts held to have been one of the means whereby a misrepresentation of the nature and capacity of the invention had been made); *Ormerod* v. *Huth* (1845), 14 M. & W. 651, Ex. Ch. (a case of "false packing," of which, however, the defendant was not proved to have known); *Horsfall* v. *Thomas* (1862), 1 H. & C. 90 (where it was alleged, but without sufficient proof, that a defect in a cannon had been covered up); *Fitzpatrick* v. *Kelly* (1873), L. R. 8 Q. B. 337, *per* QUAIN, J., at p. 342 ("when a man asks for butter, and the tradesman, without more, sells him an article which seems to be butter, the representation is that the article is butter, that is, unadulterated butter"); and as to such sales, see titles FOOD AND DRUGS, Vol. XV., p. 20; SALE OF GOODS. Compare the common devices of "salting" mines, and manipulating furniture, either to give to old and decrepit articles the appearance of fresh manufacture, or to articles of recent make the appearance of antiques. So clearly is any such device deemed a representation, though only implied, that not even an express term in the contract to take the property with all faults will suffice to countervail it, if false; see pp. 729, 730, *post*.

(*a*) *Walsham* v. *Stainton* (1863), 1 De G. J. & Sm. 678, 689, 690, C. A. (implied misrepresentation of the value of shares which the party was desirous of purchasing, in virtue of his acts and conduct in manipulating the accounts of the dealings therein, described as "fraudulent manœuvres").

(*b*) *National Exchange Co. of Glasgow* v. *Drew and Dick* (1855), 2 Macq. 103; *Scott* v. *Brown, Doering, McNab & Co.*, *Slaughter and May* v. *Brown, Doering, McNab & Co.*, [1892] 2 Q. B. 724, C. A., where both the parties had conspired to rig the market, and the action, which was brought upon these dealings as if they were legal and genuine, was dismissed on the ground that the facts showed a conspiracy to misrepresent the value of the shares, and where LOPES, L. J., at p. 730, said: "I see no substantial distinction between false rumours"

SECT. 3. Implied Representations (Acts and Conduct).

Transactions which involve a representation of existence of conditions rendering them legal.

1641. Where a transaction is one which may be carried out lawfully or unlawfully, the mere entering into the transaction (since the law presumes against illegality) raises an inference of a representation on the part of the person engaged in the transaction that all the conditions exist but for which its execution would be illegal. Thus the mere act of sending an animal to a repository or market for sale may be tantamount to a representation that, so far as the party knows, the animal is not suffering from any contagious or infectious disease which would render the act obnoxious to the prohibitory provisions of any statute (*c*). So, in company matters, the declaration and payment of a dividend may be equivalent to a statement that profits have been earned out of which alone such dividend can lawfully be paid (*d*), and the issue or delivery of fully-paid shares, where there has been no filed contract, raises the inference of a representation that cash has been paid for them, for not otherwise could such issue or delivery be lawful (*e*). On the other hand, if the act

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(he was referring to *R.* v. *De Berenger* (1814), 3 M. & S. 67) "and false and fictitious acts." A purchaser, induced to purchase shares from either of the parties to the action, by means of a fictitious premium created by those parties solely for the purpose of inducing such purchaser to buy, could have successfully sued either or both for a false and fraudulent misrepresentation (*Scott* v. *Brown, Doering, McNab & Co*, *Slaughter and May* v. *Brown, Doering, McNab & Co.*, [1892] 2 Q. B. 724, C. A., *per* A. L. SMITH, L.J., at p. 734). As to the criminal offence in this respect, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 562. As to transactions on the Stock Exchange generally, see title STOCK EXCHANGE.

(*c*) *Bodger* v. *Nicholls* (1873), 28 L. T. 441, *per* BLACKBURN, J., at p. 445: "I entertain no doubt, but it is not necessary to decide the point, that the defendant, by taking the cow to a public market to be sold, though he does not warrant her to be sound, yet thereby furnishes evidence of a representation that, so far as his knowledge goes, the animal is not suffering from any infectious disease. To say otherwise would be to run counter to the common sense of mankind." This view was not dissented from in *Ward* v. *Hobbs* (1878), 4 App. Cas. 13, by Lord CAIRNS, L.C., at p. 22, who evidently thought that the act in question might be capable of such a construction, but expressed his desire to "hold himself unpledged" on this point, it not being necessary to the decision, which turned on the fact that the defendant had expressly refused to warrant the soundness of pigs sent, though suffering from typhoid fever, to a market for sale, contrary to a statute. In *Hills* v. *Balls* (1857), 2 H. & N. 299, though it was then illegal to send a glandered horse to a public place for sale, there was no clear allegation that the horse had been so sent, and no representation as to the soundness of the animal was implied from the mere act of selling a horse having that disease at a repository, which, for aught that appeared, might have been a private place.

(*d*) This would seem to be so on the principle of the opinion of BLACKBURN, J., in *Bodger* v. *Nicholls*, *supra*, cited in note (*c*), *supra*, and the estoppel case (*Bloomenthal* v. *Ford*, [1897] A. C. 156), cited in note (*e*), *infra*. In *Jackson* v. *Turquand* (1869), L. R. 4 H. L. 305, Lord HATHERLEY, L.C., at pp. 308, 309, and Lord WESTBURY, at p. 315, referred to the question, but (it being unnecessary) declined to decide it; in an earlier case, however, *Burnes* v. *Pennell* (1849), 2 H. L. Cas. 497, Lord CAMPBELL, at pp. 524, 525, and Lord BROUGHAM, at p. 531, expressed the view that a payment of dividends is an implied declaration to the world by acts and deeds that "the company has made profits which justify such a dividend."

(*e*) *Bloomenthal* v. *Ford*, *supra*, *per* Lord HALSBURY, L.C., at pp. 163, 164, and Lord HERSCHELL, at p. 169. This was an estoppel case, but, since a representation by conduct, for the purpose of estoppel *in pais*, is exactly

in question is such that it infringes no statute, and is not illegal at common law, no such inference arises. Thus, the mere act of trading is not an implied representation that the trader is of full age, because it is not unlawful for an infant to trade (*f*); nor is the mere advertisement of an article, with the descriptive words "trade mark" appended, an implied representation that the party has registered the trade mark, for it is not illegal to use an unregistered mark (*g*).

Implied representations by conduct that representor is acting in a certain character.

1642. Where a person, in the course of a transaction, assumes a certain character by conducting himself as if he possessed it, he is deemed to represent by such conduct that he does in fact fill that character. Thus, a party by the acts of sending bought and sold notes to the other party, and guaranteeing the performance of the contract, represents to him that he has a principal (*h*); and all the cases of what is usually treated as implied warranty of authority may be, and occasionally have been, put as implied representations (*i*). Similarly, many of the non-disclosure cases, though usually considered not to fall within the province of representation, strictly so called, are capable of being regarded as representations (inferred from the conduct of the party in entering into and carrying through a particular transaction) that such transaction, so far as he knows, is of the usual and normal type, and that he has withheld nothing which, if revealed, would show it to be otherwise (*k*).

Personation by acts.

1643. Personation by "make believe" is as much representation, though no word is said, as an assumption of an *alias* by direct statement (*l*). By acts and conduct, without language, a man may represent that he is associated, as agent or partner, with a third person, when he is not (*m*), or, conversely, that he has no connection with, when in fact he is so connected, or is identical with, a supposed third person (*n*).

Implied representation by acts of a continuing state of things.

1644. Where it becomes necessary to make periodically repeated representations in order to keep alive a deception once initiated, and to prevent its discovery, acts and conduct are the means frequently, if not usually, employed. For instance, by regularly

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what a representation by conduct is for the purposes of the law of misrepresentation, the authority is in point. As to such estoppel, see titles COMPANIES, Vol. V., pp. 182, 183; ESTOPPEL, Vol. XIII., p. 410.

(*f*) *Re Jones, Ex parte Jones* (1881), 18 Ch. D. 109, 121, 125, C. A.

(*g*) *Sen Sen Co.* v. *Britten*, [1899] 1 Ch. 692; see titles TRADE MARKS, TRADE NAMES, AND DESIGNS.

(*h*) *Wilson* v. *Short* (1848), 6 Haro, 366.

(*i*) See pp. 721 *et seq.*, *post*.

(*k*) See pp. 684, *et seq.*, *post*.

(*l*) *R.* v. *Barnard* (1837), 7 C. & P. 784, *per* BOLLAND, B., in summing up: "if nothing had passed in words, I should have laid down that the fact of the prisoner's appearing in cap and gown would have been pregnant evidence from which a jury should infer that he pretended he was a member of the university." Compare Com. Dig., tit. Action upon the Case for a Deceipt, A. 3.

(*m*) *Higgons* v. *Burton* (1857), 26 L. J. (EX.) 342; *Hardman* v. *Booth* (1863), 1 H. & C. 803; *Cundy* v. *Lindsay* (1878), 3 App. Cas. 459.

(*n*) *Moens* v. *Heyworth* (1842), 10 M. & W. 147, 156, 157, 158; *Blake* v. *Albion Life Assurance Society* (1878), 4 C. P. D. 94; *Marnham* v. *Weaver* (1899), 80 L. T. 412.

Sect. 3. Implied Representations (Acts and Conduct).

transmitting to the supposed mortgagee sums of money exactly equivalent to the interest which would fall due on the mortgage, if it had been effected (*o*), or by producing (without handing over) the title deeds of the property supposed to be in mortgage (*p*), a person who has been entrusted with money to lend on such mortgage is making so many implied representations that the mortgage has been effected and is a subsisting security.

Puffers at auction sales, etc.

1645. The practice of employing puffers and resorting to other dubious devices at auction sales (*q*), the various modes of "passing off" goods by "dressing" or "making up" (*r*), and the "invitation" and "trap" cases, usually dealt with under the head of negligence (*s*), may also be treated as species of representation by conduct.

Other illustrations.

1646. Other illustrations, of a miscellaneous character, are the following. A man procures his brother, with whom he has done business, to give him a note for a large sum of money supposed to be the balance due to him in account: by the act of producing this note to a lady whom he is inducing to marry him, he represents to her that he is entitled to the money in question (*t*). A woman by her conduct assumes to possess magical powers: this, of itself, and without express words, is a representation that she does possess such powers (*a*). A seller of an animal or article which, without having been manufactured or dressed up or "faked" in any way *ad hoc*, is in its nature of an ambiguous or ambidextrous form or appearance, may, by his acts and conduct, make such use of its misleading properties as to raise an inference of a representation on his part that it possesses in fact the qualities, or some of the qualities, which appear to belong to it (*b*).

(*o*) *Blair* v. *Bromley* (1847), 2 Ph. 354; *Moore* v. *Knight*, [1891] 1 Ch. 547; *Thorne* v. *Heard and Marsh*, [1895] A. C. 495, 506.

(*p*) *Re Murray, Dickson* v. *Murray* (1887), 57 L. T. 223.

(*q*) See title AUCTION AND AUCTIONEERS, Vol. I., pp. 508, 509, 512.

(*r*) See title TRADE MARKS, TRADE NAMES, AND DESIGNS.

(*s*) See title NEGLIGENCE, and note (*p*), p. 706, *post*.

(*t*) *Montefiori* v. *Montefiori* (1762), 1 Wm. Bl. 363.

(*a*) *R.* v. *Giles* (1865), Le. & Ca. 502, 510, C. C. R.; generally, compare the cases as to false pretences by conduct cited in title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 690—704.

(*b*) In *Gill* v. *M'Dowell*, [1903] 2 I. R. 463, it was held that the sending of a beast to a sale of bullocks and heifers was an implied representation that the animal was either a bullock or a heifer. In fact it was neither, or both, being a hermaphrodite. "The animal," said GIBSON, J., *ibid.*, at p. 469, "was misleading, a sort of living lie, it was a machine of fraud which the defendant utilised." Similarly, *Patterson* v. *Landsberg & Son* (1905), 7 F. (Ct. of Sess.) 675, was treated as another case of *res ipsa loquitur* by Lord KYLLACHY, at p. 681, the article sold by the curio-dealer being "a silent asserter," and the act of sale, coupled with the dealer's conduct in regard to it, was deemed, apart from his express statements, to be an implied representation that it was an antique of some sort. As to representations by conduct for the purposes of estoppel, see title ESTOPPEL, Vol. XIII., pp. 388—402.

Part IV.—What Constitutes Misrepresentation.

SECT. 1.—*Falsity.*

SECT. 1. Falsity.

1647. A misrepresentation is a representation which at the material date (*c*) was false (*d*). What misrepresentation is.

1648. A representation is deemed to have been false if it was false in substance and in fact. For the purpose of determining whether there has or has not been a misrepresentation at all, the knowledge, belief, or other state of mind of the representor is immaterial, though of the utmost importance for the purpose of considering—should the form of proceeding render it afterwards necessary—whether the misrepresentation was fraudulent or not. At this stage of the inquiry the sole question is one of objective, not subjective, truth or untruth. A man may by mistake tell the truth (*e*), just as he may unintentionally tell the opposite. His evil intention in the one case will no more make the representation false than his good intention in the other will make it true. What falsity is.

1649. Since in every form of proceeding based on misrepresentation a misrepresentation of some kind must be established, it follows that the burden of alleging and proving that degree of falsity which is required to convert the representation into a misrepresentation rests, in every case, on the party who sets it up (*f*). Burden of proof.

SECT. 2.—*Substantial Falsity Necessary and Sufficient.*

1650. In the case of all communications between man and man for the purpose of influencing conduct there must necessarily be degrees of truth and falsity. But since, in each individual case, the law must determine in which of two mutually exclusive categories, falsity or truth, the particular representation is to be placed, it has been necessary to formulate a criterion or standard for determining this question. The rule of law which fixes this standard has been thus expressed. If the material circumstances are incorrectly stated, that is to say, if the discrepancy between the facts as represented and the actual facts is such as would be considered material by a reasonable representee, the representation is false; if otherwise, it is not. Another way of stating the rule is to say that substantial falsity is, on the one hand, necessary, and, on the other, adequate, to Falsity in substance necessary and sufficient.

(*c*) See pp. 678, 679, *post.*

(*d*) See the text, *infra*, and pp. 679—687, *post.*

(*e*) *R.* v. *Aspinall* (1876), 2 Q. B. D. 48, 57, C. A. ("although the accused had a criminal intent and believed his statement was false, yet if in fact by chance the statement was not incorrect, the charge is not supported").

(*f*) *Vernon* v. *Keys* (1810), 12 East, 632; affirmed (1812), 4 Taunt. 488, Ex. Ch. (judgment arrested because no unequivocal falsehood proved); *Halloys* v. *Fernie* (1868), 3 Ch. App. 467, 477 ("the precise representation must be distinctly stated"); *Bodger* v. *Nicholls* (1873), 28 L. T. 441 (no proof that the animal was not sound, even assuming an implied representation that it was); *Melbourne Banking Corporation* v. *Brougham* (1882), 7 App. Cas. 307, 314, 315, P. C.; *Smith* v. *Chadwick* (1884), 9 App. Cas. 187, 190—192; and see, generally, the cases cited in the notes to pp. 678–687, *post.*

SECT. 2. Substantial Falsity Necessary and Sufficient.

establish a misrepresentation (*g*). It results from the foregoing statement that where the entire representation is a faithful picture or transcript of the facts *in essentialibus*, no falsity is established, though there may have been any number of inaccuracies in unimportant details (*h*). Conversely, if the general impression conveyed is false, the most punctilious and scrupulous accuracy in immaterial minutiæ will not avail to render the representation true (*i*).

SECT. 3.—*The Date at which the Representation must be shown to have been False.*

When falsity must have existed.

1651. The representation must be shown to have been false at the date when the representee altered his position on the faith thereof. In a case of the ordinary type, where there is no appreciable interval between that date and the date when the representation was made, or no alteration in the facts during such interval, it is true to say that it is both necessary and sufficient to establish a material discrepancy between the statement and the facts as they existed when the statement was made, or, rather, the error involved in so stating the rule is not, in such cases, of any practical importance. But, in the case of a continuing representation, it may become of great importance to remember that the material date to which the falsity must be assigned is the date when the representation was acted upon, and not when it was made.

Continuing representation becoming false or true after acted upon.

1652. Where there is an appreciable interval between the two dates above mentioned, and the representation relates to an existing state of things (and not to a past event), the representor is deemed to be repeating his representation at every successive moment during the interval, unless he withdraws or modifies it by timely notice to the representee in the meantime (*k*). It follows that if, during the

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(*g*) The two forms of stating the rule are combined, as regards marine insurance, in the Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 20 (4); "a representation as to a matter of fact is true, if it be substantially correct, that is to say, if the difference between what is represented and what is actually correct would not be considered material by a prudent insurer." See title INSURANCE, Vol. XVII., p. 413. Substitute "reasonable representee" for "prudent insurer," and this definition is sound as applied to representations in general.

(*h*) See *Pawson* v. *Watson* (1778), 2 Cowp. 785, where Lord MANSFIELD, C.J., at pp. 788—790, insists on the distinction, in this respect, between a representation, where substantial falsity must be proved, and a warranty, where exact correspondence between the word and the fact is the very thing contracted for, and where, therefore, literal deviation constitutes a breach. Compare the observations in *Thomson* v. *Weems* (1884), 9 App. Cas. 671, 683, 684, 689, and in *Hambrough* v. *Mutual Life Insurance Co. of New York* (1895), 72 L. T. 140, 141, 142, C. A. Illustrations of inaccuracies held or found to be not substantial or material are to be found in *Dobson* v. *Sotheby* (1827), Mood. & M. 90, 92; *Adamson* v. *Evitt* (1830), 2 Russ. & M. 66; *Bartlett* v. *Salmon* (1855), 6 De G. M. & G. 33, 42; *Denton* v. *Macneil* (1866), L. R. 2 Eq. 352; *Bear* v. *Stevenson* (1874), 30 L. T. 177, P. C.; *McKeown* v. *Bouchard-Peveril Gear Co.* (1896), 65 L. J. (CH.) 735, 736, 737, C. A.; *Seddon* v. *North Eastern Salt Co., Ltd.*, [1905] 1 Ch. 326, 335.

(*i*) See *Arkwright* v. *Smith* (1889), 41 Ch. D. 348, 370—373, C. A.

(*k*) See *Smith* v. *Kay* (1859), 7 H. L. Cas. 750, where the acceptance of certain bills was procured by misrepresentation, for which bills a bond was

intervening period, events happen by reason of which the representation is not substantially in accordance with the facts existing at the time when the representee acts upon it, though it was in accordance with the facts existing when it was made, a misrepresentation *in fact*—whether fraudulent or not is another question (*l*)—is established (*m*). Conversely, where a representation, which was false when made, becomes, in virtue of supervening facts, true when acted upon, there is no falsity at the only material date, and therefore no misrepresentation (*n*).

SECT. 3. Date at which Representation must be shown to have been False.

SECT. 4.—*Rules of Construction for determining the Question of Falsity.*

SUB-SECT. 1.—*In General.*

1653. Since falsity means a material discrepancy between what was represented and what actually existed, it is, in every case, necessary to ascertain each of the two matters between which the comparison is to be instituted. For determining the former question, namely, what was represented, certain principles of construction have been laid down.

Rules for ascertaining meaning of representations.

SUB-SECT. 2.—*Sense in which Various Classes of Representation are to be construed.*

1654. The sense of a representation, where only one sense is possible, is that which was both in fact and also reasonably

Primary and secondary sense.

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afterwards substituted, and, in answer to the argument that the execution of the bond, at any rate, was not induced by any false statement, Lord CRANWORTH, at p. 769, observed, "it is a continuing representation. The representation does not end for ever when the representation is made. The . . . young man . . . in stating his case, would say, 'Before I executed the bond I had been led to believe, and I therefore continued to believe that'" . . . etc. As to the right of the representor to revoke or modify at any time during the period mentioned in the text, *supra*, see *Holland* v. *Manchester and Liverpool District Banking Co.* (1909), 25 T. L. R. 386, where it was held that an erroneous entry in a pass-book can be set right by the banker at any time before the customer draws upon his supposed balance, but unless and until so corrected, is a continuing representation. Compare, as to marine insurance, the Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 20 (6), "a representation may be withdrawn or corrected before the contract is concluded"; see title INSURANCE, Vol. XVII., p. 143. Similar principles are applicable to representations for the purpose of estoppel; see title ESTOPPEL, Vol. XIII., p. 383, and in cases of contract, to a continuing offer (*Carlill* v. *Carbolic Smoke Ball Co.*, [1893] 1 Q. B. 256, C. A., *per* LINDLEY, L.J., at p. 262); and see title CONTRACT, Vol. VII., p. 347.

(*l*) See pp. 691, 692, *post*.

(*m*) *Turner* v. *Harvey* (1821), Jac. 169; *Anderson's Case* (1881), 17 Ch. D. 373, 377, distinguishing *Hallows* v. *Fernie* (1868), 3 Ch. App. 467; *Re Scottish Petroleum Co.* (1883), 23 Ch. D. 413, 432, 435, 438, C. A.; and *Whurr* v. *Devenish* (1904), 20 T. L. R. 385 (where a horse was offered for sale by auction, and described as the representor's property, but during the progress of the auction was sold, notwithstanding which the representor authorised the sale to go on, and the purchaser bought on the faith of the above-mentioned continuing representation, which, at the point indicated, became a misrepresentation). On the other hand, the representation, though it continues during the whole of the interval in question, does not endure a moment beyond it: the retirement of directors (described as such in a prospectus) after allotment could not possibly make the prospectus false even as a continuing representation (*Hallows* v. *Fernie*, *supra*, at p. 472).

(*n*) *Ship* v. *Crosskill* (1870), L. R. 10 Eq. 73, 85, 86.

SECT. 4. Rules of Construction for determining the Question of Falsity.

conveyed thereby to the representee (*o*). A representee cannot establish falsity by putting an unnatural or strained interpretation on the words used, however clearly he may prove that in fact he so understood them (*p*); and what the representor professes to have meant by his statement is wholly irrelevant (*q*). The sense in which the representee is *primâ facie* deemed to have understood the representation is the natural sense of the words or other signs used; but it is open to either party to set up, and in that case the burden is on him to allege and prove, special circumstances in virtue of which a particular secondary sense (whether technical, or conventional, or wholly unnatural) was in fact attached by the representee to the representor's statement, or to expressions occurring therein, and that, in that sense, the representation, though true in its primary sense, was false, or though false in its primary sense, was true (*r*).

Ambiguous statements.

1655. Where the representation genuinely and reasonably admits of more than one meaning, the burden is on the representee first to allege, and then to prove, in which of the possible senses he understood it, and that in that sense it was false (*s*). There is,

(*o*) *Piggott* v. *Stratton* (1859), 1 De G. F. & J. 33, *per* Lord CAMPBELL, L.C., at p. 50 ("moralists and jurists tell us that words are to be understood in courts of justice in the sense in which persons using them wished and believed that they should be understood by the person to whom they were addressed").

(*p*) *Hallows* v. *Fernie* (1868), 3 Ch. App. 467, 476, 477 ("he is deceived, not by the words, but by his construction of them"); *Schroeder* v. *Mendl* (1877), 37 L. T. 452, C. A.

(*q*) *Glasier* v. *Rolls* (1889), 42 Ch. D. 436, C. A. (*per* KEKEWICH, J., at p. 452, not on this point dissented from, though the decision was reversed on other grounds); *Greenwood* v. *Leather Shod Wheel Co.*, [1900] 1 Ch. 421, 434, C. A.

(*r*) Thus, a man may lie by telling the truth. "This may be illustrated," says ALDERSON, B., in *Moens* v. *Heyworth* (1842), 10 M. & W. 147, at pp. 158, 159, "by an anecdote of a very eminent ambassador, who said, 'I have found it best always to tell the truth, as they will never believe anything that an ambassador says, so you are sure to take them in.'"

(*s*) *Vernon* v. *Keys* (1812), 4 Taunt. 488, Ex. Ch. (where the representee failed to prove that the words bore that one of their two possible meanings in which alone they would have been false); *Hallows* v. *Fernie*, *supra* (where a statement in a prospectus—false, if construed as relating to a company's existing equipment of steamships—was, if regarded as merely a promise to provide itself with vessels, not a representation at all, and, the plaintiff not having even alleged that he understood the statement in the present tense, his action failed); *Arkwright* v. *Newbold* (1881), 17 Ch. D. 301, C. A. (where the plaintiff failed to prove that he assigned to the statement in the prospectus the liberal sense in which it would have been untrue, and not the literal sense in which it was true); *Smith* v. *Chadwick* (1884), 9 App. Cas. 187, 190—192, 197—201 (where the plaintiff absolutely refused to say which of two reasonable interpretations he put upon the representation in question, stating that he understood the meaning to be that which the words obviously conveyed, and that "he was unable to express in other words what he understood to be the meaning thereof," which would have been a proper and sufficient answer had the words admitted of one sense only, but as they admitted of two, and as the plaintiff had elected to stand or fall by his supposed one and only and "obvious" meaning, he was in the unfortunate predicament of having refused even to attempt to discharge the burden, which the Court of Appeal and the House of Lords held to rest upon him, of first assigning a meaning, and then proving that he so understood the representation, and that in the sense so assigned it was false); *Low* v. *Bouverie*, [1891] 3 Ch. 82. 101, 106, C. A. (where the representee failed to establish an unequivocal misrepresentation, that is, that the sense in which he had construed the words, and in which they would have been

however, another type of ambiguity in representation which counts against the representor, and not against the representee, namely, where there is other, and independent, evidence that the representor resorted to ambidextrous language for the express purpose of afterwards falling back on the literal, or, it may even be, the plain and ordinary, interpretation of the words, though he well knew, when using them, that the representee was taking them in another, and perhaps a less natural, sense. In all such cases the burden is shifted, and it becomes the duty of the representor to establish his veracity and good faith, every presumption being made against him who, without either literally lying or suppressing facts, *fallendi causâ obscure loquitur* (*t*).

Where burden of proof shifted to representor.

SUB-SECT. 3.—*Falsity by Omission, Silence, or Inaction.*

1656. There are two main classes of cases in which reticence may contribute to establish—it can never by itself create—a misrepresentation. These are—(1) where known material qualifications of an absolute statement are omitted; and (2) where the circumstances raise a duty on the representor to state certain matters, if they exist, and where, therefore, the representee is entitled as against the representor to infer their non-existence from the representor's silence as to them.

When silence constitutes falsity.

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false, was the sense which such words reasonably bore). Where the representation is not express, but implied from acts and conduct, it would seem that the burden is on the representee of showing that the implication was not merely reasonable, but necessary (*Sen Sen Co.* v. *Britten*, [1899] 1 Ch. 692, 696). On the other hand, the representee's burden of allegation and proof was fully discharged by the plaintiff in *Capel & Co.* v. *Sim's Ships Composition Co.* (1888), 58 L. T. 807, 808, 809, and in *Glasier* v. *Rolls* (1889), 42 Ch. D. 436, 454, C. A. With this view in the latter case the Court of Appeal agreed, whilst reversing the decision on the ground that the misrepresentation was not a fraudulent one (*ibid.*, p. 459). As to the similar rules applicable to the doctrine of estoppel by representation, see title ESTOPPEL, Vol. XIII., p. 379.

(*t*) *Turner* v. *Harvey* (1821), Jac. 169, *per* Lord ELDON, L.C., at p. 176 ("if one man understands an expression in one sense and another in a different sense, though the court would impute to both that they understood it in the right sense, yet . . . if the expression used by one party has at all misled the other, it is always material in considering what a court of equity will do with the case"); *Pigott* v. *Stratton* (1859), 1 De G. F. & J. 33; *Lee* v. *Jones* (1864), 17 C. B. (N. S.) 482, 496, 497; *Smith* v. *Chadwick* (1884), 9 App. Cas. 187, *per* Lord BLACKBURN, at p. 201 ("if, with intent to lead the plaintiff to act upon it, they put forth a statement which they know may bear two meanings, one of which is false to their knowledge, and thereby the plaintiff, putting that meaning upon it, is misled, I do not think they can escape by saying he ought to have put the other. If they palter with him, in a double sense, it may be that they lie like truth, but I think they lie, and it is a fraud"); *Re Terry and White's Contract* (1886), 32 Ch. D. 14, 28, C. A. (as to ambiguous conditions of sale); *Low* v. *Bouverie*, [1891] 3 Ch. 82, 113, C. A. (if there is fraud, and the statement is intended to mislead, its ambiguity is not a defence); *Scott* v. *Snyder Dynamite Projectile Co.* (1892), 67 L. T. 104, C. A., *per* LINDLEY, L.J., at p. 106 ("the prospectus is catchy and misleading . . . It suggests that the company have acquired an existing patent, though it is possible, by subjecting it to a microscopic examination, to say that that is not what is meant. Like the well-known Introduction to the Ingoldsby Legends, it appears to say a great deal, whilst not saying anything"); and see *Aaron's Reefs* v. *Twiss*, [1896] A. C. 273, *per* Lord HALSBURY, L.C. (as to the "ambidextrous language" of the prospectus in that case).

SECT. 4. Rules of Construction for determining the Question of Falsity.

Omission of qualifications.

1657. Any omission from a statement of all reference to qualifying or supplementary facts and circumstances, such as to render what is stated so one-sided, or so absolute, a version of the entirety of the facts, as to amount to a travesty, and not a faithful summary thereof, is enough to establish a misrepresentation (*a*). The representor must not merely abstain from positive falsehood; he must not knowingly or willingly omit anything which is required to render completely true that which without it is not completely true (*b*). Such an omission amounts to that form of *suppressio veri* which not merely

(*a*) *Re Overend, Gurney & Co., Oakes* v. *Turquand and Harding, Peek* v. *Same* (1867), L. R. 2 H. L. 325, *per* Lord CHELMSFORD, at p. 342 ("it is said that everything which is stated in the prospectus is literally true, and so it is. But the objection to it is, not that it does not state the truth as far as it goes, but that it conceals most material facts with which the public ought to have been made acquainted, the very concealment of which gives to the truth which is told the character of falsehood"); *Peek* v. *Gurney* (1873), L. R. 6 H. L. 377, 403 (where the process in question is characterised by Lord CAIRNS as "such a partial and fragmentary statement of fact as that the withholding of that which is not stated makes that which is stated absolutely false"); *Arkwright* v. *Newbold* (1881), 17 Ch. D. 301, 318, C. A. The canon of construction has been applied rigorously to (i.) cases of sales and purchases (*Coverley* v. *Burrell* (1821), 5 B. & Ald. 257; *Brandling* v. *Plummer* (1854), 2 Drew. 427; *Dimmock* v. *Hallett* (1866), 2 Ch. App. 21; *Denny* v. *Hancock* (1870), 6 Ch. App. 1; *Jones* v. *Rimmer* (1880), 14 Ch. D. 588, 591; *Nottingham Patent Brick and Tile Co.* v. *Butler* (1886), 16 Q. B. D. 778, C. A.; *Re Davis and Cavey* (1888), 40 Ch. D. 601, 605; *Hepworth* v. *Pickles*, [1900] 1 Ch. 108, 111, 112; *Baker* v. *Moss* (1902), 66 J. P. 360; and *Mahomed Kala Mea* v. *A. V. Harperink* (1908), 25 T. L. R. 180, P. C.); (ii.) prospectuses of companies (*New Brunswick and Canada Railway and Land Co.* v. *Muggeridge* (1860), 1 Drew. & Sm. 363; *Re Overend, Gurney & Co., Oakes* v. *Turquand and Harding, Peek* v. *Same, supra*, at pp. 341—345, 368; *Peek* v. *Gurney, supra*; *Jury* v. *Stoker* (1882), 9 L. R. Ir. 385; *Edgington* v. *Fitzmaurice* (1885), 29 Ch. D. 459, C. A., *per* DENMAN, J., at p. 472; *Re Mount Morgan (West) Gold Mine, Ltd., Ex parte West* (1887), 56 L. T. 622, *per* KAY, J., at p. 623; *Derry* v. *Peek* (1889), 14 App. Cas. 337; *Scott* v. *Snyder Dynamite Projectile Co.* (1892), 67 L. T. 104, C. A.; *Aaron's Reefs* v. *Twiss*, [1896] A. C. 273, 287, 293, 294; *Re Dunlop-Truffault Cycle and Tube Manufacturing Co., Ex parte Shearman* (1896), 66 L. J. (CH.) 25; *Components Tube Co.* v. *Naylor*, [1900] 2 I. R. 1; *Cackett* v. *Keswick*, [1902] 2 Ch. 456, 476, C. A.); as to such cases see, further, title COMPANIES, Vol. V., pp. 132 *et seq.*; (iii.) cases of representation as to the credit and dealings of a third person (*Tapp* v. *Lee* (1803), 3 Bos. & P. 367; *Ames* v. *Milward* (1818), 8 Taunt. 637; *Lee* v. *Jones* (1864), 17 C. B. (N. S.) 482, 498); and (iv.) miscellaneous cases (*Brooke* v *Mostyn* (*Lord*) (1864), 33 Beav. 457; *Gilbert* v. *Endean* (1878), 9 Ch. D. 259 268, 270, C. A.), with which compare such of the cases cited in note (*h*), p. 670 *ante*, as relate to the misreading or misstating of the effect of a document by omitting important qualifying provisions or expressions.

(*b*) As to particulars of sale, see *Brandling* v. *Plummer* (1854), 2 Drew. 427, 430: "In all cases of sale, it is the obvious duty of the vendor . . . to describe everything which it is material to know in order to judge of the nature and value of the property. It is not for him just to tell what is not actually untrue, leaving out a great deal that is true, and leaving it to the purchaser to inquire whether there is any error or omission in the description or not"; and see title SALE OF LAND. As to prospectuses of companies, see *New Brunswick and Canada Railway and Land Co.* v. *Muggeridge* (1860), 1 Drew. & Sm. 363, 381, 382 (the framers of a prospectus "are bound . . . not only to abstain from stating as fact that which is not so, but to omit no one fact within their knowledge the existence of which might in any degree affect" the mind of any applicant for shares); and *Arkwright* v. *Newbold* (1881), 17 Ch. D. 301, C. A., *per* FRY, J., at p. 311 ("it appears to me to be well worthy of consideration whether a person putting out a prospectus does not undertake to say, 'I am

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is equivalent to, but actually is, *suggestio falsi*. To state a thing which is only true with qualifications, or subject to conditions and countervailing considerations, known to the representor, but as to which he is studiously reticent, is to say the thing which is not. Such a statement, *minus* the omitted matters, is a lie in one of its most dangerous and insidious forms (*c*). But mere incompleteness is not *per se* a factor in misrepresentation; it must always be proved clearly that it rendered what was stated fallacious and false (*d*).

When non-disclosure involves misrepresentation.

1658. There is another type of reticence or inaction which may, in certain circumstances, and where certain relations exist between the parties, amount to a misrepresentation of the non-existence of the matters as to which silence has been observed. Thus, where a man has said something to another, a duty may at once arise to say more, and if he fails to discharge this duty his reticence from that point becomes an implied misrepresentation, though complete silence throughout the transaction would not have amounted to, or have afforded any evidence of, misrepresentation, or even of actionable non-disclosure (*e*). It has already been seen how this duty may arise in the case of a continuing representation (*f*). There are other cases where, in the course of the negotiations, the representor lets fall something which, whether he

telling you everything which it is really material for you to know, and I am putting before you the whole prospect of the enterprise on which you are entering'").

(*c*) *Tapp* v. *Lee* (1803), 3 Bos. & P. 367, *per* CHAMBRE, J., at p. 371 ("if a man, professing to answer a question, select those facts only which are likely to give a credit to the person of whom he speaks, and keep back the rest, he is a more artful knave than he who tells a direct falsehood," cited with approval by PARK, J., in *Foster* v. *Charles* (1830), 6 Bing. 396, at p. 403.

(*d*) *Gover's Case* (1875), 1 Ch. D. 182, C. A., *per* BRETT, J., at p. 199 ("for a mere non-disclosure . . . which had not the effect of rendering what was disclosed or stated a misrepresentation . . . there was no remedy"); *McKeown* v. *Bouchard-Peveril Gear Co.* (1896), 65 L. J. (CH.) 735, *per* RIGBY, L.J., at p. 736; *Re Christineville Rubber Estates, Ltd.* (1911), 28 T. L. R. 38. Compare the observations of Lord CHELMSFORD and Lord CAIRNS, cited in note (*a*), p. 682, *ante*.

(*e*) *Stikeman* v. *Dawson* (1847), 1 De G. & Sm. 90, 104; *Walters* v. *Morgan* (1861), 3 De G. F. & J. 718, 723, 724; *Davies* v. *London and Provincial Marine Insurance Co.* (1878), 8 Ch. D. 469, where FRY, J., at p. 475, referring to "ordinary contracts," *i.e.*, other than contracts *uberrimæ fidei*, says—"the duty may arise from circumstances which occur during the negotiation," *e.g.*, the subsequent discovery by the representor that what he had originally stated was false at the time, or the supervening of facts rendering false what was originally true; *Arkwright* v. *Newbold* (1881), 17 Ch. D. 301, 310, 311, C. A.; *Coaks* v. *Boswell* (1886), 11 App. Cas. 232, *per* Lord SELBORNE, L.C., at p. 236 ("this, however, he may be held to do," *i.e.*, impliedly undertake or profess to communicate facts as to which he has been silent, "if he makes some other communication which, without the addition of those facts, would be necessarily, or naturally and probably, misleading"); *Central Rail. Co. of Venezuela (Directors etc.)* v. *Kisch* (1867), L. R. 2 H. L. 99, 114 ("the suppression of a fact will often amount to a misrepresentation"); and *Seaton* v. *Heath*, *Seaton* v. *Burnand*, [1899] 1 Q. B. 782, 792, C. A. ("misrepresentation might undoubtedly be made by concealment"): the decision in this case was reversed in the House of Lords, *sub nom. Seaton* v. *Burnand*, [1900] A. C. 135, but not on any ground affecting the correctness of the observation cited.

(*f*) See pp. 678, 679, *ante*.

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so intended or not, he at once perceives, or ought to perceive, to be exercising a delusive influence on the mind of the representee, and where, by not correcting the delusion, he is deemed to confirm and perpetuate it, and so to misrepresent (*g*).

Again, in certain circumstances raising a duty to declare the whole truth, a misrepresentation may be made by silence, if the representor fails to contradict a statement, erroneous to his knowledge, which has been made to him by the representee, or which he knows to have been made by, or to, the representee to, or by, a third person. Standing by, and inaction and reticence, in such circumstances, may amount either to a tacit adoption by the party keeping silence of another's misrepresentation as his own, or a tacit confirmation of another's error as truth (*h*).

Lastly, there are certain cases which are usually classed as belonging rather to the province of non-disclosure, pure and simple, than to that of misrepresentation proper, which, nevertheless, have been regarded by high authority as illustrations of positive, though implied, misrepresentation (*i*).

When silence is not misrepresentation.

1659. Except as already stated (*j*), mere silence or inaction neither constitutes, nor is equivalent or contributory to, misrepresentation, however amenable it may be to the consequences which ensue on a breach of that positive duty of disclosure which is imposed, under another head of jurisprudence, on parties standing to one another in certain relations, or engaged in transactions *uberrimæ fidei* (*k*), or however censurable it may be *in foro conscientiæ* (*l*). The

(*g*) *Nicholson* v. *Hooper* (1838), 4 My. & Cr. 179, 185, 186 ("it was the duty of the plaintiff, when informed that the defendants had on the faith of a certain assumed right advanced a large sum of money, to have apprised them of his intention to dispute it, but instead he confirmed them in the error into which they are supposed to have fallen, and himself derived benefit from the delusion so perpetuated").

(*h*) *Pilmore* v. *Hood* (1838), 5 Bing. (N. C.) 97, 107; *North British Insurance Co.* v. *Lloyd* (1854), 10 Exch. 523, 529 (one who knows that a false statement is being made to the representee by a third person, and "allows it in silence," is himself misrepresenting); *Hardman* v. *Booth* (1863), 1 H. & C. 803; *Cundy* v. *Lindsay* (1878), 3 App. Cas. 459, *per* Lord CAIRNS, L.C., at p. 465 ("they" (the jurors) "have found that by the form of the signatures to the letters which were written by Blenkarn, by the mode in which his letters and applications to the respondents were made out, and by the way in which he left uncorrected the mode and form in which, in turn, he was addressed by the respondents, he led and intended the respondents to believe that the person with whom they were communicating was not Blenkarn, the dishonest and irresponsible man, but was a well-known and solvent house of Blenkiron & Co., doing business in the same street").

(*i*) *Hamilton* v. *Watson* (1845), 12 Cl. & Fin. 109, 119, H. L.; *Lee* v. *Jones* (1864), 17 C. B. (N. S.) 482, 500, 503, 504; and *Phillips* v. *Foxall* (1872), L. R. 7 Q. B. 666, 679, which were suretyship cases. See also *Evans* v. *Edmonds* (1853), 13 C. B. 777, 784, 785 (a separation deed case), and *Cavendish Bentinck* v. *Fenn* (1887), 12 App. Cas. 652 (a principal and agent case), *per* Lord MACNAGHTEN, who, at p. 671, speaks of an agent who had concealed his interest as having "*so . . . represented*, in fact, that he was not interested in the property, and that it belonged to other persons who were not connected with the scheme." Similar rules prevail in connection with the law relating to representation by estoppel; see title ESTOPPEL, Vol. XIII. pp. 395—398.

(*j*) See pp. 681—683, *ante*, and the text, *supra*.

(*k*) See p. 760, *post*.

(*l*) As to the distinction between the ethical and the legal standard, see *Fox* v.

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reticence must amount to concealment or suppression, in order to make it an element in misrepresentation. In other words, there must be a duty of some sort to speak; no one can be said to conceal what he is not bound to reveal, nor to suppress what he need not express. Silence which does not make what is stated false (*m*), or tacit acquiescence in the self-deception of another, if nothing is said or done either to create or foster the delusion, draws with it no legal liability (*n*). But the courts have, nevertheless, been extremely alert to discern and detect anything in the history of a transaction, however slight,—the dropping of a single word, the merest hint or insinuation, even a gesture,—on the part of the representor, which may enable them, consistently with legal principle, to say that there is some evidence of a misrepresentation, and that the absolute silence, from first to last, to which alone the immunity claimed can attach, has been broken (*o*).

SUB-SECT. 4.—*Where Representation is compounded of Several Statements.*

Complex representations, how construed.

1660. Where the representation was compounded of several statements contained in one document (such as a prospectus, particulars of sale, and the like), or in a number of documents, or was made at one interview or series of interviews, the general rule of construction is that all the statements or documents must be considered in their entirety, and in their bearing upon one another,

Mackreth (1791), 2 Cox, Eq. Cas. 320, H. L.; *Smith* v. *Hughes* (1871), L. R. 6 Q. B. 597, 603, 604, 607; *Marnham* v. *Weaver* (1899), 80 L. T. 412, 413.

(*m*) See note (*a*), p. 683, *ante*.

(*n*) This principle, that silence as to matters which there is no duty to disclose can never be an implied representation, is expressed, applied, or illustrated in a variety of forms: *Fox* v. *Mackreth* (1791), 2 Cox, Eq. Cas. 320, H. L. (illustration of purchase of land, the purchaser knowing of a mine under it; no obligation to disclose this fact to vendor); *Turner* v. *Harvey* (1821), Jac. 169, *per* Lord ELDON, L.C., at p. 178 (the "mine" illustration figures again here); *Keates* v. *Cadogan* (*Earl*) (1851), 10 C. B. 591 (silence as to ruinous state of premises let); *Horsfall* v. *Thomas* (1862), 1 H. & C. 90, 100; *Ranger* v. *Great Western Rail. Co.* (1854), 5 H. L. Cas. 72, 86, 87 (nature of material to be excavated by contractor); *Phillips* v. *Homfray*, *Fothergill* v. *Phillips* (1871), 6 Ch. App. 770, 779 (illustration of purchase of picture by expert from one ignorant of its artistic value); *Smith* v. *Hughes*, *supra*, at pp. 603, 604, 607, 610, 611 (non-correction of a self-induced delusion of purchaser is not misrepresentation by vendor; COCKBURN, C.J., *ibid.*, at pp. 603, 604, again uses the "mine" illustration); *Coaks* v. *Boswell* (1886), 11 App. Cas. 232, 235, 236; *Marnham* v. *Weaver*, *supra* ("though a person may be deceived by another with the knowledge of a third person, if that third person is not a party to the deceit, and owes no legal duty or obligation to the party deceived, and does nothing but preserve silence, however morally blameworthy, he cannot be held liable at the instance of the party deceived"). The opinion of Lord ELLENBOROUGH, C.J., in the Nisi Prius case of *Hill* v. *Gray* (1816), 1 Stark. 434, if correctly and fully reported, is directly contrary to the principles above enunciated. Though never formally overruled, this case was obviously disapproved of by JERVIS, C.J., in *Keates* v. *Cadogan* (*Earl*), *supra*, at p. 600, and by Lord CHELMSFORD, L.C., in *Peek* v *Gurney* (1873), L. R. 6 H. L. 377, at pp. 390, 391, and cannot now be accepted as law.

(*o*) *Turner* v. *Harvey*, *supra*, *per* Lord ELDON, L.C., at p. 178; *Walters* v. *Morgan* (1861), 3 De G. F. & J. 718, 723, 724; *Thompson* v. *Lambert* (1868), 17 W. R. 111, 113; *Phillips* v. *Homfray*, *Fothergill* v. *Phillips*, *supra*, at pp. 777—780; and *Marnham* v. *Weaver*, *supra* (where the party was not a mere "passive spectator" of the deceit practised by the third party, but actively assisted in it).

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the primary object being to ascertain whether the conjoint effect of the whole complex representation is a true or false transcript of the whole of the facts (*p*). This general rule, however, is subject to the qualification that, if one out of the several statements or documents, not inseparably nor necessarily bound up with the others, has a clear and definite meaning by itself, and in that meaning is false or true, the representee or representor, as the case may be, is entitled to rely on this falsity or truth respectively, and it is no answer, in the former case, to say that, if the representee had examined the other statements and documents, he might have discovered something which would have led him to the truth, or, in the latter, to point to the imperfection and incompleteness of some other statement which does not purport to do more than refer to the true statement, such as an index or marginal note (*q*).

SUB-SECT. 5.—*Questions of Law and Fact as to Meaning of Representation.*

Questions of law and fact.

1661. If the representation is contained in a document, or if, when orally made, its terms are admitted, and there are no surrounding circumstances of such a nature as to suggest an artificial or special meaning, or the possibility of several meanings, the question of what sense should be attributed to it is a question of law, to this extent, that it is for the court to say whether it is capable of the meaning alleged, or, on the other hand, whether it admits of any interpretation other than that alleged (*r*). Subject to the above, every question as to the sense which the representation

(*p*) Illustrations of the rule in its application to a number of statements contained in one document, such as a prospectus, are the following:—*Cargill* v. *Bower* (1878), 10 Ch. D. 502, 516; *Re Metropolitan Coal Consumers' Association, Wainwright's Case* (1890), 63 L. T. 429, C. A.; *Aaron's Reefs* v. *Twiss*, [1896] A. C. 273, *per* Lord HALSBURY, L.C., at p. 281; *Component Tubes Co.* v. *Naylor*, [1900] 2 I. R. 1 (where one of the questions held to have been properly left to the jury was whether "the prospectus as a whole was substantially misleading and calculated to deceive"). In the following cases the rule was applied to the interpretation of the conjoint effect of a number of documents:—*Denny* v. *Hancock* (1870), 6 Ch. App. 1 (particulars of sale, and plan); *Cargill* v. *Bower*, *supra* (prospectus and relative documents); *Re Arnold, Arnold* v. *Arnold* (1880), 14 Ch. D. 270, C. A. (particulars of sale, and plan); *Drincqbier* v. *Wood*, [1899] 1 Ch. 393 (prospectus and covering letter); *Andrews* v. *Mockford*, [1896] 1 Q. B. 372, C. A. (prospectus and a following telegram published in the financial papers, to "strengthen the effect of the prospectus"). As to a number of statements in particulars of sale, see *Brandling* v. *Plummer* (1854), 2 Drew. 427, 430, 431. In all the above cases, except *Cargill* v. *Bower*, *supra*, the result of the examination of the entirety of the representations or documents was to show either that the whole was as false as each part, and each part as false as the whole, or that statements which, severally and *separatim*, were true, produced nevertheless, when taken together, a totally false impression. In *Cargill* v. *Bower*, *supra*, on the other hand, statements and documents, inaccurate or incomplete when construed singly, were held, in their conjoint effect, to be a substantially true transcript of the facts; so also in *Bartlett* v. *Salmon* (1855), 6 De G. M. & G. 33, 42.

(*q*) *Re Arnold, Arnold* v. *Arnold*, *supra*, at pp. 282, 284, is an example of the former type of case, and *Moore* v. *Explosives Co.* (1887), 56 L. J. (Q. B.) 235, C. A., illustrates the latter. As to the former, see, further, pp. 726, 727, *post*.

(*r*) *Bellairs* v. *Tucker* (1884), 13 Q. B. D. 562, 575; *Moore* v. *Explosives Co.*, *supra*.

in fact bore, or conveyed to the mind of the representee, is an issue of fact, as to which (in the case of a suggested special sense, at all events) evidence is admissible, and may even be necessary (*s*).

SECT. 4. Rules of Construction for determining the Question of Falsity.

Part V.—What Constitutes Fraudulent and Innocent Misrepresentation respectively.

SECT. 1.—*Fraudulent Misrepresentation.*

SUB-SECT. 1.—*In General.*

Fraud, as well as falsity, to be proved in certain cases.

1662. In cases of a certain class (*t*), the party complaining of having been misled by a representation, to his injury, has no remedy unless the representation was not only false, but fraudulent (*a*). It becomes therefore necessary to examine when a misrepresentation is deemed fraudulent and when innocent.

Fraudulent misrepresentation in law.

1663. Whether a representation is fraudulent or not in any particular case is a question of fact (*b*); but the question of what are the constitutive elements of fraud as applied to representations, is one of law in this sense, that it has been definitely settled by judicial authority.

SUB-SECT. 2.—*Fraud as distinguished from mere Falsity.*

"Fraudulent" means "actually and morally fraudulent."

1664. Fraud, in connection with representations, has the same meaning in all the courts whose province it is to consider it. There is no distinction between "legal" and "equitable" fraud (*c*), or between "legal" or "technical" fraud and "moral" or "personal" fraud (*d*); and there is no such thing as "imputed" or "constructive" fraud, if and so far as these expressions serve to suggest that any statement may be construed as fraudulent, which is not characterised by actual fraud, as the law has defined it.

Fraud is more than falsity.

1665. Fraud connotes more, and denotes less, than mere falsity. There cannot be a fraudulent representation which is not false, but there may be a false representation which is not fraudulent (*e*).

(*s*) *Woodhouse* v. *Swift* (1836), 7 C. & P. 310; *Foster* v. *Mentor Life Assurance Co.* (1854), 3 E. & B. 48, 71—74, 77—81; *Clarke* v. *Dickson* (1859), 6 C. B. (N. S.) 453, 469—471; *Charlton* v. *Hay* (1875), 32 L. T. 96; *Smith* v. *Chadwick* (1884), 9 App. Cas. 187, 195; and as to evidence being admissible and necessary, see *Sen Sen Co.* v. *Britten*, [1899] 1 Ch. 692, *per* STIRLING, J., at p. 696: "I have no evidence before me as to the effect which the representation has had upon anybody. I have nothing before me but the bare fact that these words appear upon the packages," and *Coleman & Co., Ltd.* v. *Smith (Stephen) & Co., Ltd.*, [1911] W. N. 223, C. A.

(*t*) See pp. 719, 720, *post.*

(*a*) The burden of proof in such cases is on the representee; see p. 725, *post.*

(*b*) See pp. 724, 725, *post.*

(*c*) *Le Lievre* v. *Gould*, [1893] 1 Q. B. 491, 498, C. A.; compare *Derry* v. *Peek* (1889), 14 App. Cas. 337.

(*d*) *Derry* v. *Peek*, *supra*; see the whole of Lord HERSCHELL'S judgment, *ibid.*, at pp. 359—380.

(*e*) "Every deceit comprehends a lie, but a deceit is more than a lie" (*per* BULLER, J., in *Pasley* v. *Freeman* (1789), 3 Term Rep. 51, 56).

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Untruth in fact does not of itself import a dishonest mind (*f*). Something more must be shown in order to render a misrepresentation fraudulent (*g*).

SUB-SECT. 3.—*Non-belief in Truth of Misrepresentation necessary and sufficient to render it Fraudulent.*

Non-belief in truth of misrepresentation renders it fraudulent.

1666. The exact extent and character of the additional elements required to render a false statement fraudulent was until 1889 a matter of some doubt and controversy. It has never been questioned that a misrepresentation known or believed by the representor to be false when made, is fraudulent; nor that when a man undertakes to state as an absolute and positive fact that which he does not know to be true, or as to which he has no knowledge at all, such a class of statement also is, if false, fraudulent as well (*h*); but it was not until 1843, in the Exchequer Chamber, that mere non-belief in the truth was definitely pronounced to be also indicative of fraud (*i*). Since that date the last proposition has been reasserted in a variety of forms and applied to a variety of representations and circumstances (*k*), but the substance and purport has always been identical; and it may now be taken as established beyond all question that, whenever a man makes a false statement which he does not actually and honestly believe to be true, that statement is, for purposes of civil liability, as fraudulent as if he had stated that which he did not know to be true, or knew or believed to be false; so that all the varying types of statement which are frequently described as separate classes of fraudulent misrepresentation are in truth nothing but species or

(*f*) Conversely, an intention to deceive does not necessarily involve that the statement made was untrue in fact; see note (*e*), p. 677, *ante*.

(*g*) "It is not enough to establish misrepresentation alone; it is conceded on all hands that something more must be proved, though it has been matter of controversy what additional elements are requisite" (*Derry* v. *Peek* (1889), 14 App. Cas. 337, *per* Lord HERSCHELL, at p. 359).

(*h*) *Pawson* v. *Watson* (1778), 2 Cowp. 785, 788; *Haycraft* v. *Creasy* (1801), 2 East, 92, 103; *Schneider* v. *Heath* (1813), 3 Camp. 506.

(*i*) *Taylor* v. *Ashton* (1843), 11 M. & W. 401, 415 ("it is not necessary to shew that the defendants knew the fact to be untrue; if they stated a fact which was untrue" ("true" in the report is an obvious clerical error and was so treated by Lord HERSCHELL in *Derry* v. *Peek*, *supra*, at p. 367) "for a fraudulent purpose, they at the same time not believing that fact to be true, in that case it would be both a legal and moral fraud").

(*k*) *Evans* v. *Edmonds* (1853), 13 C. B. 777, 786; *Rawlins* v. *Wickham* (1858), 3 De G. & J. 304, 316, 317; *Behn* v. *Burness* (1863), 3 B. & S. 751, 753, Ex. Ch.; *Reese River Silver Mining Co.* v. *Smith* (1869), L. R. 4 H. L. 64, where Lord CAIRNS, at pp. 79, 80, lays down that "if persons take upon themselves to make assertions as to which they are ignorant whether they are true or untrue"—by which expression, as pointed out by Lord HERSCHELL in *Derry* v. *Peek*, *supra*, at pp. 370, 371, conscious ignorance, or absence of belief, was obviously intended—"they must, in a civil point of view, be held as responsible as if they had asserted that which they knew to be untrue"; *Hart* v. *Swaine* (1877), 7 Ch. D. 42, 46, 47; *Arkwright* v. *Newbold* (1881), 17 Ch. D. 301, 320, C. A.; *Leddell* v. *McDougal* (1881), 29 W. R. 403, C. A.; *Edgington* v. *Fitzmaurice* (1885), 29 Ch. D. 459, 465, 466, 480—482, C. A.; *Derry* v. *Peek*, *supra*, at p. 374; *Angus* v. *Clifford*, [1891] 2 Ch. 449, 471, C. A.; *Pritty* v. *Child* (1902), 71 L. J. (K. B.) 512, *per* CHANNELL, J., at p. 514, who evidently thought that the water-finder's "reckless" statement might very well have been, though in fact it had not been, found fraudulent by the county court judge.

examples of one class, and, as such, are comprehended in the simple formula that any misrepresentation made without an actual and honest belief in its truth is deemed fraudulent (*l*). Proof of this absence of actual and honest belief is necessary, but, on the other hand, is sufficient, to satisfy the requirements of the law; and cases of misrepresentation made under such conditions, with the added elements of a wicked indifference or recklessness as to its truth or falsity (*m*), or a positive suspicion, belief, or knowledge of its untruth, are only so many *a fortiori* instances of the fraud which is constituted by the one necessary element above indicated (*n*).

Non-belief means absence of actual and honest belief.

1667. The belief which is required to save a misrepresentation from being deemed fraudulent is a belief which is genuine, not only in the sense that it was actual and real, but in the sense that it was honest. A belief, though in fact entertained by the representor, may have been itself the outcome of a fraudulent diligence in ignorance—that is, of a wilful abstention from all sources of information which might lead to suspicion, and a sedulous avoidance of all possible avenues to the truth, for the express purpose of not having any doubt thrown on what he desires and is determined to, and afterwards does (in a sense), believe. A state of mind so engendered renders the misrepresentation as fraudulent as if the representor had never entertained any belief at all (*o*).

(*l*) In *Derry* v. *Peek* (1889), 14 App. Cas. 337, at p. 374, Lord HERSCHELL, after reviewing the authorities on this question, deduces the following results, "fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and the third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent there must I think, always be an honest belief in its truth, and this probably covers the whole ground, for one who knowingly alleges that which is false has obviously no such honest belief."

(*m*) See, for instance, *Behn* v. *Burness* (1863), 3 B. & S. 751, 753, Ex. Ch. ("reckless ignorance whether it may be true or untrue"); *Arkwright* v. *Newbold* (1881), 17 Ch. D. 301, 320, C. A. ("reckless disregard as to whether it is or is not true"); *Edgington* v. *Fitzmaurice* (1885), 29 Ch. D. 459, 465, 466, 480—482, C. A. ("in a gambling spirit, without properly inquiring into the truth or falsity of the thing, without caring sufficiently whether it is true or false, and will, or will not, mislead people"); *Angus* v. *Clifford*, [1891] 2 Ch. 449, 471, C. A. (where BOWEN, L.J., enlarges on the "moral obliquity which consists in the wilful disregard of the importance of truth"). It is obvious, however, that these added elements are not necessary ingredients in the legal concept of fraudulent misrepresentation, and that "reckless" statements are only instances, with circumstances of aggravation, of a statement made without honest belief in its truth. If, in fact, the representor does not believe his representation to be true, it is utterly immaterial in what spirit—speculative, indifferent, or deliberate—he propounds it. The mere propounding is the fraud.

(*n*) See note (*i*), p. 688, *ante*.

(*o*) *Derry* v. *Peek*, *supra*, *per* Lord HERSCHELL, at p. 376 ("if I thought that a person making a false statement had shut his eyes to the facts, or purposely abstained from inquiring into them, I should hold that honest belief was absent, and that he was just as fraudulent as if he had knowingly stated that which was false"). Compare *Shrewsbury* v. *Blount* (1841), 2 Man. & G. 475, 507,

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SUB-SECT. 4.—*Immateriality of Representor's Motive or Intention.*

Irrelevancy of representor's motive.

1668. It results from the foregoing definition of "fraudulent misrepresentation" that, given the one necessary condition already indicated, the motive or intention of the representor in making the misrepresentation is wholly irrelevant (*p*). It may be that he intended to injure the representee without benefiting himself, or to benefit himself without injuring the representee (*q*); it may be that he did not intend to do either, but solely to benefit a third person (*r*), or even the representee himself (*s*), or otherwise to do right (*t*). Or, lastly, he may have acted with no intelligible or rational motive whatsoever and told a lie from mere caprice, mischievousness, or stupidity (*a*). In all these cases alike, provided only that there was an absence of actual and honest belief in the truth of his assertion, the misrepresentation is accounted fraudulent, and no proof of a wicked, or any, intention on the part of the representor is required by the law; or (as it is sometimes put), if it is necessary to establish an intention to deceive or injure, such intention is immediately and irrebuttably presumed in law from the mere act of making the misrepresentation without such belief (*b*).

where, however, the terms "really" and "honestly" appear to be used convertibly.

(*p*) *Stone* v. *Compton* (1838), 5 Bing. (N. C.) 142, 155, 156; *Crawshay* v. *Thompson* (1842), 4 Man. & G. 357, 382; *Derry* v. *Peek* (1889), 14 App. Cas. 337, 374.

(*q*) *Evans* v. *Edmonds* (1853), 13 C. B. 777, 786.

(*r*) *Pasley* v. *Freeman* (1789), 3 Term Rep. 51, *per* BULLER, J., at p. 58 ("if A. by fraud and deceit cheat B. out of £1,000, it makes no difference to B. whether A., or any other person, pockets that £1,000"); *Foster* v. *Charles* (1830), 7 Bing. 105, 106, 107; *Polhill* v. *Walter* (1832), 3 B. & Ad. 114, 123, 124; *Milne* v. *Marwood* (1855), 15 C. B. 778, 783; *Denton* v. *Great Northern Rail. Co.* (1856), 5 E. & B. 860 (where the inaccuracy in the time-table obviously could not have been intended either to injure the plaintiff or to benefit the railway company); *Peek* v. *Gurney* (1873), L. R. 6 H. L. 377, 409, 410; *Leddell* v. *McDougal* (1881), 29 W. R. 403, C. A.; *Arnison* v. *Smith* (1889), 41 Ch. D. 348, C. A., *per* Lord HALSBURY, L.C., at p 368 ("if men tell for business purposes what in plain English is called a lie, they are guilty of fraud, and to talk about their having had no intention to deceive is no more a defence than it would be a defence to a prosecution for forging a bill of exchange to say that the forger meant to pay it when it became due"); compare *ibid.*, *per* LINDLEY, L.J., at pp. 372, 373.

(*s*) *Leddell* v. *McDougal*, *supra*; *Smith* v. *Chadwick* (1884), 9 App. Cas. 187, 201.

(*t*) *Foster* v. *Charles*, *supra*, at p. 107; *Re McCallum*, *McCallum* v. *McCallum* (1900), 83 L. T. 717, 718, 725, C. A.

(*a*) Examples are *Richardson* v. *Silvester* (1873), L. R. 9 Q. B. 34, 36 (where, for aught that appeared in allegation or proof, the defendant's implied misrepresentation that he had a farm to let was absolutely motiveless, but it was none the less held fraudulent in law); and *Wilkinson* v. *Downton*, [1897] 2 Q. B. 57 (a case of a so-called "practical joke").

(*b*) *Foster* v. *Charles* (1830), 6 Bing. 396, 403; *Corbett* v. *Brown* (1831), 8 Bing. 33, 37; *Crawshay* v. *Thompson*, *supra*; *Smith* v. *Chadwick*, *supra*, at p. 190; *Coaks* v. *Boswell* (1886), 11 App. Cas. 232, 236 (in the case of "a communication which would be necessarily, or naturally and probably, misleading, . . . a man is presumed to intend the necessary or natural consequences of his own words and acts, and the *evidentia rei* would therefore be sufficient without other proof of intention"); *Arnison* v. *Smith*, *supra*, at p. 372; *Wilkinson* v. *Downton*, *supra*, at p. 59.

SUB-SECT. 5.—*When Non-belief must be shown to have existed.*

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1669. It is generally stated, or assumed, that to render a misrepresentation fraudulent, it is necessary and sufficient to show that the representor did not believe in its truth when making it; and in the ordinary type of case, where either there is no interval of time between the making of the misrepresentation and the representee's alteration of position on the faith of it, or no change in the situation takes place during any such interval, there is nothing substantially inaccurate or misleading in the form in which this proposition is expressed. But in any case where the representation is a continuing one, and where there is an alteration of circumstances, or of the representor's state of belief, in the interim, it becomes a question whether the usual mode of stating the rule is adequate, and whether the latter of the two terminal dates is not that at which the condition of the representor's mind, with a view to determining whether the misrepresentation was fraudulent or not, is to be investigated.

When the absence of belief must have existed: (i.) where no change in situation; (ii.) where circumstances have altered.

The change in the situation may assume either of two forms. On the one hand the representor may discover, during the intervening period, that his original statement was false when he made it, though he then honestly believed it to be true; in which case it is quite clear that the misrepresentation must be deemed to have been fraudulent when acted upon, and that the later, and not the earlier, date is the only relevant one (*c*). Or, on the other hand, the representation, though it was, when made, in substantial accordance with the facts then existing, may, by reason of supervening events within the knowledge of the representor, become in substantial disaccord with the facts existing at the date of the representee's alteration of position. The mere occurrence of these events undoubtedly renders the representation false in fact at the later date (*d*). Further, it is equally clear that such occurrence, coupled with the representor's knowledge, gives rise, immediately on his discovery, to a duty of disclosure, the violation of which renders him liable to proceedings for rescission at the suit of the representee (*e*). In such proceedings, however, it is not necessary to allege or prove that the misrepresentation was fraudulent. The question is, whether, under the conditions stated, there is any liability in damages, where proof of fraud is required. There is no direct decision on the point (*f*); but it is submitted that, in

Nature of change in circumstances.

(*c*) *Jarrett* v. *Kennedy* (1848), 6 C. B. 319, 323; *Reynell* v. *Sprye*, *Sprye* v. *Reynell* (1882), 1 De G. M. & G. 660, 709, C. A.; *Browalie* v. *Campbell* (1880), 5 App. Cas. 925, 950.

(*d*) See pp. 678, 679, *ante*.

(*e*) *Davies* v. *London and Provincial Marine Insurance Co.* (1878), 8 Ch. D. 469, 475; *Arkwright* v. *Newbold* (1881), 17 Ch. D. 301, C. A., *per* FRY, J., at p. 310, whose opinion as to the mere existence of the duty to disclose was not dissented from by the Court of Appeal. The duty to disclose must be discharged promptly and in no ambiguous language, such as that which characterised the pretended corrective circular in *Arnison* v. *Smith* (1889), 41 Ch. D. 348, C. A. (see *ibid.*, pp. 370—373).

(*f*) Though it has been agitated and discussed in some of the cases. Weighty opinions have been expressed on either side. The representor, under circumstances of the character stated in the text, was held liable in an action of deceit

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accordance with principle and the general current of authority, the answer to the question should be in the affirmative (*g*).

SECT. 2.—*Innocent Misrepresentation.*

SUB-SECT. 1.—*Actual Honest Belief in Truth of Misrepresentation.*

Actual honest belief in truth of misrepresentation is innocence.

1670. A misrepresentation must be either fraudulent or innocent. It cannot be both. Fraud and innocence, just as much as falsity and truth, are mutually exclusive categories. It follows, therefore, from the definition already given of a fraudulent misrepresentation, as connoting the absence of actual honest belief in its truth, that the connotation of an innocent misrepresentation is the presence of such actual honest belief (*h*); and that, in neither case, is anything more than this absence, or presence, required to constitute fraud or innocence respectively.

SUB-SECT. 2.—*Effect of Negligent or Unreasonable Belief.*

Existence of honest belief consistent with negligence or unreasonableness or incompetence in forming it.

1671. It is well established that a misrepresentation which was founded on a belief in its truth, if that belief really existed, and was genuinely and honestly entertained (*i*), is not deprived of its character of innocence by reason of the mere fact that the belief resulted from want of care, skill, or competence, or lapse of memory, though such conduct, in other aspects, may have been of a most culpable character (*k*). Negligence is not dishonesty (*l*); indeed, it

(which involves that the misrepresentation was deemed fraudulent) in *Adamson* v. *Jervis* (1827), 4 Bing. 66, 74, and in *Denton* v. *Great Northern Rail. Co.* (1856), 5 E. & B. 860, 866, 867. In *Traill* v. *Baring* (1864), 4 De G. J. & Sm. 318, C. A., it seems to have been thought that, in the case of an implied representation of intention, which was originally in fact entertained by the representors, who, however, changed their minds afterwards, and before the representees acted on the faith of it, the failure to discharge the duty of immediate disclosure of the altered circumstances rendered the misrepresentation, "in the eyes of the court," fraudulent, though it was not necessary to decide the question. Compare the two propositions enunciated in *Brownlie* v. *Campbell* (1880), 5 App. Cas. 925, at p. 950, by Lord BLACKBURN, from the latter of which it would appear that he would have considered such a case as that stated in the text a case of fraud. On the other hand, in *Arkwright* v. *Newbold* (1881), 17 Ch. D. 301, C. A., at p. 325, COTTON, L.J., expresses doubt, and JAMES, L.J., *ibid.*, at p. 329, in a supplement to his judgment, takes occasion to express positive dissent from this view. The opinions, however, of the Lords Justices form no part of the *ratio decidendi*; COTTON, L.J., indeed, emphatically disclaimed any intention of deciding anything on the question; and no reasons were given by either of them.

(*g*) If the date of acting on a continuing representation is the date to be regarded for the purpose of determining its falsity or truth, as it clearly is (see pp. 678, 679, *ante*), it is difficult, on principle, to see why it is not also the material date for the purpose of determining its fraud or innocence.

(*h*) *Collins* v. *Evans* (1844), 5 Q. B. 820, 827, 830, Ex. Ch.; *Derry* v. *Peek* (1889), 14 App. Cas. 337, *per* Lord HERSCHELL, at pp. 374—376; *Angus* v. *Clifford*, [1891] 2 Ch. 449, C. A., *per* BOWEN, L.J., at pp. 463, 464; *Low* v. *Bouverie* [1891] 3 Ch. 82, 105, C. A.; *Le Lievre* v. *Gould*, [1893] 1 Q. B. 491, 503, C. A.

(*i*) As to what "honesty" means in this connection, see p. 679, *ante*.

(*k*) Which was the case in *Arkwright* v. *Newbold*, *supra* (the successful defendant being on that account deprived of his costs), and, to some extent, in *Derry* v. *Peek*, *supra*, *per* Lord HERSCHELL, at p. 376.

(*l*) *Evans* v. *Bicknell* (1801), 6 Ves. 174, *per* Lord ELDON, L.C., at pp. 188, 191, 192; *Taylor* v. *Ashton* (1843), 11 M. & W. 401, 415; *Dickson* v. *Reuter's*

is its direct antithesis (*m*). It has been stated that, though negligence does not amount to fraud, it may, if very gross, constitute evidence of it (*n*). But the true meaning of this elliptical expression is that there may be cases in which the alleged want of care would, on this hypothesis, be so utterly abnormal that the tribunal appointed to determine the question of fact would be justified in preferring the alternative hypothesis of want of honesty (*o*). Carelessness or stupidity in arriving at a genuine conviction ought not to be, though it frequently has been, confounded with that moral recklessness or callousness, already referred to (*p*), which prompts the putting forward of a misrepresentation as to which the representor has no belief at all (*q*). Similarly, absence of reasonable grounds for the representor's belief, if in fact it was a real and genuine belief, does not of itself constitute, or indicate fraud (*r*); though, here again, there may be cases where the alleged belief, if it ever existed at all, must have been based on grounds so utterly preposterous as to compel the inference that in fact it never

Telegram Co. (1877), 3 C. P. D. 1, 6, C. A.; *Derry* v. *Peek* (1889), 14 App. Cas. 337, 361; *Angus* v. *Clifford*, [1891] 2 Ch. 449, 462—468, C. A.; *Thodon* v. *Tindall* (1891), 65 L. T. 343; *Le Lievre* v. *Gould*, [1893] 1 Q. B. 491, 501, C. A.

(*m*) *Kettlewell* v. *Watson* (1882), 21 Ch. D. 685, *per* FRY, J., at p. 706 (a case of "constructive notice" by wilful abstention from inquiry).

(*n*) For instance, in *Evans* v. *Bicknell* (1801), 6 Ves. 174, *per* Lord ELDON, L.C., at pp. 190, 191; in *Derry* v. *Peek*, *supra*, *per* Lord HERSCHELL, at p. 369; and in the two passages cited in note (*o*), *infra*.

(*o*) *Western Bank of Scotland* v. *Addie*, *Addie* v. *Western Bank of Scotland* (1867), L. R. 1 Sc. & Div. 145, *per* Lord CRANWORTH, at p. 168: "if a little more care and caution must have led the directors to a conclusion different from that which they put forth, this may afford strong evidence to show that they really did not believe in the truth of what they stated, and so that they were guilty of fraud"; *Le Lievre* v. *Gould*, *supra*, *per* BOWEN, L.J., at p. 500: "if the case had been tried by a jury, the judge would have pointed out to them that gross negligence might amount to evidence of fraud, if it was so gross as to be incompatible with the idea of honesty, but even gross negligence, in the absence of dishonesty, did not of itself amount to fraud."

(*p*) See p. 689, *ante*.

(*q*) *Derry* v. *Peek*, *supra*, *per* Lord HERSCHELL, at p. 361: "to make a statement careless whether it is true or false, and therefore without any real belief in its truth, appears to me to be an essentially different thing from making, through want of care, a false statement, which is nevertheless honestly believed to be true"; *Le Lievre* v. *Gould*, *supra*, *per* BOWEN, L.J., at p. 501: "that expression" (*i.e.*, the expression "not knowing or caring whether the statement was true or false") "did not mean not taking care to find out whether the statement was true or false; it meant not caring in the man's own heart and conscience whether it was true or false,—and that would be wicked indifference and recklessness."

(*r*) The first distinct judicial enunciation of this heresy is to be found in *Western Bank of Scotland* v. *Addie*, *Addie* v. *Western Bank of Scotland*, *supra*, *per* Lord CHELMSFORD, L.C., at p. 162, but, in the same case, Lord CRANWORTH, at p. 168, expressed at once his emphatic dissent. These, however, were individual opinions, and there was no decision to that effect until that of the Court of Appeal in *Peek* v. *Derry* (1887), 37 Ch. D. 541, C. A., which was reversed in the House of Lords *sub nom. Derry* v. *Peek*, *supra*. In this authority is to be found the last word on the subject. It was acted upon and applied by the Court of Appeal in *Glasier* v. *Rolls* (1889), 42 Ch. D. 436, C. A., immediately afterwards, and in numerous subsequent cases, already cited. As regards prospectuses of companies, the legislature, in 1890, intervened to vary the law; see title COMPANIES, Vol. V., pp. 186—140.

SECT. 2. Innocent Misrepresentation.

did exist (*s*). On the same principle actual failure to recollect a fact, the omission of which renders the representation false, does not of itself render it fraudulent also (*t*).

Part VI.—Inducement and Materiality.

SECT. 1.—*In General.*

Inducement and materiality are separate and essential elements in proceedings for misrepresentation.

1672. No misrepresentation, however gross or fraudulent, draws with it any civil consequences, unless it operated both to influence the mind and to affect the interests of the representee. The first of these essentials introduces the questions of inducement and materiality; the second, those of alteration of position and damage (*u*). As regards the former (*a*), the first rule to be borne in mind is that inducement in fact, and materiality (a tendency to induce), are wholly distinct and separate matters, and that, in any form of proceeding (*b*), it is necessary to establish both the one and the other (*c*).

(*s*) *Derry* v. *Peek* (1889), 14 App. Cas. 337, *per* Lord HERSCHELL, at p. 369: "a consideration of the grounds of belief is no doubt an important aid in ascertaining whether the belief was really entertained. A man's mere assertion that he believed the statement he made to be true is not accepted as conclusive proof that he did so. There may be such an absence of reasonable ground for his belief as, in spite of his assertion, to carry conviction to the mind that he had not really the belief which he alleges"; compare also *ibid.*, pp. 375, 376, 380.

(*t*) *Bain* v. *Fothergill* (1874), L. R. 7 H. L. 158, 212; *Mathias* v. *Yetts* (1882), 46 L. T. 497, 506, C. A.; *Low* v. *Bouverie*, [1891] 3 Ch. 82, 101, 106, C. A. In the last case the apparently conflicting opinions expressed in *Burrowes* v. *Lock* (1805), 10 Ves. 470—unless that case is to be treated as one of estoppel only—and in *Slim* v. *Croucher* (1860), 1 De G. F. & J. 518, are definitely overruled. Where the misrepresentation is only the subject of rescission proceedings, in which fraud is irrelevant and honesty no answer, the fact that the omitted matter had escaped the representor's memory is no answer either (*Mathias* v. *Yetts*, *supra*, at pp. 502, 504). So also if a man chooses to state a thing as an absolute fact within his own knowledge (*Brownlie* v. *Campbell* (1880), 5 App. Cas. 925, 936, 945, 953). The same principle is applied to cases of mistake; see title MISTAKE.

(*u*) Alteration of position and damage are the subject of pp. 703—707, *post*.

(*a*) Which is the subject of this part of the title; see the text, *infra*, and pp. 695—703, *post*.

(*b*) See pp. 724—728, *post*.

(*c*) *Smith* v. *Chadwick* (1884), 9 App. Cas. 187, *per* Lord SELBORNE, L.C., at p. 190: "he must establish that this fraud was an inducing cause to the contract, for which purpose it must be material, and it must have produced in his mind an erroneous belief, influencing his conduct." No doubt there may be extreme cases in which actual inducement may be inferred as a fact from obvious materiality—as to which, see pp. 701, 702, *post*—but this does not negative the proposition that the issues are separate. An express warranty or condition gets rid of all questions both of inducement and materiality; see *Pawson* v. *Watson* (1778), 2 Cowp. 785, 788—790; *Attwood* v. *Small* (1838), 6 Cl. & Fin. 232, 444, H. L.; *Thomson* v. *Weems* (1884), 9 App. Cas. 671, 683, 684, 689; *Hambrough* v. *Mutual Life Insurance Co. of New York* (1895), 72 L. T. 140, C. A., and insurance cases generally, as to which see title INSURANCE, Vol. XVII., pp. 412 *et seq.*

SECT. 2.—*Inducement.*

SUB-SECT. 1.—*In General.*

Inducement in fact must be shown.

1673. Actual inducement must be shown, irrespective of materiality. In other words, however antecedently probable it may have been in any case that the misrepresentation alleged would influence a normal person to take just the steps which he did, yet, if in fact he was not so influenced, he has no cause of action (*d*).

SUB-SECT. 2.—*What Actual Inducement includes.*

What actual inducement means.

1674. The inducement which the representee is required to establish means an inducement which was both the object and the result of the representation (*e*). Neither element suffices without the other.

Intention to induce, without result, is insufficient.

1675. The first of the above two propositions, namely, that there is nothing actionable in a proved intention to induce which fails of its effect altogether, is obvious. A naked lie (*f*), or a lie in gross, as it has otherwise been expressed (*g*), or a *dolus* which never *dedit locum contractui* (*h*), or an attempt to overreach, which missed its mark and was not *cum fructu* (*i*), comes to nothing (*k*).

Inducement in fact, without proved, or presumed, intention to induce, is insufficient.

1676. The converse proposition is not so obvious, but is equally well established. It is not every false statement by which a man

(*d*) For instance, nothing could have been more calculated to influence the representee's mind than the prospectus and scrip certificates in *Shrewsbury* v. *Blount* (1841), 2 Man. & G. 475, yet, the jury having found the contrary, the court declined to interfere. So, in *Smith* v. *Chadwick* (1884), 9 App. Cas. 187, it was obvious (see *ibid.*, at pp. 190, 194) that a certain statement in the prospectus, which was false, was of a nature to make a deep impression on a person in the position of the plaintiff, but, since the plaintiff had admitted in cross-examination that in fact it had not influenced him in the least, the court could only consider those statements in the prospectus on which he did profess to rely, and as to which he failed to prove either falsity or inducement.

(*e*) This proposition is frequently expressed in the formula of the Roman jurists that the misrepresentation must be one *dans locum contractui*.

(*f*) The expression of BULLER, J., in *Pasley* v. *Freeman* (1789), 3 Term Rep. 51, 56, "an action cannot be supported for telling a bare naked lie."

(*g*) By NORTH, J., in *Archer* v. *Stone* (1898), 78 L. T. 34, distinguishing the type of lie so described from a "lie appurtenant," which he defines as "a lie relating to any part of the contract, or its subject-matter, which induces another person to contract."

(*h*) *Attwood* v. *Small* (1838), 6 Cl. & Fin. 232, H. L.

(*i*) *Ibid.*, *per* Lord BROUGHAM, at pp. 447, 448.

(*k*) *Coaks* v. *Boswell* (1886), 11 App. Cas. 232, 236 ("if the vendor was not in fact misled, the contract could not be set aside"). Instances of failure to prove inducement in fact, and consequent failure to obtain relief, are: *Flinn* v. *Headlam* (1829), 9 B. & C. 693; *Attwood* v. *Small*, *supra*; *Shrewsbury* v. *Blount*, *supra*; *Vigers* v. *Pike* (1842), 8 Cl. & Fin. 562, H. L.; *Hills* v. *Balls* (1857), 2 H. & N. 299; *Re Northumberland and Durham District Banking Co.*, *Ex parte Bigge* (1858), 28 L. J. (CH.) 50; *Horsfall* v. *Thomas* (1862), 1 H. & C. 90; *Way* v. *Hearn* (1862), 13 C. B. (N. S.) 292, 305, 307; *Mathias* v. *Yetts* (1882), 46 L. T. 497, 502, 504, C. A.; *Bellairs* v. *Tucker* (1884), 13 Q. B. D. 562, 578, 582; *Salaman* v. *Warner* (1891), 65 L. T. 132, C. A.; *Wasteneys* v. *Wasteneys*, [1900] A. C. 446, 451, P. C.; *Baty* v. *Keswick* (1901), 85 L. T. 18; *Stevens* v. *Hoare* (1904), 20 T. L. R. 407; *Sleigh* v. *Glasgow and Transvaal Options, Ltd.* (1904), 6 F. (Ct. of Sess.) 420; *Seddon* v. *North Eastern Salt Co., Ltd.*, [1905] 1 Ch. 326, 335; *Gamage (A. W.), Ltd.* v. *Charlesworth*, [1910] S. C. 257.

SECT. 2. Inducement.

is in fact induced to alter his position for the worse which gives a right of action (*l*), but only such as the representor, either in fact or in contemplation of law, intended to operate as an inducement. There must have been, on the part of the representor, in order to render him liable, an actual or presumptive design to induce the representee, or a class of which he is a member, to act upon the misrepresentation in a particular manner.

When intention presumed.

This purpose is presumed on proof of the making of a statement which the representor must have foreseen would necessarily, or probably (in the ordinary course of events, or in the special circumstances of the case) produce the kind of effect on the representee's mind which it in fact produced.

When direct evidence essential.

Where the misrepresentation was made *alio intuitu*, and without having in mind, either in fact or presumptively, the representee, or any class to which he belongs, no such intent is implied, and it must be established, if at all, by direct evidence (*m*). Nor can a representee be heard to say that the representor intended to mislead him by a statement made in answer to a question which he (the representee) had no right to ask (*n*), or where the representor was

(*l*) If this were so, "a man might sue his neighbour for having a conspicuous clock too slow, since the plaintiff might be thereby prevented from attending to some duty, or acquiring some benefit" (*Barley* v. *Walford* (1846), 9 Q. B. 197, 208); or if "a person coming from abroad publishes a false account of a mining district, a party going out, and suffering loss, would be entitled to sue" (*Gerhard* v. *Bates* (1853), 2 E. & B. 476, 485); or "if, in a public directory, there were the statement of an address of a firm, which was inaccurate, any one of the public who had to pay for a journey to go to that place to do business with that firm would have a cause of action against the proprietors of that directory for that statement" (*Thiodon* v. *Tindall* (1891), 65 L. T. 343, 348).

(*m*) *Salaman* v. *Warner* (1891), 65 L. T. 132, C. A. (statement of claim containing no averment of an intention to induce struck out). On the other hand, the declaration in *Barley* v. *Walford*, *supra*, and in *Gerhard* v. *Bates*, *supra*, did contain sufficient allegations of such intention, and, in each case, the demurrer was overruled. As regards proof, the following are cases where, on failure to show either an express or an implied purpose to induce, notwithstanding that inducement in fact was proved or admitted, the representee was refused relief:—*Way* v. *Hearn* (1862), 13 C. B. (N. S.) 292, 303, 305, 307; *New Brunswick and Canada Railway and Land Co.* v. *Conybeare* (1862), 9 H. L. Cas. 711; *Thiodon* v. *Tindall*, *supra*; *Baty* v. *Keswick* (1901), 85 L. T. 18; *Sleigh* v. *Glasgow and Transvaal Options, Ltd.* (1904), 6 F. (Ct. of Sess.) 420. Contrast *Andrews* v. *Mockford*, [1896] 1 Q. B. 372, C. A., and *Gordon* v. *Street*, [1899] 2 Q. B. 641, C. A., in each of which cases the representation would have appeared antecedently unlikely to influence the representee, but where, nevertheless, it was alleged and proved, and the representee accordingly established his claim in the first case, and his defence in the second. On this question of intent to induce, see also the cases cited in the notes to pp. 715—719, *post*; and, as regards estoppel by representation, to which precisely the same rules apply, see title ESTOPPEL, Vol. XIII., p. 383.

(*n*) *Collins* v. *Cave* (1859), 4 H. & N. 225, 232 ("a simple lie where the party is under no obligation to tell the truth, gives no cause of action"). Thus, in *Low* v. *Bouverie*, [1891] 3 Ch. 82, C. A., which overruled *Slim* v. *Croucher* (1860), 1 De G. F. & J. 518, it was held that a gratuitous and voluntary answer by a trustee to a request for information as to the incumbrances on the proposed borrower's reversionary interests, which had been made by a money-lender, a perfect stranger, could not possibly give the money-lender any cause of action, because, though incorrect, and acted upon in fact by him to his loss, the misrepresentation was clearly not intended to induce the money-lender to do anything.

not only under no duty to give information correctly, but was under a positive duty to give it falsely (*o*).

SUB-SECT. 3.—*What Actual Inducement does not include.*

Sufficient to prove that representation was an inducing cause.

1677. It is sufficient to prove that the misrepresentation was an inducing cause, though it may not have been the inducing cause. When once it is established that it had an influence on the mind and conduct of the representee, the law places no burden on him, and confers no right on the representor, of instituting a conjectural inquiry as to what would have happened if certain things had been said which in fact were not said, or had been said differently (*p*).

Inducing cause need not be the sole inducement.

1678. Further, if once it is shown that the misrepresentation was an inducing cause, it is no answer to suggest, or prove, that other considerations co-existed and co-operated with the misrepresentation in producing the result. These matters are *res inter alios actæ*, and it does not lie in the wrongdoing representor's mouth to set them up. If, as against him, the misrepresentation was the sole inducement, it need not have been the sole inducement in any other sense (*q*).

SUB-SECT. 4.—*Entirety of the Statements or Documents to be considered, if more than one.*

Entirety of connected statements or documents to be considered

1679. Where the inducing cause is alleged to be a document (such as a prospectus, advertisement, circular, or the like), or a batch of documents, containing a number of statements, more or less interconnected, either by express reference and incorporation, or by community of subject-matter, it is a primary rule that for the purpose of determining the issue of inducement, the conjoint effect on the representee's mind of the entirety of the statements or documents, in their mutual relation to and qualification of one another, is the question to be considered, rather than the effect of any particular statement or document apart from the others (*r*).

(*o*) The case put by BRAMWELL, B., in *Cave* v. *Mills* (1862), 7 H. & N. 913 at p. 930, where there is not only no obligation to tell the truth, but there is a positive "duty or obligation the other way, which, it might be said, would be, when one sought to buy poison to murder another."

(*p*) *Reynell* v. *Sprye*, *Sprye* v. *Reynell* (1852), 1 De G. M. & G. 660, C. A.; *Smith* v. *Kay* (1859), 7 H. L. Cas. 750, *per* Lord CHELMSFORD, L.C., at p. 759 ("can it be permitted to a party who has practised a deception, with a view to a particular end which has been attained by it, to speculate on what might have been the result if there had been a full communication of the facts?"); *Re London and Leeds Bank, Ex parte Carling*, *Carling* v. *London and Leeds Bank* (1887), 56 L. J. (CH.) 321, 323, 324; *Gordon* v. *Street*, [1899] 2 Q. B. 641, 646, C. A., and *Drincqbier* v. *Wood*, [1899] 1 Ch. 393, 400.

(*q*) *Attwood* v. *Small* (1838), 6 Cl. & Fin. 232, 448, H. L.; *Tatton* v. *Wade* (1856), 18 C. B. 371, 385, 387, 388, Ex. Ch.; *Re Royal British Bank, Nicol's Case* (1859), 3 De G. & J. 387, 422; *Higgins* v. *Samels* (1862), 2 John. & H. 460, 468; *Mathias* v. *Yetts* (1882), 46 L. T. 497, 502, C. A.; *Edgington* v. *Fitzmaurice* (1885), 29 Ch. D. 459, 480, 481, 483, 484, 485, C. A.; *Re London and Leeds Bank, Ex parte Carling*, *Carling* v. *London and Leeds Bank*, *supra*; *Drincqbier* v. *Wood*, *supra*, at pp. 404, 405.

(*r*) *New Brunswick and Canada Railway and Land Co.* v. *Muggeridge* (1860),

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Where no right to have entirety considered.

On the other hand, in the case of two or more statements and documents not so connected, the representee has a right to allege, and, if he can, prove, that he relied on one of them without reference to, or even seeing or reading, the other or others, or that he relied upon each of them separately and independently; and in every such case the representor has no right, as in the former type of case he might have, to insist on all of them being read together and in the light of one another (*s*).

SUB-SECT. 5.—*When Representee must assign a Meaning to the Representation, and prove that he was induced by it in that Meaning.*

When the representee must state the sense which he put upon the representation, and in which he was induced.

1680. Where the representation is fairly capable of two or more constructions, in one of which it would be false and in the other of others true, but not otherwise, it is incumbent on the representee to allege, and prove, in which of its possible meanings he understood it, and, so understanding, was induced by it to alter his position (*t*). He cannot, in such a case, content himself with protesting that the words mean what they say, or leave it to the court to find out not only what they mean—this the court must always do—but what he thought they meant. If he declines this burden he fails in the action, though the representation be proved untrue in one of the senses of which it is capable, because he has, in that event, presented a case without any proof of inducement (*a*).

SECT. 3.—*Materiality.*

SUB-SECT. 1.—*What Materiality means.*

Definition of materiality.

1681. A representation is material (*b*) when its tendency, or its natural and probable result, is to induce the representee to act on the faith of it in the kind of way in which he is proved to have in fact acted (*c*).

1 Drew. & Sm. 363, 379, 380; *Arnison* v. *Smith* (1889), 41 Ch. D. 348, C. A. (*per* Lord HALSBURY, L.C., at p. 369, a passage in which the rule, and the reasons for it, find their best expression); *Aaron's Reefs* v. *Twiss*, [1896] A. C. 273, 280, 291, H. L.; *Andrews* v. *Mockford*, [1896] 1 Q. B. 372, 382, 383, C. A.; *Drinqbier* v. *Wood*, [1899] 1 Ch. 393, 404; *McConnel* v. *Wright*, [1903] 1 Ch. 546, 551, C. A.

(*s*) As to when a representor is, and when he is not, entitled to exculpate himself by reference to other statements or documents, see pp. 726, 727, 729, *post*.

(*t*) This is the same proposition, in an inverted form, as that contained in p. 680, *ante*; see the authorities cited in note (*s*) thereto; and *Capel & Co.* v. *Sim's Ships Composition Co.* (1888), 58 L. T. 807, 808, 809.

(*a*) *Smith* v. *Chadwick* (1884), 9 App. Cas. 187, and the observations of JESSEL, M.R., S. C. (1882), 20 Ch. D. 27, C. A., at p. 45.

(*b*) Materiality is a distinct thing from inducement. Each is a question of fact, if there is any evidence at all (see p. 701, *post*), and each must be separately proved; though, in certain cases, inducement may be inferred, as a fact, from manifest materiality; see p. 702, *post*; and see p. 694, *ante*.

(*c*) "Of such a nature as would induce a person to enter into the contract, or would tend to induce him to do so," is the language used by JESSEL, M.R., in *Smith* v. *Chadwick* (1882), 20 Ch. D. 27, C. A., at p. 44, whilst in the same case in the House of Lords (1884), 9 App. Cas. 187, Lord BLACKBURN, at p. 196, uses the expression: "of such a nature as would be likely to induce a person to enter into the contract." As to what is a material representation for the purpose of marine insurance, see the Marine Insurance Act, 1906 (6 Edw. 7,

SECT. 3. Materiality.

Belief of either party is irrelevant to the question.

1682. For the purposes of determining the question of materiality, except in the class of case hereafter mentioned (*d*), no regard is paid to the views entertained by either of the parties when the representation was made. If, in any ordinary case, a representation was not material, the mere fact that the representee thought at the time that it was, cannot make it so (*e*). Conversely, if, in any such case, the representation was material, the mere fact that the representor did not at the time regard it as such cannot make it otherwise (*f*).

Materiality constituted by special circumstances known to the parties.

1683. It must be remembered, however, that a tendency to induce means a tendency to induce the particular representee in the proved or admitted circumstances of the case. Where there is nothing special in such circumstances, it is sufficient to prove that, in the ordinary course of events, the natural and probable effect of the representation was to influence the mind of a normal representee in the manner alleged (*g*). But, to the knowledge of the representor, there may be special circumstances, or peculiarities in the moral or mental constitution, or in the situation, of the representee, of such a character as to render the particular representation of the utmost importance to the particular representee to whom it was addressed, though it would be utterly inoperative on the mind of a normal person under normal conditions. In all such cases the representation is material as between the parties. The question most frequently arises when the representation relates to the personality or identity of any individual who is alleged to be the owner, or late owner, of property offered to the representee for sale (*h*), or of the intended purchaser from the representee of any property (*i*),

c. 41), s. 20 (2), where it is defined as "a representation which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk"; see title INSURANCE, Vol. XVII., p. 413.

(*d*) See the text, *infra*.

(*e*) *Beachey* v. *Brown* (1860), E. B. & E. 796, *per* CROMPTON, J., at p. 803: "I do not think that the non-disclosure of a fact which is material in the mind of the defendant is enough." The observation would apply with even greater force in a case of misrepresentation.

(*f*) See the non-disclosure cases (the principles enunciated in which are on this point equally applicable to cases of positive misrepresentation) of *Lindenau* v. *Desborough* (1828), 8 B. & C. 586, 592, 593; *Dalglish* v. *Jarvie* (1850), 2 Mac. & G. 231, 243; *London Assurance* v. *Mansel* (1879), 11 Ch. D. 363, 368.

(*g*) See, generally, the cases cited in the notes to pp. 724—728, *post*, for illustrations of the more obvious types of materiality.

(*h*) A case of the alleged misrepresentation of the personality of a vendor was *Fellowes* v. *Gwydyr* (*Lord*) (1829), 1 Russ. & M. 83, where Lord LYNDHURST, L.C., entertained no doubt that the representation would have been material if it had been shown that the representee would not have treated with anyone but Lord Gwydyr, but this was not sufficiently made out. The following are illustrations of the materiality of statements as to present or late ownership of goods offered for sale at auction:—*Bexwell* v. *Christie* (1776), 1 Cowp. 395 ("sale of goods and effects of a gentleman deceased at his house in the country"); *Hill* v. *Gray* (1816), 1 Stark. 434 ("sale of pictures as the property of Sir Felix Agar, a well-known collector"); *Arkwright* v. *Newbold* (1881), 17 Ch. D. 301, C. A. (*per* JAMES, L.J., at p. 314, during the argument as to a case of selling a picture under similar conditions); and *Whurr* v. *Devenish* (1904), 20 T. L. R. 385 (sale of a horse as the property of a private gentleman, whereas at the actual moment of sale it had become the property of a jobmaster).

(*i*) *Smith* v. *Wheatcroft* (1878), 9 Ch. D. 223 (where FRY, J., at p. 230,

SECT. 8. **Materiality.**

or of the representee's intended creditor in a monetary dealing (*k*), or when it relates to any person's independence of, or connection with, other persons or influences in the contemplated transaction (*l*). In many such cases the representation has been held to be material, and the objection that it was immaterial to the contract (though, in one sense, this is true) has been overruled, because the objection presupposes that the contract has already been entered into, whereas the question is whether, but for the statement, the representee would ever have entered into the contract at all, or, in other words, whether the representation was material, not to the contract, but to the inducement (*m*). In this type of case, unlike the ordinary type, it is obvious that the knowledge or belief of the representor is of the last importance, because it is precisely that knowledge or belief which makes a representation material as against him which would not be material as against anyone else (*n*).

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recognises the principle that a misrepresentation of the identity of a purchaser may be a material one, if the vendor "would have been unwilling to enter into a contract in the same terms with anybody else," though he held that in that case the representee had failed to prove this essential fact); *Archer* v. *Stone* (1898), 78 L. T. 34; *Nash* v. *Dix* (1898), 78 L. T. 445. The last two cases were both claims for specific performance by purchaser against vendor, and the defence set up was of the same character in both, namely, that the plaintiff had falsely stated that he was buying for himself, and not as agent for other persons, known by him to be persons to whom the defendant would have objected to sell on any terms. NORTH, J., who decided both cases, held, or rather assumed, as beyond question (for no one even argued to the contrary), that such a representation was material, but in the first case, the falsity of the statement being established, the defence prevailed; in the second, such falsity not being shown, it failed. As to claims for specific performance, see, further, title SPECIFIC PERFORMANCE.

(*k*) *Smith* v. *Kay* (1859), 7 H. L. Cas. 750, 758, 759, 766, 767; *Gordon* v. *Street*, [1899] 2 Q. B. 641, 647—649, C. A.

(*l*) *Fellowes* v. *Gwydyr* (*Lord*) (1829), 1 Russ. & M. 83 (a man representing himself to be the agent of another, when in fact he was independent, being a purchaser from him); *Moens* v. *Heyworth* (1842), 10 M. & W. 147 (goods stated to have been "invoiced to sellers as of first shipping quality," by shippers of distinct and independent position, whereas they were agents or partners); *Smith* v. *Wheatcroft* (1878), 9 Ch. D. 223; *Archer* v. *Stone*, *supra*; and *Gordon* v. *Street*, *supra*, illustrate the converse type of case, namely, statements by the representor of his independent individuality, when in reality he was identical with, or the instrument of, another person. A curious question arose in *Angus* v. *Clifford*, [1891] 2 Ch. 449, C. A., namely, whether an express or implied statement that an expert's report is independent and disinterested, whereas in fact it was prepared in the interests and at the instance of third persons, is, or is not, capable of being deemed a material misrepresentation, if there is no false statement in the report itself. ROMER, J. (*ibid.*, at pp. 456—458), held in the affirmative. In the view which the Court of Appeal took of the case, it became unnecessary to decide whether this opinion was correct, and that court expressly declined to do so, though LINDLEY, L.J., at pp. 468, 469, and KAY, L.J., at p. 480, appear to have entertained some doubt on the point. The view of ROMER, J., therefore, remains unreversed, and, it is submitted, is sound.

(*m*) *Gordon* v. *Street*, *supra*, *per* A. L. SMITH, L.J., at pp. 645, 646.

(*n*) *Archer* v. *Stone*, *supra*; *Gordon* v. *Street*, *supra*, where A. L. SMITH, L.J., at p. 648, lays great stress on the fact that the plaintiff himself was keenly alive to the importance, in his own interests, of suppressing his identity; and *Whurr* v. *Devenish* (1904), 20 T. L. R. 385, where it was proved that the defendant was fully aware of the materiality of his representation that the horse was a private person's property (namely, his own), and not that

SUB-SECT. 2.—*Burden of Proof.*

SECT. 3. Materiality.

Burden of proving materiality on representee.

1684. Materiality, if disputed, must be established by the representee (*o*), in addition to, and apart from, inducement (*p*). This burden is usually discharged by comparison of the terms of the representation with the proved or admitted facts of the case. When once the circumstances are established, the question is, as a rule, the subject of argument only; but, in certain cases (for example, where the representation is only an implied one, say, from the external appearance of an object of sense) it may be necessary to adduce some evidence of its tendency to deceive, and it may not be enough to rely on the *res ipsa loquitur* doctrine alone (*q*).

SECT. 4.—*Questions of Law and Fact in Relation to Inducement and Materiality.*

SUB-SECT. 1.—*Questions of Fact.*

When inducement and materiality are questions of fact.

1685. Both inducement and materiality are *primâ facie* issues of fact (*r*). Neither can be presumed as matter of law (*s*); and they are separate issues, requiring separate and independent proof (*t*). Inducement cannot be inferred in law from proved materiality (*a*),

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of a horse dealer, as tending to establish "the *bona fides* and genuineness of the sale" and "to fetch better prices."

(*o*) See, generally, the cases cited in the notes to the text, *infra* and to pp. 699, 700, *ante*, and 702, 703, *post*.

(*p*) *Mathias* v. *Yetts* (1882), 46 L. T. 497, C. A., *per* JESSEL, M.R., at p. 502, and *per* HANNEN, L.J., at p. 504.

(*q*) *London General Omnibus Co., Ltd.* v. *Lavell*, [1901] 1 Ch. 135, C. A.; *Coleman & Co., Ltd.* v. *Stephen Smith & Co., Ltd*, [1911] W. N. 223, C. A. On the other hand, in *Gill* v. *M'Dowell*, [1903] 2 I. R. 463, and in *Patterson* v. *Landsberg & Son* (1905), 7 F. (Ct. of Sess.) 675, it was thought that the hermaphrodite animal in the one case, and the curio in the other, "told its own lie," and bore on its face the evidence of its capacity to induce and mislead. See note (*b*), p. 676, *post*.

(*r*) As to inducement, see, generally, the authorities cited on pp. 694—698, *ante*, and particularly *Andrews* v. *Mockford*, [1896] 1 Q. B. 372, C. A., where two of the questions left to the jury on the trial related to the issue of inducement, the issue of materiality being separately left to them (*ibid.*, 374); see also *Clapham* v. *Shillito* (1844), 7 Beav. 146. As to materiality being an issue of fact, see also *Flinn* v. *Headlam* (1829), 9 B. & C. 693, where the question was left to the jury. In the following cases a judge, sitting without a jury, determined the issue of materiality as a fact:—*Re Universal Non-Tariff Fire Insurance Co., Forbes & Co.'s Claim* (1875), L. R. 19 Eq. 485, 493, 494, 496; *Capel & Co.* v. *Sim's Ships Composition Co.* (1888), 58 L. T. 807, 809, 810; and *Whurr* v. *Devenish* (1904), 20 T. L. R. 385. Compare the Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 20 (7): "whether a particular representation be material or not is in each case a question of fact."

(*s*) As to inducement, see *Arnison* v. *Smith* (1889), 41 Ch. D. 348, C. A., *per* Lord HALSBURY, L.C., at p. 374, with which compare, as to inducement for the purposes of estoppel by representation, his similar observations in *Bloomenthal* v. *Ford*, [1897] A. C. 156, at p. 162. As regards materiality, see *Bevan* v. *Adams* (1870), 22 L. T. 795, where, the judge having taken upon himself to withdraw the question from the jury, and to hold that the representation could not be material, the court ordered a new trial. On the other hand, in the Nisi Prius case of *Hill* v. *Gray* (1816), 1 Stark. 434, Lord ELLENBOROUGH, C.J., ignoring the jury, ruled, as matter of law, that the supposed representation in that case as to the ownership of the picture must have been material. According to the principles now accepted, this decision would presumably have been held wrong *in banco*, but there was no appeal.

(*t*) See pp. 694, 695, *ante*.

(*a*) In *Redgrave* v. *Hurd* (1881), 20 Ch. D. 1, C. A., JESSEL, M.R., at p. 21, is

SECT. 4. Questions of Law and Fact in Relation to Inducement and Materiality.

though there may be cases (of very rare occurrence) in which the materiality is so obvious as to justify an inference of fact therefrom that the representee was actually induced (*b*), but, even in such exceptional cases, the inference is only a *primâ facie* one, and may be rebutted by counter-evidence (*c*), and, further, the fact that the representee does not choose to pledge his oath to the fact of inducement is of itself some evidence, fit to be considered by a jury, tending to weaken the strength of the inference which might otherwise be so drawn (*d*).

SUB-SECT. 2.—*Questions of Law.*

When questions of law.

1686. It is a question of law whether any representation is capable of being construed as material (*e*); and also, as in the case of any other issues of fact, whether there is any evidence at all of actual inducement (*f*).

SUB-SECT. 3.—*Matters to be considered in determining Issues of Fact.*

Relevant matters in determining issues of fact.

1687. In determining as a fact, whether any representation was of a nature to induce, or did induce, the representee to alter his position, all the circumstances must be considered (*g*), and, amongst

reported to have said that the inference was one of law, but in numerous subsequent cases it is explained that this was a mere verbal slip, and could not have been intended literally, and that he tacitly corrected it himself in later deliverances; see note (*b*), *infra*.

(*b*) See *Clapham* v. *Shillito* (1844), 7 Beav. 146, *per* Lord LANGDALE, M.R., at pp. 150—152; *Smith* v. *Chadwick* (1882), 20 Ch. D. 27, C. A., where JESSEL, M.R., at p. 44, states the law correctly ("the inference is, if he entered into the contract, that he acted on the inducement so held out; but even then you may show that in fact he did not so act"); *Mathias* v. *Yetts* (1882), 46 L. T. 497, C. A.; *Smith* v. *Chadwick* (1884), 9 App. Cas. 187, affirming the decision of the Court of Appeal, *supra*, *per* Lord BLACKBURN, at p. 196; *Smith* v. *Land and House Property Corporation* (1884), 28 Ch. D. 7, C. A., *per* BOWEN, L.J., at p. 16; *Hughes* v. *Twisden* (1886), 55 L. J. (CH.) 481, *per* NORTH, J.; *Arnison* v. *Smith* (1889), 41 Ch. D. 348, C. A., *per* Lord HALSBURY, L.C., at p. 369. In *Moss & Co.* v. *Swansea Corporation* (1910), 74 J. P. 351, CHANNELL, J., seems to have inferred inducement as a fact from the obvious materiality of an admitted misrepresentation.

(*c*) See *Smith* v. *Chadwick*, *supra*; *Hughes* v. *Twisden*, *supra*; and *Arnison* v. *Smith*, *supra*, at the pages cited in note (*b*), *supra*.

(*d*) *Smith* v. *Chadwick* (1884), 9 App. Cas. 187, *per* Lord BLACKBURN, at p. 196: "I think that the tribunal which has to decide the fact should remember that now, and for some years past, the plaintiff can be called on his own behalf, and that, if he is not so called, or, being so called, does not swear that he was induced, it adds much weight to the doubt whether the inference was a true one. I do not say it is conclusive."

(*e*) In *Beachey* v. *Brown* (1860), E. B. & E. 796, it was held on demurrer that a certain fact, the concealment of which was complained of, could not be deemed material; compare *Smith* v. *Chadwick* (1882), 20 Ch. D. 27, C. A., *per* JESSEL, M.R., at p. 45 ("it may be that the misstatement is . . . so trivial that it could not have affected the plaintiff's mind at all"); *Bloomenthal* v. *Ford*, [1897] A. C. 156, *per* Lord HALSBURY, L.C., at p. 162 ("a statement may be made so preposterous in its nature that nobody could believe that anyone was misled"). In *Gordon* v. *Street*, [1899] 2 Q. B. 641, C. A., the question whether the misrepresentation of the plaintiff's identity under cover of an *alias* was capable of being considered material by a jury was debated as a question of law.

(*f*) See title EVIDENCE, Vol. XIII., p. 429.

(*g*) *Bloomenthal* v. *Ford*, *supra*, *per* Lord HALSBURY, L.C., at p. 162: "in arriving at a conclusion upon this question of fact, like any other question of fact, all the circumstances must be considered."

others, the character of the document in which the representation is contained (*h*), the nature of the transaction or business into which it is alleged that the representee was induced to enter, and the general or particular experience (whether arising from his profession or trade or otherwise) of the representee (*i*).

SECT. 4. Questions of Law and Fact in Relation to Inducement and Materiality.

Part VII.—Alteration of Position and Damage.

SECT. 1.—*Alteration of Position.*

SUB-SECT. 1.—*In General.*

1688. In order to sustain any action or proceeding for misrepresentation, it is incumbent on the representee to establish that he was thereby induced, not merely to alter his mind, but to alter his position, in the sense indicated below (*k*).

Alteration of position must always be shown.

SUB-SECT. 2.—*Meaning of the Expression.*

1689. Alteration of position means, and means only, a change in the material or temporal interests, or situation, of the representee (*l*). This change may, or may not, be accompanied by ascertainable pecuniary loss or physical injury, which is damage; and where it is necessary to prove damage, such resultant loss or injury must be shown, in addition to the alteration of position itself, but otherwise not (*m*). In any case, damage is a separate and distinct issue from alteration of position, to establish which latter it is necessary and sufficient to prove that by reason of his belief in the truth of the representation the representee voluntarily did something affecting his temporal concerns (*n*).

What it means.

(*h*) See the cases cited in note (*s*), p. 671, *ante*, as to prospectuses, advertisements, and the like.

(*i*) Thus, in company prospectus cases, it has been considered of importance that the representee "was an attorney," whose "knowledge of the world and experience must have taught him how little reliance is to be placed upon representations of such a nature" (*Shrewsbury* v. *Blount* (1841), 2 Man. & G. 475, *per* TINDAL, C.J., at p. 504); or "a person well acquainted with dealings of shares in companies, with prospectuses, and Stock Exchange transactions" (*Bellairs* v. *Tucker* (1884), 13 Q. B. D. 562, *per* DENMAN, J., at p. 577); or "a man of business, who had himself turned his own business into a company, and taken shares in other companies, and was quite competent to form an opinion for himself" (*Smith* v. *Chadwick* (1884), 9 App. Cas. 187, *per* Lord BLACKBURN, at p. 197); or a broker with experience of company promotions and undertakings (*Capel & Co.* v. *Sim's Ships Composition Co.* (1888), 58 L. T. 807, 809); or an underwriter, as distinct from an investor, to which two classes of applicants for allotment totally different considerations apply (*Baty* v. *Keswick* (1901), 85 L. T. 18).

(*k*) See the text, *infra*.

(*l*) A mere change of mind, without a change of position, is not enough; nor is a change of position which affects solely the representee's social, moral, political, or spiritual condition; nor is a change of party, of religious belief, of a club or society, or of a philosophical or scientific school of thought, and the like.

(*m*) See pp. 705, 738, *post*.

(*n*) There is a class of case in which it is not necessary to show that the

SECT. 1. Alteration of Position.

SUB-SECT. 3.—*Kinds of Alteration of Position.*

How the representee's position may be altered.

1690. A representee may act on the faith of a representation, so as to alter his position, in various ways. He may enter into a contract either with the representor himself (*o*), or with a third person, or class of persons (*p*), or the alteration of position may take the form of a unilateral transaction, of a binding nature, in the sense that it is not revocable except with the consent of the other party thereto, such as a gift, licence or consent, a forbearance, or a renunciation (*q*); or it may consist in an act, of whatever nature, the effect of which is to render the representee civilly responsible to some third person (*r*), or even to render him amenable to criminal process, if such act would not have constituted any offence at all on the assumption of the truth of the statement on the faith of which he committed it (*s*). Further, a man may physically alter his position by the act of using property, whether land or a chattel, in reliance upon a representation (express, or implied from acts and conduct) that the place or chattel may be used without danger (*t*), and, generally, by the doing of, or abstention from, anything which has a bearing on his material interests, and which he is not legally compellable to do, or to abstain from (*a*).

SUB-SECT. 4.—*Burden of Proof and Questions of Law and Fact.*

Burden of proof.

1691. The burden is on the representee to allege and prove that the representor, actually or presumptively, intended him to act on the faith of the representation in the manner in which he did act, and it is not enough to prove even damage to the representee, unless it is also shown that it resulted from an alteration of position induced by such representation (*b*). Whether there is any sufficient

representee altered his position at all, in the sense of doing anything on the faith of the representation, namely, where he is shown to have suffered involuntary physical damage in consequence thereof, as to which see p. 706, *post*.

(*o*) See pp. 737—758, *post*.

(*p*) For illustrations, see most of the cases cited in the notes to pp. 724—737, *post*.

(*q*) As to gifts, see *Haygarth* v. *Wearing* (1871), L. R. 12 Eq. 320, 329; *Re Glubb, Bamfield* v. *Rogers*, [1900] 1 Ch. 354, C. A.; and, generally, title GIFTS, Vol. XV., pp. 419—421. As to consents to judgments, see title JUDGMENTS AND ORDERS, Vol. XVIII., pp. 216, 217. As to renunciations, see *M'Carthy* v. *Decaix* (1831), 2 Russ. & M. 614, 620—623. Releases by deed and compromises come under the head of contracts proper; examples of these are *Hirschfeld* v. *London, Brighton and South Coast Rail. Co.* (1876), 2 Q. B. D. 1, and *Gilbert* v. *Endean* (1878), 9 Ch. D. 259, C. A.; and see title CONTRACT, Vol. VII., pp. 441, 444.

(*r*) *Adamson* v. *Jarvis* (1827), 4 Bing. 66.

(*s*) *Burrows* v. *Rhodes*, [1899] 1 Q. B. 816.

(*t*) See notes (*o*) and (*p*), p. 706, *post*.

(*a*) See, generally, the cases cited in the notes to the text, *infra* and to pp. 705—707, *post*.

(*b*) *Tallerman* v. *Dowsing Radiant Heat Co.*, [1900] 1 Ch. 1, 5, 6, C. A. (action dismissed because, though damage was caused to the plaintiff by misrepresentation alleged to constitute a "passing off," yet "the statements complained of were not intended to be acted on by the plaintiffs, and had not been acted upon by them."). The same burden of proof is incumbent on a party setting up estoppel by representation; see title ESTOPPEL, Vol. XIII., p. 384.

averment (*c*), or any proof (*d*), of such matters are questions of law. Subject to these, and also to the principle of law that everyone is presumed to intend the natural consequences of his acts and statements, all matters connected with alteration of position are issues of fact (*e*).

Sect. 1. Alteration of Position.

Questions of law and fact.

SECT. 2.—*Damage.*

SUB-SECT. 1.—*In General.*

1692. Where the representee elects, or is compelled (*f*), to affirm a contract which he was induced to enter into with the representor, or where his alteration of position consisted in some act other than the entering into such a contract, and where, therefore, no question of rescission arises, it is essential to prove that the entering into the contract, or other alteration of position, resulted in damage cognisable by the law (*g*); and in all such cases it is of no more use to prove the former without the latter (*g*) than it is to establish the latter without the former (*h*).

When necessary to prove damage.

SUB-SECT. 2.—*What constitutes Actionable Damage.*

1693. The only damage of which the law takes cognisance, in an action for misrepresentation, is actual and temporal injury, that is, some loss of money or money's worth, or some tangible detriment capable of being quantified and assessed. It does not include mental distress, unless accompanied by physical effects, nor mere loss of social advantages to which no money value can be attached (*i*).

What actionable damage includes.

It includes, firstly, loss arising out of a contract entered into on the faith of the representation, being the difference between what is paid and payable, and the lesser value (if it be lesser) of what is received and receivable thereunder (*k*); loss of money paid to a third person, or to the representor himself (*l*); loss of profits, appointments, or earnings (*m*); or the equivalent in money of any

Loss.

(*c*) *Behn* v. *Kemble* (1859), 7 C. B. (N. S.) 260; *Salaman* v. *Warner* (1891), 65 L. T. 132, C. A.

(*d*) See, generally, the cases cited in the notes to the text, *infra* and to pp. 706, 707, *post*.

(*e*) See the same cases, and also those cited in the notes to p. 696, *ante*.

(*f*) As to the circumstances in virtue of which a representee is compelled to adhere to a contract which he otherwise might have rescinded, see pp. 749—752, *post*.

(*g*) As defined in the text, *infra*.

(*h*) See note (*b*), p. 704, *ante*.

(*i*) In *Chamberlain* v. *Boyd* (1883), 11 Q. B. D. 407, C. A. (a case of slander not actionable except on proof of actual damage, and therefore in point on the question now under discussion), it was held amongst other things, that the loss of a chance of election to a social club did not amount to such damage in law; and see title LIBEL AND SLANDER, Vol. XVIII., pp. 730 *et seq.*

(*k*) The principles on which the damages are computed and quantified are dealt with at pp. 732—735, *post*. The topic now under discussion concerns only the qualities and legal constituents of damage.

(*l*) Moneys paid to the representor himself are usually sued for as money had and received (see title CONTRACT, Vol. VII., p. 485); but they may also be treated as damages, though the amount is liquidated (*Kettlewell* v. *Refuge Assurance Co.*, [1908] 1 K. B. 545, 550, C. A.).

(*m*) *Barley* v. *Walford* (1846), 9 Q. B. 197 (loss of profit on a design for silk handkerchiefs); *Denton* v. *Great Northern Rail. Co.* (1856), 5 E. & B 860

SECT. 2. Damage.

destruction of, or injury to, property; or any expense, or detriment of any kind, which admits of pecuniary computation (*n*).

Personal and physical injury.

Secondly, the damage may consist in the personal and physical injury which results from doing some act on the faith of either an express representation (*o*), or a representation implied from conduct, as in the "invitation" and "trap" cases, which, though usually treated under the head of negligence, might, it is conceived, with equal or greater propriety be dealt with as illustrations of misrepresentation (*p*).

Bodily suffering.

Lastly, where a representee is induced by fraudulent misrepresentation to believe a certain state of things to exist, or a certain thing to have happened, and the misrepresentation is of such a nature that the mere making of it to a normal person who believes it, is calculated to, and does, produce not merely mental distress, but consequential physical and personal injury, then, though he does nothing, but only suffers something by reason of his belief in its truth, his bodily suffering is damage of which the law takes notice in an action founded on such misrepresentation (*q*).

Causal connection between the damage and the representation.

1694. In every case where it is necessary to prove actionable damage of the nature indicated, it is further incumbent on the representee to establish a causal connection, as distinct from a relation of mere sequence and succession, between it and the

(missing an appointment); *Burrows* v. *Rhodes*, [1899] 1 Q. B. 816 (loss of pay and earnings and capacity to earn).

(*n*) As to loss of property by reason of the fraudulent misrepresentation, see *Mullett* v. *Mason* (1866), L. R. 1 C. P. 559 (loss of cow from cattle plague, and of other cows with which it was placed, and which became infected with the same disease). As to expenses, see *Barley* v. *Walford* (1846), 9 Q. B. 197 (where, in addition to his loss of profits, the plaintiff was put to trouble and expense in making inquiries and communicating with the parties falsely represented to be the registered owners of the design); *Milne* v. *Marwood* (1855), 15 C. B. 778 (expense of fitting up a vessel); *Richardson* v. *Silvester* (1873), L. R. 9 Q. B. 34 (time and money spent in going to see the farm advertised); *Wilkinson* v. *Downton*, [1897] 2 Q. B. 57 (expense of railway fares, *inter alia*); *Burrows* v. *Rhodes*, *supra* (fees paid for surgical operations); *Pritty* v. *Child* (1902), 71 L. J. (K. B.) 512 (expense of sinking a well).

(*o*) The following are examples of physical injury resulting from the use of a chattel, or of land, the qualities or condition of which had been misrepresented:—*Levy* v. *Langridge* (1838), 4 M. & W. 337, Ex. Ch. (a gun); *Longmeid* v. *Holliday* (1851), 6 Exch. 761 (a lamp); *Burtsal* v. *Bianchi* (1891), 65 L. T. 678 (illness caused by taking a house with defective drains). In the last two cases the plaintiff failed on other grounds.

(*p*) For illustrations of this type of case, see title NEGLIGENCE. In *Blakemore* v. *Bristol and Exeter Rail. Co.* (1858), 8 E. & B. 1035, where it was alleged that the defendants, by placing a crane on a particular spot, had "professed to the public" that it might safely be used by consignees of goods, the whole of the judgments are based on the hypothesis that the action was capable of being maintained as one of deceit; see the observations on this case in *Heaven* v. *Pender* (1883), 11 Q. B. D. 503, C. A., *per* COTTON and BOWEN, L.JJ., at p. 516. That cases of this description may be regarded as cases of misrepresentation appears to have been the view, or a corollary from the view, expressed in *North Eastern Rail. Co. (Directors etc.)* v. *Wanless* (1874), L. R. 7 H. L. 12, *per* Lord CAIRNS, L.C., at p. 15 ("it appears to me that the circumstance that the gates at this level crossing were open at this particular time amounted to a statement, and a notice to the public, that the line at that time was safe for crossing").

(*q*) *Wilkinson* v. *Downton*, [1897] 2 Q. B. 57.

misrepresentation. It is not every false statement which in fact produces damage which is actionable (*r*). The damage must be shown to have been the natural and probable consequence, in the ordinary course of events, or in the special circumstances of the case, of the misrepresentation being believed and acted upon or (in the last of the above-mentioned classes of damage (*s*)) of its being believed (*t*). Where this connection is not made out, the representee, though he may prove that he did in fact sustain the damage alleged by reason of his belief in the truth of the misrepresentation, must fail (*u*); where it is made out, he succeeds (*a*). He is also, however, entitled to succeed if he is in a position to allege and prove that the representor in fact intended the precise kind of damage which resulted, and, in that case, the question whether such damage was the natural and probable result of the misrepresentation is, as against the representor who so intended, wholly immaterial (*b*).

SUB-SECT. 3.—*Burden of Proof and Questions of Law and Fact.*

1695. All questions of damage are questions of fact, the burden of establishing which is upon the representee (*c*); subject to the following, which are questions of law, namely (i.) whether there is any evidence of the alleged damage having been sustained at all; (ii.) whether, if sustained, the alleged damage amounts to what the law regards as such; (iii.) whether there is any evidence that such damage was in fact caused by the representee's belief in the truth of the misrepresentation; and (iv.) whether the proved damage was the natural and probable, or (as the case may be) the actually intended, consequence of the misrepresentation (*d*).

Questions of fact.

Questions of law.

(*r*) *Barley* v. *Walford* (1846), 9 Q. B. 197, 209.

(*s*) See the text, *supra*.

(*t*) See, generally, title DAMAGES, Vol. X., pp. 310—313, 317—322. When the damage alleged or proved in any case of misrepresentation, or other tort, is described as "too remote," nothing more is meant than that it is not the natural or probable result of the injury. So also, when it is said, as it was in *Barry* v. *Croskey* (1861), 2 John. & H. 1, *per* WOOD, V.-C., at pp. 23, 24, that the misrepresentation must be the "direct" or "immediate" cause of the loss or injury, these expressions (not very felicitous ones) are intended to indicate no more than the existence of this natural connection and causality, as appears from *Andrews* v. *Mockford*, [1896] 1 Q. B. 372, C. A., *per* Lord ESHER, M.R., at p. 378: "the jury has found that the natural consequence of the publication in the newspaper was that the plaintiff should buy shares; and, if so, the injury received by the plaintiff was the immediate, and not the remote, consequence of the representation thus made."

(*u*) *Collins* v. *Cave* (1860), 6 H. & N. 131, 134, Ex. Ch.; *Barry* v. *Croskey*, *supra* (demurrer allowed); *Dashwood* v. *Jermyn* (1879), 12 Ch. D. 776; *Ajello* v. *Worsley*, [1898] 1 Ch. 274, 281—283.

(*a*) *Polhill* v. *Walter* (1832), 3 B. & Ad. 114, 123, 124; *Barley* v. *Walford*, *supra*, at pp. 206—209; *Mullett* v. *Mason* (1866), L. R. 1 C. P. 559, 563, 564; *Wilkinson* v. *Downton*, [1897] 2 Q. B. 57, 59.

(*b*) In *Andrews* v. *Mockford*, *supra*, there was abundant evidence of such an actual intention.

(*c*) *Pasley* v. *Freeman* (1789), 3 Term Rep. 51, *per* BULLER, J., at p. 56, purporting to cite, though the citation is not quite accurate, the proposition of CROKE, J., in *Baily* v. *Merrell* (1615), 3 Bulst. 94, at p. 95 ("fraud without damage, or damage without fraud, gives no cause of action; but when these two concur, an action lies"); *Smith* v. *Chadwick* (1884), 9 App. Cas. 187, 195, 196.

(*d*) *Vernon* v. *Keys* (1810), 12 East, 632, 638; affirmed (1812), 4 Taunt. 488.

Part VIII.—Who are deemed Parties to the Representation.

SECT. 1. In General.

SECT. 1.—*In General.*

Parties to the representation.

1696. In any proceeding in which misrepresentation is set up, the only person liable is the representor, or one whom the law deems such, and the only person entitled to relief is the representee, or one whom the law deems such, subject to the rules of procedure as to the transmission or devolution of such liability and title respectively, by reason of death, marriage, insolvency, assignment, and the like (*e*). It is necessary, therefore, before discussing in detail the various remedies and forms of relief available to the representee against the representor (*f*), to ascertain precisely who are the persons who are considered in law to come within these several designations.

SECT. 2.—*The Representor.*

SUB-SECT. 1.—*General Statement of Rules.*

Who is deemed a representor.

1697. The following is a general statement of the rules for determining what persons are deemed representors. In the first place, only he who actually made the representation is liable for its consequences, if there was no principal nor partner on whose behalf he purported to make and made it; but, if there was, then such principal or partner is deemed the representor, or one of the two representors, as the case may be (*g*). Secondly, an agent who has a co-agent, or who is a sub-agent, does not, merely as such, make such co-agent, or the intermediate agent, as the case may be, liable as a principal (*h*). Thirdly, where it is necessary to establish fraud, an innocent principal is liable for the fraud of his agent, and for this purpose it makes no difference that the principal is a corporation (*i*). Lastly, all who concur in making any false representation are jointly responsible, and, if it was fraudulent also, are jointly and severally responsible, to the representee for the consequences (*k*).

Liability of principal for misrepresentation of his agent.

SUB-SECT. 2.—*Principal Liable for Agent's Act of Misrepresentation.*

1698. Any person by whose express or implied authority a representation purported to be and was made is accountable to the

Ex. Ch.; *Eastwood* v. *Bain* (1858), 3 H. & N. 738; *Bear* v. *Stevenson* (1874), 30 L. T. 177, P. C.; *Clydesdale Bank* v. *Paton*, [1896] A. C. 381, 397, 398; *Tallerman* v. *Dowsing Radiant Heat Co.*, [1900] 1 Ch. 1, C. A.; *Stevens* v. *Hoare* (1904), 20 T. L. R. 407, 409.

(*e*) For a reference to these rules, see pp. 735, 753, 758, *post*, as to actions for damages, proceedings for rescission, and affirmative defences respectively.

(*f*) See pp. 724—758, *post*.

(*g*) See the text, *infra*.

(*h*) See pp. 709, 710, *post*.

(*i*) See pp. 710—713, *post*.

(*k*) See pp. 713, 714, *post*.

representee, if it should turn out to be false, in any proceedings for rescission or analogous relief (*l*). For this purpose the agent's act of misrepresentation is the act of his principal (*m*). Where the action is for damages, and fraud, therefore, must be proved, different considerations arise, which are discussed later (*n*). But in an action of contract, which an action for rescission is, proof of such express or implied authority, without reference to the knowledge, belief, or other state of mind either of the agent or of the principal, is enough to entitle the representee to proceed against the principal (*o*); where there is no such proof, he fails to render the alleged principal liable (*p*). If the alleged principal, in any such case, is held not to have been a principal, the alleged agent, who actually made the representation, remains, as he always was from the first, liable. Conversely, where the alleged principal is held to have been such, the agent escapes (*q*), for the contract which is sought to be avoided was not made with him, but with the principal (*r*).

Different rules in actions for damages and for rescission.

SUB-SECT. 3. *The Position of Co-agents and Sub-agents.*

1699. One of several agents of the same principal does not, as such, by any representation he may make, render his co-agent liable to the representee (*s*). Some express authority *in hâc re* must be shown, if this result is to follow (*t*).

Co-agents.

(*l*) The person in question may be either a principal or a partner (for partnership is only a branch of the law of agency), and he may be so for general business purposes, or only for the purpose of the particular adventure or transaction. As to the various classes of agents, see title AGENCY, Vol. I., pp. 152, 153. As to partners, see title PARTNERSHIP. The same principles apply to estoppel by representation; see title ESTOPPEL, Vol. XIII., pp. 385, 386.

(*m*) And is properly so pleaded, even when the representation was fraudulent; see *Barwick* v. *English Joint Stock Bank* (1867), L. R. 2 Exch. 259, 266, 267, Ex. Ch.

(*n*) See pp. 710 *et seq.*, *post*.

(*o*) As in *Karberg's Case*, [1892] 3 Ch. 1, 13, C. A. In *Lurgan's* (*Lord*) *Case*, [1902] 1 Ch. 707, the company would have been held liable, on the principle of the last case, but for the fact that the applicant had disabled himself from relying on the point (see *ibid.*, at pp. 709, 710)

(*p*) As in *New Brunswick and Canada Railway and Land Co.* v. *Conybeare* (1862), 9 H. L. Cas. 711; *Western Bank of Scotland* v. *Addie*, *Addie* v. *Western Bank of Scotland* (1867), L. R. 1 Sc. & Div. 145, 166—168; *Thorne* v. *Heard and Marsh*, [1895] A. C. 495, 502, 506.

(*q*) *Eaglesfield* v. *Londonderry* (*Marquis*) (1878), 26 W. R. 540, H. L., *per* Lord BLACKBURN, at p. 541, disagreeing to this extent with certain expressions used by JESSEL, M.R., in the court appealed from, S. C. (1876), 4 Ch. D. 693, C. A., though agreeing with the decision itself: "it seems to me that, neither at law nor in equity, is an agent personally liable upon a contract by which he, within the scope of his authority, renders his principal liable, though it is of course otherwise in the case of a tort."

(*r*) Accordingly the practice, formerly not uncommon, of joining solicitors and other agents as defendants in actions for misrepresentation for the mere purpose of obtaining discovery or making them liable for costs is disapproved by the court; see *Barnes* v. *Addy* (1874), 9 Ch. App. 244, 255; *Burstall* v. *Beyfus* (1884), 26 Ch. D. 35, 40, 41, C. A.; *Mathias* v. *Yetts* (1882), 46 L. T. 497, 502, C. A.

(*s*) *Weir* v. *Bell* (1878), 3 Ex. D. 238, 245, 247, 248, 250, C. A.; *Re Denham & Co.* (1883), 25 Ch. D. 752, 764, 765.

(*t*) *Cargill* v. *Bower* (1878), 10 Ch. D. 502, 513, 514.

SECT. 2. The Representor.

Sub-agents.

1700. A sub-agent may render the ultimate principal liable, if the proved circumstances of the case are such that the ultimate principal and the intermediate agent must be deemed to have intended and agreed that the latter should, or might, appoint a substitute for the purpose of discharging in his stead, and on behalf of the former, duties including or involving the making of representations of the character of that sued upon (*a*). Otherwise, direct intervention and express authority of the ultimate principal must be shown by evidence (*b*).

SUB-SECT. 4.—*The Liability of Principal and Agent respectively for Fraudulent Misrepresentation.*

Fraud of agent is fraud of principal, whether natural or artificial person.

1701. In the case of a fraudulent misrepresentation in respect of which relief is sought in damages, there are involved the distinctive characteristics not only of tort, as contrasted with contract (*c*), but of a state of mind, as opposed to the mere act of making the statement. With one exception (*d*), however, the rules which determine the responsibility of principal and agent respectively for the act of misrepresentation apply equally to the question of their respective liabilities for the guilty knowledge which makes that act fraudulent. It is now well established, though all these propositions were at different times either doubted or distinctly dissented from, that there is nothing in fraud to differentiate it from any other tort, and, therefore, that a man may have implied authority to make a fraudulent misrepresentation, and thereby render his innocent principal or partner liable as a representor (*e*); that agent and principal are one person in law, for the purpose of not only all the

(*a*) *De Bussche* v. *Alt* (1878), 8 Ch. D. 286, 310, 311, C. A.

(*b*) Such intervention and express authority were established in *Powell and Thomas* v. *Evan Jones & Co.*, [1905] 1 K. B. 11, 17, 18, 20, 22, 23, C. A.

(*c*) See pp. 724—737, *post*, which are concerned with misrepresentation in its aspect as a tort, as contrasted with pp. 737—753, *post*, which deal with it as a ground for rescission of contracts.

(*d*) See p. 712, *post*.

(*e*) *Blair* v. *Bromley* (1847), 2 Ph. 354, 359—361; *Re Royal British Bank, Ex parte Brockwell* (1857), 26 L. J. (CH.) 855, 856; *Udell* v. *Atherton* (1861), 7 H. & N. 172, *per* POLLOCK, C.B., and WILDE, B., MARTIN and BRAMWELL, BB., dissenting; *Barwick* v. *English Joint Stock Bank* (1867), L. R. 2 Exch. 259, Ex. Ch., *per* WILLES, J., at p. 265 ("with regard to the question whether a principal is answerable for the acts of his agent in the course of his master's business, and for his master's benefit, no sound distinction can be drawn between the case of fraud and the case of any other wrong. The general rule is, that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service, and for the master's benefit, though no express command or privity of the master be proved"); *Mackay* v. *Commercial Bank of New Brunswick* (1874), L. R. 5 P. C. 394, 410—413; *Ludgater* v. *Love* (1881), 44 L. T. 694, C. A.; and see titles AGENCY, Vol. I., pp. 213 *et seq.*; MASTER AND SERVANT, pp. 248 *et seq.*, *ante*. The *dictum* to the contrary effect in *Wilde* v. *Gibson* (1848), 1 H. L. Cas. 605, *per* Lord CAMPBELL, at pp. 632, 633, was dissented from in *Reynell* v. *Sprye*, *Sprye* v. *Reynell* (1852), 1 De G. M. & G. 660, C. A., *per* KNIGHT BRUCE, L.J., at pp. 683, 684, and in *Udell* v. *Atherton*, *supra*, *per* WILDE, B., at pp. 181, 182, and is clearly not now accepted as law, if it ever was. As to the responsibility of an innocent member of a firm for the fraud of his guilty partner, see *Re Collie, Ex parte Adamson* (1878), 8 Ch. D. 807, 820, C. A.; and see, generally, title PARTNERSHIP.

acts of the body, but also all the states of the mind, which go to make up a fraudulent misrepresentation, and that it is immaterial who had the guilty knowledge, and who made the false statement, so that, where the one did not make the statement, and the other had no guilty knowledge, instead of neither being liable as representor, as was once thought (*f*), both are so liable (*g*); that if the misrepresentation was made for the intended benefit or in the supposed interests of the principal, such principal is responsible, as a representor, whether in fact he benefited thereby or not (*h*); and that, for all the above purposes, a corporation, or other artificial person, or unincoporated or *quasi*-corporate body or society, is in no other position than an individual (*i*).

(*f*) *Cornfoot* v. *Fowke* (1840), 6 M. & W. 358. It has always been a matter of some doubt what it was that this case was actually intended to decide; see the observations of Lord HALSBURY cited in note (*g*), *infra*. So far, if at all, as it was intended thereby to lay down the proposition that, where the principal did not personally make the misrepresentation, though he possessed the knowledge which, had he made it, would have rendered it fraudulent, and the agent had no such knowledge, though he made the misrepresentation, neither is liable, the case is no longer of any authority; see note (*g*), *infra*.

(*g*) *Pearson (S.) & Son, Ltd.* v. *Dublin Corporation*, [1907] A. C. 351, where Lord LOREBURN, L.C., at p. 354, lays down that "the principal and agent are one, and it does not signify which of them made the incriminated statement, or which of them had the guilty knowledge," a proposition concurred in, and repeated in almost identical terms, by Lord HALSBURY, *ibid.*, at pp. 358, 359, after first making the following observations at pp. 357, 358, on *Cornfoot* v. *Fowke*, *supra* "If it was supposed to decide that the principal and agent could be so divided in responsibility that—like the schoolboy's game of 'I did not take it,' 'I have not got it'—the united principal and agent might commit fraud with impunity, it would be quite new to our jurisprudence. One of the learned judges who decided *Cornfoot* v. *Fowke* explained it by saying that it was only decided on a point of pleading, and another by saying that it was attempted to add a term to a written contract which was not in it. Whether these were satisfactory reasons I do not care to inquire. It is enough to say that the case is not law if it is supposed to affirm the proposition to which I have referred."

(*h*) The Privy Council in *Mackay* v. *Commercial Bank of New Brunswick* (1874), L. R. 5 P. C. 394, left this point open (see *ibid.*, at p. 416), but it has since been decided that the expression "for the master's benefit," which is made use of by the Exchequer Chamber in enunciating the proposition cited in note (*e*), *supra*, means only "for the intended benefit of the master," or "in his supposed interests" (*British Mutual Banking Co.* v. *Charnwood Forest Rail. Co.* (1887), 18 Q. B. D. 714, 717, C. A.; see also *Swift* v. *Jewsbury* (1874), L. R. 9 Q. B. 301, 312, 313, Ex. Ch.; *Pearson (S.) & Son, Ltd.* v. *Dublin Corporation*, *supra* (where the defendants were not a trading body); *Malcolm, Brunker & Co., Ltd.* v. *Waterhouse & Sons* (1908), 24 T. L. R. 854; *Lloyd* v. *Grace, Smith & Co.*, [1911] 2 K. B. 489, 507, C. A.).

(*i*) *Ranger* v. *Great Western Rail. Co.* (1854), 5 H. L. Cas. 72, 86, 87; *Mackay* v. *Commercial Bank of New Brunswick*, *supra*, at pp. 413, 415, where it is pointed out that the *dicta* in *Western Bank of Scotland* v. *Addie*, *Addie* v. *Western Bank of Scotland* (1867), L. R. 1 Sc. & Div. 145, *per* Lord CHELMSFORD, L.C., at p. 158, and *per* Lord CRANWORTH, at pp. 166, 167, to the effect that, though a fraudulent misrepresentation of any of its agents is imputable to a corporation for the purpose of rescission, it is not so imputable for the purpose of an action for damages, were wholly unnecessary to the decision of that case, opposed to principle, and ought not to be accepted; and, further, that in expressing this personal opinion, Lord CRANWORTH was departing from the proposition he had himself laid down in *Ranger* v. *Great Western Rail. Co.*, *supra*, which latter was sound and was approved and followed. In most of the other cases cited in the notes to pp. 709, 710, *ante*, the text, *supra*, and to pp. 712, 713, *post*, where a corporation was defendant, it was not thought possible even to raise the

SECT. 2. The Representor.

Unity of principal and agent for purposes of fraudulent, but not innocent, misrepresentation.

1702. The exception above referred to is that, as already indicated (*k*), in cases of fraudulent misrepresentation, both agent and principal may be deemed representors, or rather components of a person who, in contemplation of law, is one representor; whereas, in cases of innocent misrepresentation or actions to rescind a contract induced by misrepresentation, whether fraudulent or innocent, it is otherwise (*l*). It has, indeed, been suggested that in the former class of case a person who, after his alleged agent has made the fraudulent misrepresentation, intervenes and adopts the benefit of it, cannot, by reason of that circumstance alone, be held liable as a representor, or an accessory after the fact (*m*); but this view is erroneous, and it is now clear that such a person may be held so liable by ratification or adoption (*n*).

SUB-SECT. 5.—*Implied Authority.*

When authority is implied.

1703. A man is deemed to have the implied authority of another to make the representation which, being false or (as the case may be) false and fraudulent, is to render that other answerable for its consequences to the representee, when it was, and purported to be, made in the course, and within the scope, and for the purposes, of his service or employment, or, where it is a case of partnership, of the partnership business or undertaking (*o*). In applying this rule, the nature of the service, employment, business, or undertaking

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point in argument, and in no case, except those above referred to, is there to be found even a *dictum* in its favour, though, in reference to "a statutory corporate body," BOWEN, L.J., in *British Mutual Banking Co.* v. *Charnwood Forest Rail. Co.* (1887), 18 Q. B. D. 714, C. A., at p. 719, expressed a desire to reserve his opinion as to whether such a body "could in any case be liable in an action for deceit beyond the extent of the benefits they had reaped by the fraud." One of the things decided in that case was that a corporation cannot be made answerable for any fraudulent misrepresentation of their officer "by which they could not be bound"—because of the statutory limitation of their powers—"if they had actually authorised him to make it," and this, therefore, is only an apparent, and not a real, exception to the rule stated in the text, *supra*. As to the general liability of corporations in tort, see title CORPORATIONS, Vol. VIII., pp. 386 *et seq.* As to the liability of *quasi*-corporations, or unincorporated associations or bodies of persons, for the torts of their agents, see *Ruck* v. *Williams* (1858), 3 H. & N. 308 (improvement commissioners); *Whitehouse* v. *Fellowes* (1861), 10 C. B. (N. S.) 765 (trustees of a turnpike road); *Taff Vale Railway* v. *Amalgamated Society of Railway Servants*, [1901] A. C. 426, *per* Lord HALSBURY, L.C., at p. 436 (trade unions, the liability of which associations, however, has since been abolished by statute; see title TRADE AND TRADE UNIONS). As to the liability of the Crown (which is a corporation sole), or of a servant of the Crown, for the wrongful acts of its servants, or his fellow-servants, as the case may be, see titles AGENCY, Vol. I., pp. 213, note (*f*), 224, note (*s*); CONSTITUTIONAL LAW, Vol. VI., p. 415.

(*k*) *Eaglesfield* v. *Londonderry* (*Marquis*) (1878), 26 W. R. 540, 541, H. L.

(*l*) See p. 709, *ante*.

(*m*) *Hoole* v. *Speak*, [1904] 2 Ch. 732, *per* KEKEWICH, J., at pp. 735, 736. The view there expressed is clearly not law, being directly in the teeth of the authorities, none of which were cited to the learned judge, and particularly *Wilson* v. *Tunman* (1843), 6 Man. & G. 236, 242, cited and approved in *Keighley, Maxsted & Co.* v. *Durant*, [1901] A. C. 240, 246, 247.

(*n*) See notes (*s*) and (*t*), p. 713, *post*.

(*o*) *Barwick* v. *English Stock Joint Bank* (1847), L. R. 2 Exch. 259, 266, Ex. Ch.; see also title AGENCY, Vol. I., pp. 164—168; and as to the implied authority of partners, see title PARTNERSHIP.

must first be proved; and the question then is whether making representations at all is within the class of acts incidental thereto, and, if it is, the further inquiry may become necessary whether the particular representation sued upon belongs to the class of representations which the alleged servant, agent, or partner is, in virtue of his service, employment, or the nature of the partnership business or adventure, employed or authorised to make (*p*). If the answer to both these questions is in the affirmative, the principal is a representor, and liable as such; if the answer to either is in the negative, he is not (*q*). Further, if the misrepresentation, though within the scope of the agent's employment, is proved by the representor to have been in fact made both with the object and result of serving his private ends only, and not those of the alleged principal at all, such alleged principal is not a representor (*r*).

Ratification and estoppel.

1704. Whether for the purposes of proceedings to rescind a contract or for the purposes of an action for damages, a man may become liable as principal for the misrepresentation of another by adoption or ratification (*s*), and by estoppel (*t*).

SUB-SECT. 6.—*Liability of Joint Representors.*

Joint liability of representors for purposes of rescission.

1705. Where two or more persons are joint contractors under a contract induced by a misrepresentation made by them, or on their behalf, and it is sought to avoid such contract, all such persons are deemed joint representors, and, as such, jointly responsible to the representee in any proceedings instituted for that purpose, and each of them is accordingly, on payment of his share of any liability consequential upon rescission, entitled to indemnity or contribution against any of the others who, being solvent, has paid nothing or less than his share, as in the case of any other action of contract (*a*).

(*p*) In *Lynde* v. *Anglo-Italian Hemp Spinning Co.*, [1896] 1 Ch. 178, ROMER, J., at pp. 182, 183, gives a useful classification of the kinds of acts which, according to the doctrine of implied authority, will render a company liable for misrepresentations in a prospectus, and this classification can easily be adapted so as to admit of a general application. As to the different classes of agents, see also title AGENCY, Vol. I., pp. 152, 153; and see, further, title MASTER AND SERVANT, pp. 248, 252—254, *ante*.

(*q*) The representee failed to establish the allegation of implied authority in the following cases:—*Burnes* v. *Pennell* (1849), 2 H. L. Cas. 497, 519, 520; *Wheelton* v. *Hardisty* (1857), 8 E. & B. 232, 260, 268—274, 301, 302, Ex. Ch.; *Re Northumberland and Durham District Banking Co., Ex parte Bigge* (1858), 28 L. J. (CH.) 50; *Re Liverpool Borough Bank, Duranty's Case* (1858), 26 Beav. 268; *Re National Patent Steam Fuel Co., Ex parte Worth* (1859), 28 L. J. (CH.) 589; *Re Royal British Bank, Ex parte Frowd* (1861), 9 W. R. 328; *New Brunswick and Canada Railway and Land Co.* v. *Conybeare* (1862), 9 H. L. Cas. 711; *Newlands* v. *National Employers' Accident Association* (1885), 54 L. J. (Q. B.) 428, 430, 431, C. A.; *Lynde* v. *Anglo-Italian Hemp Spinning Co., supra*, at pp. 184, 185; *Biggar* v. *Rock Life Assurance Co.*, [1902] 1 K. B. 516, 524, 525; *Hoole* v. *Speak*, [1904] 2 Ch. 732; *M'Millan* v. *Accident Insurance Co.*, [1907] S. C. 484; *Hindle* v. *Brown* (1908), 98 L. T. 791, C. A.

(*r*) See p. 732, *post*.

(*s*) *Hoole* v. *Speak*, *supra*, at pp. 735, 736 (so far as regards contracts only); and see title AGENCY, Vol. I., pp. 173—181.

(*t*) *Wright* v. *Crookes* (1840), 1 Scott (N. R.), 685, 698, 699, Ex. Ch.; and see titles AGENCY, Vol. I., pp. 158, 159; ESTOPPEL, Vol. XIII., pp. 390—392.

(*a*) See title CONTRACT, Vol. VII., pp. 471, 472.

SECT. 2. The Representor.

Joint and several liability for purposes of action of deceit.

1706. Where, however, a misrepresentation, having been made by more than one person, was fraudulent, and the action is for damages, all those who concurred in the fraud are, as in the case of any other tort, both jointly and severally answerable *in solido* to the representee (*b*); and, since all are tortfeasors, none of them has any right of indemnity or contribution against any of the others (*c*).

SUB-SECT. 7.—*Burden of Proof and Questions of Law and Fact.*

Burden of proof: questions of law and fact.

1707. The burden is on the representee of establishing that the representation was made by the person charged as representor, or, where he is not alleged to have personally made it, with his authority (*d*). Where either personal representation or express authority is relied upon by the representee, the questions whether the alleged representation was made, and whether such express authority was given, are questions of fact (*e*), subject to the question of law whether there is any evidence in support of either allegation. Where, however, implied authority is relied upon, though, subject as above (*f*), it is a question of fact what the nature and terms of the employment or business were in the particular case, or what were the duties of the alleged agent (*g*), it is a question of law whether from the proved or admitted facts in relation to these matters the authority is to be implied (*h*).

SECT. 3.—*The Representee.*

SUB-SECT. 1.—*In General.*

Who is deemed a representee.

1708. A representee in law includes the following:—(i.) Any person to whom the representation was physically and directly made, or any principal or partner of such person; (ii.) any specific person, not coming within the above description, but whom the

(*b*) *Cullen* v. *Thomson's Trustees and Kerr* (1862), 4 Macq. 424, 432, 433, H. L.; *Swift* v. *Winterbotham* (1873), L. R. 8 Q. B. 244, 254 (the subsequent reversal of the actual decision by the Exchequer Chamber, *sub nom. Swift* v. *Jewsbury* (1874), L. R. 9 Q. B. 301, left this statement of the law unimpeached); *Phosphate Sewage Co.* v. *Hartmont* (1877), 5 Ch. D. 394, 456, C. A.; *Re Collie, Ex parte Adamson* (1878), 8 Ch. D. 807, 819, 820, C. A.; and see title COMPANIES, Vol. V., p. 139.

(*c*) *Merryweather* v. *Nixan* (1799), 8 Term Rep. 186; *Adamson* v. *Jervis* (1827), 4 Bing. 66; *Palmer* v. *Wick and Pulteneytown Steam Shipping Co.*, [1894] A. C. 318; *The Englishman and The Australia*, [1895] P. 212, 216—219.

(*d*) See, generally, the cases cited in the notes to pp. 708—713, *ante*.

(*e*) See, generally, the same cases. In *Ludgater* v. *Love* (1881), 44 L. T. 694, C. A., at each of the two trials it was left to the jury to say whether the father had authorised his son to make the statement which he did.

(*f*) *Thorne* v. *Heard and Marsh*, [1895] A. C. 495, 502.

(*g*) In *Newlands* v. *National Employers' Accident Association* (1885), 54 L. J. (Q. B.) 428, 430, 431, C. A., it was pointed out that no "practice or regular course of business" had been established by evidence to support the allegation that the secretary had authority to make a statement of the kind which he had made, and that, in the absence of such evidence, it was a conclusion of law that no such implication of authority could be made. So in *British Mutual Banking Co.* v. *Charnwood Forest Rail. Co.* (1887), 18 Q. B. D. 714, 716—719, C. A., the jury found that the secretary of the company had been held out as a person to answer inquiries, but the Court of Appeal held that, from the whole of the proved and found facts, no authority could be inferred in law.

(*h*) *Mackay* v. *Commercial Bank of New Brunswick* (1874), L. R. 5 P. C. 394, 415, 416, and the cases cited in note (*g*), *supra*.

representor, either actually or in contemplation of law, intended the representation to reach and influence; and (iii.) any individual member of the public, or of a class, who has acted upon a representation addressed to such public or class (*i*).

SECT. 3. The Representee.

SUB-SECT. 2.—*The Person to whom the Representation was made, or his Principal or Partner.*

1709. The first description of representee is the simplest of all. If a representation is made individually and exclusively to A., with no other person in contemplation, A. is obviously the sole representee. It is equally plain that if it is made to A., with knowledge on the representor's part, that A. is merely the agent of B. to receive and transmit it to B., or that he is the agent, for that purpose, of someone who, though undisclosed at the time, afterwards turns out to be B., the only representee is B., A. being the mere messenger or medium through whom the representation is conveyed (*k*). On the other hand, the representation may be made to B. through A., but with the intention that A. shall also be influenced and act upon it, as where the representor knows or believes that B. is A.'s partner or joint-contractor or associate in the business which it is to bring about, in which case either A. or B., or each of them, if either, or each, acts upon the faith of the representation, is deemed a representee (*l*).

Person to whom representation made, or his principal or partner.

SUB-SECT. 3.—*Any Person to whom the Representor intended the Representation to be passed on.*

1710. A second class of case arises where the representor makes a representation to A., either with an express direction or authority to repeat it to B., or with a presumptive intent that it shall come to B.'s notice, and be acted upon by him, such intent being presumed in law on proof of the fact that the representor knew at the time that A. intended to pass it on to B. for him to act upon (*m*), or subsequently, but before B. acted upon it, knew that

Person to whom representation was intended to be passed on.

(*i*) These three classes are included in the comprehensive proposition laid down in *Swift* v. *Winterbotham* (1873), L. R. 8 Q. B. 244, *per* COCKBURN, C.J., at p. 253.

(*k*) See for examples, *Haycraft* v. *Creasy* (1801), 2 East, 92; *Gilbert* v. *Endean* (1878), 9 Ch. D. 259, C. A.

(*l*) Thus, in cases of marine insurance, "a representation to the first underwriter extends to the others" (*Barber* v. *Fletcher* (1779), 1 Doug. (K. B.) 305, *per* Lord MANSFIELD, C.J., at p. 306); and see title INSURANCE, Vol. XVII., p. 415.

(*m*) *Levy* v. *Langridge* (1837), 2 M. & W. 519; affirmed (1838), 4 M. & W. 337, Ex. Ch. (where the plaintiff's father, to whom the representation (that the gun sold was made by Nock, and was a good and safe gun) was personally made, expressly informed the defendant that the gun was intended for use by the plaintiff (2 M. & W. 520, 521, 530, 531)); *Swift* v. *Winterbotham*, *supra* (where it was proved that the nature of banking business was such that it must have been "within the contemplation of the defendant when the representation was made, that it would or might be communicated to the customer of the bank on whose behalf it was sought," namely, the plaintiff, who was therefore held entitled to recover). This decision was afterwards reversed *sub nom. Swift* v. *Jewsbury* (1874), L. R. 9 Q. B. 301, Ex. Ch., but the reversal was on the ground that the alleged representor was not entitled to be so considered, and not on the ground that the plaintiff was not in law a representee.

SECT. 3. **The Representee.**

A. had in fact so passed it on to B. for that purpose (*n*). In any such case B. is deemed a representee, whether A. is also so deemed or not, which latter question depends on all the circumstances of the individual case (*o*). Where such intent is not established, either by direct evidence or as an implication from the proved or admitted facts, B. is not in law the representee (*p*), but only A., who, however, in such circumstances, is usually not in a position to prove either alteration of position or damage (*p*).

SUB-SECT. 4.—*A Member of a Class to whom the Representation was made.*

Member of public or class addressed.

1711. A third kind of possible representee comes into being when, a representation having been addressed to the public at large, or to some class or section of the community, with the object of inducing members of it to take a certain course, a person belonging to such public or class reads or hears the representation and is induced thereby to take that course (*q*); whereupon that person is entitled, as representee, to all such rights against the representor as he would be entitled to if the representation had been made to him directly and individually (*r*).

(Compare *Parsons* v. *Barclay & Co.* (1910), 103 L. T. 196, C. A. (a similar case of a banker's confidential report).

(*n*) *Pilmore* v. *Hood* (1838), 5 Bing. (N. C.) 97, 105, 106, 108, 109.

(*o*) Thus, in the case of a prospectus, the representor may hand or address it to A., either (i.) with express instructions not to communicate it to anyone else, in which case A. is ordinarily held to be the sole representee, but not necessarily so, as, *e.g.*, where the circumstances are such as existed in *Re Royal British Bank, Ex parte Brockwell* (1857), 26 L. J. (CH.) 855 (see note (*r*), *infra*); or (ii.) for the sole purpose of his passing it on, as a mere distributing agent, to B., or a class of which B. is one, in which event B. is the only representee, as in *Gerhard* v. *Bates* (1853), 2 E. & B. 476 (see note (*r*), *infra*); or (iii.) with the intention that A. shall, or with knowledge that he may, first act upon it himself and then pass it on to his friends, or to a class to which both A. and B. belong, whereupon both A. and B are representees. In *Levy* v. *Langridge*, *supra*, the defendant was told that the gun was intended for the use both of the plaintiff's father, to whom the representation was directly made, and his sons.

(*p*) See, generally, the cases cited in the notes to the text, *infra*.

(*q*) On the same principle as that on which it has been held that, though a contract cannot be made with the world, an offer can be made to the public in general, which, when any person accepts the offer by acting upon it, becomes a contract with that person (*Carlill* v. *Carbolic Smoke Ball Co.*, [1893] 1 Q. B. 256, 262, 268, 269, 274, C. A.); and see title CONTRACT, Vol VII., p. 347.

(*r*) Such cases may be classified, without pretending that the classification is exhaustive, as follows: (i.) representations addressed to the public to induce them to subscribe for shares or debentures in a company—that is, to apply for an allotment on a new issue, at the incorporation of the company, or to induce them and the existing shareholders to so subscribe on a subsequent issue (see *Re Royal British Bank, Ex parte Brockwell* (1857), 26 L. J. (CH.) 855, 862, where it was held that "the representation was intended not only to delude existing shareholders, but to induce the public to take the new shares just issued," notwithstanding that the report was headed "For the use of the proprietors only"); (ii.) representations contained in similar documents to induce, not applications for shares, but purchases in the market (*R.* v. *De Berenger* (1814), 3 M. & S. 67, 72—76 ("a fraud levelled against all the public," for "its object was to injure all those who should become purchasers" of the public funds on the strength of the false rumour spread by the accused that Napoleon was dead, and peace was on the point of being declared)); *Shrewsbury* v. *Blount*

SUB-SECT. 5.—*Burden of Proof and Questions of Law and Fact.*

SECT. 3. The Representee.

Questions of law and fact.

1712. The question whether the party claiming relief in respect of any misrepresentation was or was not a representee is a question of fact, and the subject, therefore, of evidence (*s*); but the question whether there is any evidence of this fact, and also all questions which may arise as to whether, on the proved and admitted facts of the case, the representation must, or must not, be deemed to have been made to the alleged representee, are questions of law (*a*).

Burden of proof.

1713. It is incumbent on the party who asserts his right to relief in respect of a misrepresentation to allege, and, having so alleged, to prove (*b*), that he was the representee, or one of the representees, whether the representation is alleged to have been made to him personally and directly, or through another person,

(1841), 2 Man. & G. 475; *Gerhard* v. *Bates* (1853), 2 E. & B. 476 (fraudulent misrepresentation addressed to the Stock Exchange Committee, but with the view of inducing the public, and the plaintiff, as a member thereof, "to become the purchaser and bearer" of the shares in question); *Bedford* v. *Bagshaw* (1859), 4 H. & N. 538 (where the circumstances were of the same nature as those in the last case, and where POLLOCK, C.B., at p. 548, said that "all persons buying shares on the Stock Exchange must be considered as persons to whom it was contemplated that the representation would be made"); *Scott* v. *Dixon* (1859), 29 L. J. (EX.) 62, n. (a report, though addressed in the first instance to the shareholders, held also to have been intended for the public, to induce them to buy shares); *R.* v. *Aspinall* (1876), 2 Q. B. D. 48, C. A. (the same type of case as *Gerhard* v. *Bates*, *supra*, and *Bedford* v. *Bagshaw*, *supra*); and *Scott* v. *Brown, Doering, McNab & Co.*, *Slaughter and May* v. *Brown, Doering, McNab & Co.*, [1892] 2 Q. B. 724, C. A.); (iii.) representations intended to reach and influence both possible applicants and possible purchasers in the market (*Andrews* v. *Mockford*, [1896] 1 Q. B. 372, C. A.); (iv.) representations made to any member of the public to whom a negotiable instrument may be offered in the course of circulation (*Polhill* v. *Walter* (1832), 3 B. & Ad. 114, 123, 124; *West London Commercial Bank* v. *Kitson* (1884), 13 Q. B. D. 360, 362, C. A.); (v.) advertisements to the public offering a situation (*R.* v. *Silverlock*, [1894] 2 Q. B. 766, C. C. R., where a count in an indictment was held good which averred that an advertisement for a housekeeper was "a false pretence to all Her Majesty's subjects, by means of which" the accused "did unlawfully obtain from" the prosecutrix the property in question); (vi.) invitations to the public to bid at an auction sale by announcement of particulars and conditions of sale etc. (*Robinson* v. *Wall* (1847), 2 Ph. 372, 374, 375); (vii.) statements to the travelling public on time-tables of railway companies (*Denton* v. *Great Northern Rail. Co.* (1856), 5 E. & B. 860).

(*s*) Such evidence was given in *Swift* v. *Winterbotham* (1873), L. R. 8 Q. B. 244 (banking practice), and *Bedford* v. *Bagshaw*, *supra* (Stock Exchange rules).

(*a*) See *Gerhard* v. *Bates*, *supra*; *Bedford* v. *Bagshaw*, *supra*; *Swift* v. *Winterbotham*, *supra*; *R.* v. *Aspinall*, *supra*; *R.* v. *Silverlock*, *supra*; *Andrews* v. *Mockford*, *supra*; and *Salaman* v. *Warner* (1891), 65 L. T. 132, C. A. (where the argument was on the question of law, whether the facts alleged in the declaration, statement of claim, or indictment, or proved at the trial, disclosed any averments or evidence that the representee was the person, or one of the persons, to whom the fraudulent misrepresentation, or false pretence, was made.

(*b*) Amongst the other omissions which made a count in the declaration bad in *Behn* v. *Kemble* (1859), 7 C. B. (N. S.) 260, was the omission to aver that any representation was made to the plaintiff. As to proof, see, generally, the cases cited in the notes to pp. 714—716, *ante*, the text, *supra*, and to p. 718, *post*.

SECT. 3. The Representee.

or as a member of the public or a class. In the two latter descriptions of cases, however, though the burden is the same as in the first, it frequently involves problems of greater nicety and intricacy.

Indirect representee.

Thus, where the alleged representee is an individual to whom the representation was not made directly, but passed on through a third person, cogent and precise proof is required of the representor's intention (actual or presumptive) to influence and mislead him by the transmission of such representation through the suggested channel. Wherever this cogent proof has not been forthcoming, either the fact has been found against the alleged representee, or, if found in his favour, the court has held that there was no evidence to justify such a finding (*c*).

Representee, member of a class.

Again, where the representation is made to a class of which the alleged representee claims to be a member, it must be clearly established that he was one of the persons to whom the representor contemplated that the representation should be made (*d*). In the absence of direct evidence (by his own admissions or declarations) of the representor's having so contemplated, which is not often available, the nature of the representation must be carefully examined, and, on such examination, in the light of any evidence which is necessary and admissible, together with such customs and practices in the affairs of life as the law will take judicial notice of (*e*), it has often been found that, though a certain class of persons was intended to be deceived by the representation, that class was not the particular class to which the representee belongs, but a

(*c*) *Longmeid* v. *Holliday* (1851), 6 Exch. 761, 776; *Collins* v. *Cave* (1860), 6 H. & N. 131, 134, Ex. Ch.; *Barry* v. *Croskey* (1861), 2 John. & H. 1, 23, 24; *Le Lievre* v. *Gould*, [1893] 1 Q. B. 491, 497, 498, 499, 502, C. A. (in which it was said that *Cann* v. *Willson* (1888), 39 Ch. D. 39, where CHITTY, J., had expressed a contrary view, was no longer law); *Edinburgh United Breweries* v. *Molleson*, [1894] A. C. 96, 109—112, 114. It was pointed out in *Blakemore* v. *Bristol and Exeter Rail. Co* (1858), 8 E. & B. 1035, 1052, 1053, and again in *Barry* v. *Croskey*, *supra*, at pp. 17, 18, 24, that if a friend of the father or son, in *Levy* v. *Langridge* (1838), 4 M. & W. 337, Ex Ch., had used the gun with the permission of either of them, or a stranger, without such permission, had used it, such person would not have had a cause of action as a representee. Doubts have even been expressed in *Barry* v. *Croskey*, *supra*, *per* WOOD, V.-C., at pp. 18, 19, and in *Andrews* v. *Mockford*, [1896] 1 Q. B. 372, C. A., *per* RIGBY, L.J., at pp. 384, 385, whether those who purchased funds on the faith of the rumours set afloat by the accused, in *R.* v. *De Berenger* (1814), 3 M. & S. 67, could have been deemed representees in any civil proceedings instituted against him; but these doubts appear not to have been entertained by BRETT, J.A., judging from his observations in *R.* v. *Aspinall* (1876), 2 Q. B. D. 48, C. A., at p. 60.

(*d*) *Bedford* v. *Bagshaw* (1859), 4 H. & N. 538, *per* POLLOCK, C.B., and BRAMWELL, B., at p. 548. The application of the principles there laid down to the facts of the particular case was dissented from in *Peek* v. *Gurney* (1873), L. R. 6 H. L. 377, *per* Lord CHELMSFORD, at pp. 396, 397 (a personal opinion which was not necessary to the decision of the House, and in which none of the other Lords expressed any concurrence), but neither he nor anyone has ever expressed any doubt as to the correctness of the principles themselves. He was, however, justified in pointing out that *Bagshaw* v. *Seymour* (1856), 18 C. B. 903, inasmuch as it was never argued either before the Exchequer Chamber, or in the House of Lords, was not of the slightest authority, and ought not to have been relied upon in *Bedford* v. *Bagshaw*, *supra*, as binding the court.

(*e*) *Polhill* v. *Walter* (1832), 3 B. & Ad. 114, 124; see, generally, title CUSTOM AND USAGES, Vol. X., pp. 236 *et seq.*

different or a smaller one, in which case the burden of proof is not discharged; as, for instance, where a plaintiff claims to have been induced to purchase shares in the market by a document the primary function of which is to induce, not purchases in the market, but applications for allotment (*f*), or *vice versâ* (*g*), or where a company complains of fraudulent statements made by its officers or agents, not to it, but to the public (*h*), or where a member of the public, as such, claims to have sustained injury in consequence of a misrepresentation addressed to a more limited class, of which he is not a member (*i*). SECT. 3. The Representee.

Part IX.—What renders Misrepresentation Actionable.

SECT. 1.—*In General.*

1714. Misrepresentation is amenable to civil proceedings at the instance of the representee, subject to certain conditions precedent. The nature of these conditions, and of the remedy and relief afforded, and of the proof required, varies in certain important respects accordingly as the misrepresentation was fraudulent or innocent, and also according to the manner in which the representee's position was altered. What misrepresentation is actionable.

SECT. 2.—*General Description of Remedies in Case of Fraudulent Misrepresentation.*

1715. A fraudulent misrepresentation, whereby the representor has induced the representee to alter his position in some other manner than by entering into a contract or binding transaction with the representor (*j*), is the subject of an action for damages, either at common law or in equity (*k*); and, on proof of the several matters hereafter specified (*l*), the representee is entitled to relief in When misrepresentation fraudulent—two remedies.

(*f*) In the absence of special circumstances, the function of a prospectus, which is to procure allottees, is exhausted with the allotment (*Peek* v. *Gurney* (1873), L. R. 6 H. L. 377, 395—400, 410—413; *Salaman* v. *Warner* (1891), 65 L. T. 132, C. A.). But where such special circumstances, showing some direct connection between the prospectus and a purchase of shares in the market by the alleged representee, are averred, as they were in *Gerhard* v. *Bates* (1853), 2 E. & B. 476, or proved, as in *Andrews* v. *Mockford*, [1896] 1 Q. B. 372, C. A., the burden of allegation in the one case, and of proof in the other, is discharged.

(*g*) *Re National Patent Steam Fuel Co., Ex parte Worth* (1859), 28 L. J. (CH.) 589.

(*h*) *Vigers* v. *Pike* (1842), 8 Cl. & Fin. 562, 646, 647, H. L.; *Overend and Gurney Co.* v. *Gibb* (1872), L. R. 5 H. L. 480, 501; *Re Ambrose Lake Tin and Copper Mining Co., Ex parte Taylor, Ex parte Moss* (1880), 14 Ch. D. 390, 397, 399, C. A.

(*i*) *Blakemore* v. *Bristol and Exeter Rail. Co.* (1858), 8 E. & B. 1035.

(*j*) As to the constituents of fraudulent misrepresentation, see pp. 679—691, *ante*. As to inducement and materiality, alteration of position, and representor and representee, see pp. 694—702, pp. 703, 704, and pp. 708—717, *ante*, respectively.

(*k*) See title EQUITY, Vol. XIII., pp. 67, 68.

(*l*) See pp. 724, 725, *post*.

SECT. 2. General Description of Remedies in Case of Fraudulent Misrepresentation.

this form, but to no other relief. Where, however, the alteration of position assumes the form of a contract or binding transaction with the representor, the representee has two remedies: he may either adhere to the contract or transaction, and maintain an action for damages, or repudiate it; and, in the latter event, unless the representor accepts the repudiation, he may institute proceedings for the judicial avoidance or annulment thereof, or set up the fraudulent misrepresentation as an affirmative defence to any action or proceeding instituted for the direct or indirect enforcement of such contract or transaction, subject to the conditions, and on proof of the matters, respectively hereafter described (*m*).

Remedies alternative, not cumulative.

1716. The two kinds of relief above referred to are obviously inconsistent with, and therefore strictly alternative to, one another, and not cumulative. They cannot both be pursued, either simultaneously (*n*),—since no man can at one and the same time approbate and reprobate (*o*),—or successively (*p*), since, generally speaking, an election, once made, is finally made (*q*). But though, in such cases, the representee has no more than a right to choose, on the other hand, he has no less. Thus, if he elects to sue for rescission, or to set up the misrepresentation as an affirmative plea, not having lost his right to do so (*r*), it is no answer to such action or plea, that he might have sued for damages; and, conversely, if he elects to sue for damages, not having lost his right to do so (*s*), it is no bar to his action that he might first have avoided the contract or transaction, or taken proceedings to rescind it, or asserted his right to have it treated as void in any action brought to enforce it (*t*).

(*m*) See pp. 740–742, 756, 757, *post*.

(*n*) *Lemprière* v. *Lange* (1879), 12 Ch. D. 675, *per* JESSEL, M.R., at p. 679.

(*o*) *Clarke* v. *Dickson* (1858), E. B. & E. 148, *per* CROMPTON, J., at p. 152 ("if you are fraudulently induced to buy a cake, you may return it and get back the price; but you cannot both eat your cake, and return your cake"). But the representee is entitled to claim these inconsistent forms of relief in one and the same pleading, if he claims them strictly as alternatives: see *Greenwood* v. *Leather Shod Wheel Co.*, [1900] 1 Ch. 421, C. A. As to pleading, generally, see title PLEADING.

(*p*) Where, however, a representee has been unable to obtain the full restitution to which he has become entitled under an order of the court for rescission and consequential relief, there is no objection to his afterwards suing the actual representor, not being the person against whom the order for rescission was made, for damages to the extent of the loss which he has so sustained. Thus, in *Ship* v. *Crosskill* (1870), L.R. 10 Eq. 73, the representee had already had his name removed from the register of shareholders by order of the court, and was entitled to repayment by the company of all moneys paid to it, but, the company being in liquidation, he sued the individual representors for these irrecoverable moneys as damages, and was held entitled to do so if he could prove fraud, which, however, he failed to do.

(*q*) See p. 740, *post*.

(*r*) As he may do in any of the modes described in pp. 749–752, *post*. In that case his remedy, if any, is in damages.

(*s*) *E.g.*, by accepting a voluntary cancellation of the contract, if accompanied by complete restoration of everything he has paid thereunder, but not otherwise; see *Ship* v. *Crosskill*, *supra*, and p. 730, *post*.

(*t*) *Arnison* v. *Smith* (1889), 41 Ch. D. 348, C. A., *per* COTTON, L.J., at p. 371, impliedly, if not expressly, accepting the argument (*ibid.*, at p. 367) that "the cases shew that an action to rescind, and an action for deceit are perfectly independent, and there is not a trace of authority in support of the position that you must resort to the former before resorting to the latter."

SECT. 3.—*General Description of Remedies in Case of Innocent Misrepresentation.*

SECT. 3. General Description of Remedies in Case of Innocent Misrepresentation.

1717. In the case of an innocent misrepresentation (*u*), if, but not unless, the representee's alteration of position consisted in his entering into a contract or binding transaction with the representor (*a*), the representee is entitled to the several remedies hereafter mentioned, for the purpose of having the contract or transaction avoided, or treated as void, whether by way of active proceedings or affirmative defence (*b*), but not to any other relief.

Remedies in case of innocent misrepresentation.

SECT. 4.—*When Misrepresentation not Actionable, as such.*

SUB-SECT. 1.—*In General.*

1718. Except as already stated in general terms, misrepresentation is not the subject of any non-statutory action, or civil proceedings whatsoever (*c*). It has, indeed, from time to time been suggested, (i.) that, in cases where misrepresentation is actionable, there are other remedies known to the law than those above described, and, in support of this view, the so-called "making good" doctrine has been invoked; and (ii.) that it is not correct to say that innocent misrepresentation inducing an alteration of position otherwise than by contracting with the representor is, as above stated (*d*), entirely without remedy, inasmuch as innocent misrepresentation of authority entitles the representee to recover damages. It is proposed to show that neither of these suggestions is supported by authority, or consistent with principle.

Misrepresentation not liable to civil non-statutory proceedings, except as above.

SUB-SECT. 2.—"*Making Good.*"

1719. For long periods in the history of English jurisprudence an erroneous belief has prevailed that, in the form of "making good" representations, as it has been called, there exists a special form of equitable relief, which is neither damages, nor rescission, but a compound of some of the constituent elements of each. The special remedy in question was suggested to be of this nature. A. makes a misrepresentation to B., whereby B. is induced to contract with A. The ordinary remedies available to B. would be rescission, and, alternatively (if the misrepresentation was fraudulent) damages.

Doctrine of "making good."

(*u*) See pp. 692, 694, *ante*.
(*a*) See p. 703, *ante*.
(*b*) These are discussed at pp. 737 *et seq.*, *post*, and pp. 754 *et seq.*, *post*.
(*c*) It will be remembered that misrepresentation means only what it is defined as meaning in pp. 677 *et seq.*, *ante*, for there are misrepresentations in other senses which, though innocent of fraud, are actionable, such, for instance, as those made by a party not with the object of misleading the other party, but merely in breach of a contractual duty, owed to a man's employer or principal, to use due care and skill in giving accurate information as to the affairs on which he is employed, as in *Cassoboglou* v. *Gibb* (1883), 11 Q. B. D. 797, C. A., and *Salvesen (Chr.) & Co.* v. *Rederi Aktiebolaget Nordstjernan*, [1905] A. C. 302. In such cases, if the party chooses unnecessarily to base his claim on fraud, and the jury negative it, he must put up with the consequences (*Thom* v. *Bigland* (1853), 8 Exch. 725).
(*d*) See the text, *supra*.

SECT. 4. **When Misrepresentation not Actionable, as such.**

Analysis of authorities relied on.

According to the "making good" theory, instead of granting either of these remedies, equity had jurisdiction to enforce specifically, not the contract in fact entered into, but another contract consisting of the terms thereof varied, or supplemented, or rectified, by the addition of a promise or undertaking that the representation made was true. But when the authorities relied upon as countenancing this doctrine are carefully examined, regard being had to the facts of each case, and the actual decision on those facts, rather than to *dicta* and phraseology not required for the purposes of the principles of law enunciated, it is clear that none of them supports the theory, and that all come within one or more of the following three classes—(1) cases in which the term "making good" indicates no more than either compensation in damages, or rescission, or such specific restitution as forms part of the relief ancillary thereto (*e*), all of which are the ordinary and recognised remedies for misrepresentation; (2) cases of estoppel by representation, which is a rule of evidence, and not a cause of action, much less a specia' form of remedy (*f*); and (3) cases (not really cases of misrepresentation at all) in which the sole question has been whether the so-called representation did, or did not, amount to an enforceable contract or promise, and in which, accordingly as it did, or did not, so amount, equity required, or did not require, the alleged contractor (miscalled a "representor"), to "make good" (which, in this class of case, meant no more than "to perform") that which was held to be a contract or promise, or nothing, and which did not become in law anything else by being described as a representation (*g*). It follows that the theory of

(*e*) As in *Evans* v. *Bicknell* (1801), 6 Ves. 174, 180, 182, 183; *Merewether* v. *Shaw* (1816), 2 Cox, Eq. Cas. 124, 134, 135; *Blair* v. *Bromley* (1847), 2 Ph. 354, 360, 361; *Slim* v. *Croucher* (1860), 1 De G. F. & J. 518, 524—526, overruled by *Low* v. *Bouverie*, [1891] 3 Ch. 82, C. A.; *Skidmore* v. *Bradford* (1869), L. R. 8 Eq. 134.

(*f*) *Montefiori* v. *Montefiori* (1762), 1 Wm. Bl. 363; *Piggott* v. *Stratton* (1859), 1 De G. F. & J. 33, *per* Lord CAMPBELL, L.C., at pp. 49, 50; *Loftus* v. *Maw* (1862), 3 Giff. 592. The estoppel relied upon in the so-called "making good" cases is often termed "equitable estoppel," but when the definition of this expression given in *Citizens' Bank of Louisiana* v. *First National Bank of New Orleans* (1873), L. R. 6 H. L. 352, *per* Lord SELBORNE, L.C., at pp. 360, 361, is compared with the common law definition of estoppel, it will be seen that there is nothing special or distinctive in equitable estoppel except this very use of the term "making good." See also title ESTOPPEL, Vol. XIII., pp. 376, 377.

(*g*) In the following cases an enforceable contract was established, and on that ground alone the party relying upon it succeeded, and the free use made of the term "making good" was entirely unnecessary, and, therefore, misleading:—*Hammersley* v. *de Biel* (1845), 12 Cl. & Fin. 45, H. L.; *Moorhouse* v. *Colvin* (1851), 15 Beav. 341 (*quoad* one of the alleged promises); *Prole* v. *Soady* (1859), 2 Giff. 1; *Coverdale* v. *Eastwood* (1872), L. R. 15 Eq. 121; *Moore* v. *Knight*, [1891] 1 Ch. 547, C. A.; *Synge* v. *Synge*, [1894] 1 Q. B. 466, C. A. In the following cases, on the other hand, the party failed on the sole ground that he had proved no enforceable contract or promise, and the urgent invocation of the "making good" theory was ineffectual:—*Merewether* v. *Shaw*, *supra*, at p. 134; *Moorhouse* v. *Colvin*, *supra*, at p. 349 (*quoad* one of the two promises relied upon); *Maunsell* v. *Hedges* (1854), 4 H. L. Cas. 1039; *Jorden* v. *Money* (1854), 5 H. L. Cas. 185; *Dashwood* v. *Jermyn* (1879), 12 Ch. D. 776, 781, 786; *Maddison* v. *Alderson* (1883), 8 App. Cas. 467; *Re Fickus*, *Farina* v. *Fickus*, [1900] 1 Ch. 331. There is no doubt that both the above classes of case were rightly

"making good" as a special remedy, even if it ever did derive support from any actual decision, is now quite exploded (*h*).

SECT. 4. When Misrepresentation not Actionable, as such.

SUB-SECT. 3.—*Misrepresentation of Authority.*

1720. A misrepresentation of authority, whether in words or by conduct, is, when fraudulent, the subject of an action for damages, under the same conditions as any other fraudulent misrepresentation (*i*). It is now undoubted law that an innocent misrepresentation of authority is equally the subject of such an action (*k*), which, at first sight, would appear to constitute an anomaly, and an exception to the rule above stated (*l*), that no innocent misrepresentation is amenable to proceedings for damages. But it has been held otherwise (*m*); and the reason is that the law has chosen to regard an express or implied representation of authority in a double aspect, that is, not only as a representation inducing the representee to enter into a contract with a third person which the representor assumed and professed to be authorised to make on that person's behalf, but also as an implied warranty, promise, or undertaking on the representor's part that he had the authority which he professed to have, whence it follows that the absence of such authority would establish a breach thereof, in respect of which breach the right to recover damages is of course independent of the question whether the breach was fraudulent or innocent (*n*); and, accordingly, in all the cases in which relief has been given in respect of innocent misrepresentations of this character, it was on this latter aspect alone that the decision was expressed to be founded (*o*).

Right to damages for innocent misrepresentation of authority based upon theory of implied warranty.

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decided, but the unfortunate result of incumbering the former class, which were plain cases of contract, with the objectionable phraseology in question, particularly in *Hammersley* v. *de Biel* (1845), 12 Cl. & Fin. 45, H. L., was to encourage a constant citation of them as authorities, not for what they decided, but for the special equitable doctrine which was supposed to be indicated by the special terminology; see, for instance, the language used in *Prole* v. *Soady* (1859), 2 Giff. 1, *Coverdale* v. *Eastwood* (1872), L. R. 15 Eq. 121, 132; *Moore* v. *Knight*, [1891] 1 Ch. 547, 553—555, C. A.; *Synge* v. *Synge*, [1894] 1 Q. B. 466, 469, 470, C. A. As to specific performance, see title SPECIFIC PERFORMANCE.

(*h*) See *Re Fickus, Farina* v. *Fickus*, [1900] 1 Ch. 331, 334, 335.

(*i*) *Polhill* v. *Walter* (1832), 3 B. & Ad. 114; *Smout* v. *Ilbery* (1842), 10 M. & W. 1, 9, *Randell* v. *Trimen* (1856), 18 C. B. 786, 793, 794; *Starkey* v. *Bank of England*, [1903] A. C. 114.

(*k*) In *Smout* v. *Ilbery, supra*, at pp. 9—11, it was held that the misrepresentation of authority must constitute a tort in order to be actionable, but this view was overruled in *Collen* v. *Wright* (1857), 8 E. & B. 647, Ex. Ch. (see *Halbot* v. *Lens*, [1901] 1 Ch. 344, 349, 350, and *Yonge* v. *Toynbee*, [1910] 1 K. B. 215, 226, C. A.).

(*l*) In *Firbank's Executors* v. *Humphreys* (1886), 18 Q. B. D. 54, 61, C. A., LINDLEY, L.J., inadvertently describes cases of misrepresentation as an exception to this rule; and it was so argued, but unsuccessfully, in *Starkey* v. *Bank of England, supra*.

(*m*) *Starkey* v. *Bank of England, supra*, at pp. 117—119.

(*n*) See *Pawson* v. *Watson* (1778), 2 Cowp. 785, *per* Lord MANSFIELD, C.J., at pp. 788—790.

(*o*) *Collen* v. *Wright, supra*; *Dickson* v. *Reuter's Telegram Co.* (1877), 3 C. P. D. 1, 5, 8, C. A.); *Firbank's Executors* v. *Humphreys, supra*, at pp. 60, 61; *Starkey* v. *Bank of England, supra*, at pp. 116, 117; *Salton* v. *New Beeston Cycle Co.*, [1900] 1 Ch. 43; *Yonge* v. *Toynbee, supra*, at pp. 226, 227, 231—233; *Simmons* v. *Liberal Opinion, Ltd., Re Dunn*, [1911] 1 K. B. 966, C. A.; and see title AGENCY, Vol. I., pp. 221—223.

Part X.—Action for Damages for Misrepresentation.

SECT. 1.

Nature of Action.

SECT. 1.—*Nature of Action.*

Action for damages.

1721. On proof of the several matters specified below, an action (*p*) is maintainable at the suit of the representee for damages in respect of misrepresentation. Such action is founded in tort; and the same principles of law and rules of evidence are applicable in whatever court the proceedings are instituted (*q*).

SECT. 2.—*Constituent Elements of the Cause of Action.*

Constituent elements.

1722. In any action for damages the burden is on the representee of alleging, and (except in so far as any of them are either expressly or impliedly admitted before or at the trial) proving, each and every of the following matters: (i.) that the alleged representation consisted of something said, written, or done which amounts in law to a representation; (ii.) that the defendant was the representor; (iii.) that the plaintiff was the representee; (iv.) inducement and materiality; (v.) falsity; (vi.) alteration of position; (vii.) fraud, and (viii.) damage. Of these *alleganda et probanda*, the first six are common to all forms of proceeding for misrepresentation (*r*), and have already been the subject of full discussion (*s*); but the last two, fraud and damage, are peculiar to actions of the class now under consideration.

Concurrence of fraud and damage essential.

1723. From the earliest times it has been recognised that the concurrence of fraud and damage is essential, and that neither is sufficient without the other (*t*). Indeed, the two elements are indicated *ex facie* by the very names, "action of deceit," and "action for damages," respectively. The necessity for proving damage has

(*p*) Which includes counterclaim; see *Redgrave* v. *Hurd* (1881), 20 Ch. D. 1, C. A.

(*q*) The action when brought at common law is frequently called by its old name of "action of deceit"; when brought in the Chancery Division it used to be described as "an equitable claim for damages in the nature of, or analogous to, an action of deceit": but whatever distinctive terminology may be used, it has long been settled that the two forms of proceeding are precisely the same, and governed by the same principles (*Peek* v. *Gurney* (1873), L. R. 6 H. L. 377, 384, 390; *Arkwright* v. *Newbold* (1881), 17 Ch. D. 301, 320, C. A.; *Smith* v. *Chadwick* (1884), 9 App. Cas. 187, 193; *Schroeder* v. *Mendl* (1887), 37 L. T. 452, 454, C. A.; *Derry* v. *Peek* (1889), 14 App. Cas. 337, 360). As to the general principles of tort, see title TORT.

(*r*) That is, not only actions for damages, but also proceedings for rescission, and defences, which form the subject of pp. 737 *et seq.*, *post*, and pp. 754 *et seq.*, *post*, respectively.

(*s*) As to (i.), see pp. 658 *et seq.*, and 671 *et seq.*, *ante*; as to (ii.), see p. 714, *ante*; as to (iii.), see pp. 717—719, *ante*; as to (iv.), see pp. 694, 695, 701, *ante*; as to (v.), see p. 677, *ante*; and as to (vi.), see pp. 704, 705, *ante*.

(*t*) *Baily* v. *Merrell* (1615), 3 Bulst. 94, 95; *Pasley* v. *Freeman* (1789), 3 Term Rep. 51, *per* BULLER, J., at p. 56 ("the foundation of this action is fraud and deceit in the defendant, and damage to the plaintiff"); *Levy* v. *Langridge* (1838), 4 M. & W. 337, Ex. Ch.

SECT. 2. Constituent Elements of the Cause of Action.

already been dealt with (*a*). The necessity for establishing fraud, whatever for the time being that term might be held to include, has never been doubted (*b*). Every action for damages, whether at law or in equity, in which it has not been alleged, or having been alleged has not been proved, has failed (*c*); every such action where it has been alleged and proved has succeeded, or, if not successful, has failed on grounds independent of the fraudulent character of the misrepresentation (*d*).

SECT. 3.—*Affirmative Defences to the Action.*

SUB-SECT. 1.—*In General.*

Special affirmative defences.

1724. For the purposes of resisting an action or counterclaim for damages for fraudulent misrepresentation, a representor is entitled

(*a*) See pp. 705—707, *ante*.

(*b*) The doubts and debates which have arisen from time to time, and which have provoked the long series of authorities referred to in notes (*c*) and (*d*), *infra*, relate to the question of what constitutes fraud, not to the necessity of proving it. It is now, however, settled definitely what "fraud" includes and what it does not; see pp. 687—692, *ante*

(*c*) Examples of omission to allege fraud, or the *scienter*, as well as falsity, in actions at common law, and consequent decisions that the declaration or statement of claim was bad, are:—*Chandelor* v. *Lopus* (1603), Cro. Jac. 4, Ex. Ch.; *Hill* v. *Balls* (1857), 2 H. & N. 299, 302, 304, 305; *Behn* v. *Kemble* (1859), 7 C. B. (N. S.) 260, 267; *Childers* v. *Wooler* (1859), 2 E. & E. 287, 306; *Thiodon* v. *Tindall* (1891), 65 L. T. 343. Instances of common law actions failing on the ground of no proof of fraud are:—*Baily* v. *Merrell* (1615), 3 Bulst. 94; *Haycraft* v. *Creasy* (1801), 2 East, 92; *Pickering* v. *Dowson* (1813), 4 Taunt. 779; *Ames* v. *Milward* (1818), 8 Taunt. 637, *Horncastle* v. *Moat* (1824), 1 C. & P. 166; *Freeman* v. *Baker* (1833), 5 B. & Ad. 797, 805, 807; *Shrewsbury* v. *Blount* (1841), 2 Man. & G. 475; *Taylor* v. *Ashton* (1843), 11 M. & W. 401, 413; *Collins* v. *Evans* (1844), 5 Q. B. 820, 827—830, Ex. Ch.; *Ormerod* v. *Huth* (1845), 14 M. & W. 651, 664, Ex. Ch.; *Longmead* v. *Holliday* (1851), 6 Exch. 761, 766; *Dickson* v. *Reuter's Telegram Co.* (1877), 3 C. P. D. 1, 6, 7, C. A.; *Schroeder* v. *Mendl* (1877), 37 L. T. 452, C. A.; *Bellairs* v. *Tucker* (1884), 13 Q. B. D. 562, 576, 580—582; *Burstal* v. *Bianchi* (1891), 65 L. T. 678. The following are equity cases where the same result followed the like deficiency of proof:—*Evans* v. *Bicknell* (1801), 6 Ves 174, 188, 191, 192; *Rashdall* v. *Ford* (1866), L. R. 2 Eq. 750, 754; *Ship* v. *Crosskill* (1870), L. R. 10 Eq. 73; *Redgrave* v. *Hurd* (1881), 20 Ch. D. 1, 12, C. A. (claim for damages dismissed, no fraud being proved; claim for rescission, where no fraud need be proved, succeeding); *Derry* v. *Peek* (1889), 14 App. Cas. 337, 374; *Angus* v. *Clifford*, [1891] 2 Ch. 449, 462—468, 471, 479, C. A.; *Low* v. *Bouverie*, [1891] 3 Ch. 82, C. A.; *Coleman* v. *North* (1898), 47 W. R. 57; *Lagunas Nitrate Co.* v. *Lagunas Syndicate*, [1899] 2 Ch. 392, 427—431, C. A.; *Parsons* v. *Barclay & Co.* (1910), 103 L. T. 196, C. A.

(*d*) These cases, as to which see, generally, the notes to pp. 726—737, *post*, and to pp. 687—692, *ante*, may be roughly classified, according to the subject-matter of the fraudulent misrepresentation, as follows:—misrepresentations relating to (1) real or personal property, the subject of sale and purchase, as to which see also titles SALE OF GOODS; SALE OF LAND; (2) the takings, profits, liabilities, or outgoings of a business, as to which, when contained in prospectuses of companies, see also title COMPANIES, Vol. V., pp. 132—136; (3) the validity of instruments and transactions; (4) the credit of a third person, in reference to which see also the cases cited at pp. 731, 732, *post*; (5) personal identity, as to which see pp. 699, 700, *ante*; (6) security of places, chattels, or investments, as to which see notes (*o*) and (*p*), p. 706, *ante*; and (7) miscellaneous cases, such as *Denton* v. *Great Northern Rail. Co.* (1856), 5 E. & B. 860 (railway time-table); *Burrows* v. *Rhodes*, [1899] 1 Q. B. 816 (legality of foreign expedition); *Pritty* v. *Child* (1902), 71 L. J. (K. B.) 512 (water-finder); and *Dott* v. *Brickwell* (1906), 23 T. L. R. 61 (money-lending transaction).

SECT. 3. **Affirmative Defences to the Action.**

to set up certain affirmative defences special to this form of proceeding, in addition to those which may be raised in answer to any other action of tort (*e*). These special affirmative pleas are five in number, one of them being statutory, having only a limited application, and the other four non-statutory (*f*). The burden of proving each of them is on the representor (*g*).

SUB-SECT. 2.—*The Representee's Knowledge of the Truth.*

Representee's knowledge of the truth.

1725. A representee who knows the truth is not deceived. Proof, therefore, of such knowledge is a complete answer to any proceeding founded on misrepresentation, whether such misrepresentation was fraudulent or innocent (*h*). In order to make good this plea it is sufficient to show that the representee was cognisant of the real facts at any time before he altered his position on the faith of the false statement (*i*). But it must be established that the representee's knowledge was exact and complete: it is not enough to show partial and fragmentary information, or mere suspicion (*k*). Moreover, actual knowledge must be proved. Imputed or constructive notice is not to the purpose: thus, it is of no avail to establish merely that the representee had such means of knowledge and materials within his reach as would have enabled a person of ordinary business habits and normal intelligence to discover the whole truth, though the representor himself may have supplied those means and materials, or even that the representee availed himself of them, if his investigation, whether perfunctory or diligent, did not in fact result in actual knowledge (*l*). The reason is obvious. No man can be

(*e*) See title TORT.

(*f*) See the text, *infra*, and pp. 727—732, *post*. As to the statutory defence available in cases of representation as to a third person's credit, see pp. 731—732, *post*.

(*g*) See, generally, the cases cited in the notes to pp 727—732, *post*.

(*h*) It is convenient to cite here, once for all, the cases illustrative of the plea in question, which is available alike for the purposes of the class of action now under consideration, where fraud must be proved, and also for the purposes of the proceedings dealt with in pp. 737 *et seq.*, *post*, where fraud need not be proved. There are very few reported instances of the success of the plea: in actions for damages, none, unless it be *Eaglesfield* v. *Londonderry* (*Marquis*) (1878), 26 W. R. 540, H. L., *per* Lord HATHERLEY, at p. 541; in proceedings for rescission, the following:—*Attwood* v. *Small* (1838), 6 Cl. & Fin. 232, 390, 448—450, H. L.; *Vigers* v. *Pike* (1842), 8 Cl. & Fin. 562, 648, H. L.; *Begbie* v. *Phosphate Sewage Co.* (1875), L. R. 10 Q. B. 491, 498, 499; *Re British Burmah Lead Co., Ex parte Vickers* (1887), 56 L. T. 815; *Wasteneys* v. *Wasteneys*, [1900] A. C. 446, 449, P. C.; and, by way of answer to a defence based on misrepresentation, *Dyer* v. *Hargrave*, *Hargrave* v. *Dyer* (1805), 10 Ves. 505 (as to one of the misrepresentations the subject thereof), and *Bawden* v. *London, Edinburgh, and Glasgow Assurance Co.*, [1892] 2 Q. B. 534, C. A.

(*i*) For the representation is deemed to continue until then; see pp. 678, 679, *ante*.

(*k*) *Martin* v. *Cooper* (1846), 3 Jo. & Lat. 496, 507, 508; *Wilson* v. *Short* (1847), 6 Hare, 366, 376; *Hughes* v. *Jones* (1861), 3 De G. F. & J. 307, 312, C. A.; *Redgrave* v. *Hurd* (1881), 20 Ch. D. 1, C. A.

(*l*) *Dyer* v. *Hargrave*, *Hargrave* v. *Dyer*, *supra* (as to two of the three misrepresentations which were the subject of the plea); *Dobell* v. *Stevens* (1825), 3 B. & C. 623; *Pearson* v. *Wheeler* (1825), Ry. & M. 303; *Bowring* v. *Stevens* (1826), 2 C. & P. 337; *Harris* v. *Kemble* (1831), 5 Bli. (N. S.) 730, 745, 750; *King* v. *Wilson* (1843), 6 Beav. 124, 129; *Reynell* v. *Sprye*, *Sprye* v. *Reynell*

heard to complain that another has confided in a misrepresentation made, even if innocently, much less if fraudulently, for the purpose of inspiring that very confidence, or plead as an excuse that he whom he has misled was wanting in sagacity or diligence in not testing the statement by inquiry (*m*). The representee never owed any duty to the representor to be circumspect, or active in suspicion; or if he ever did, it was the very office and effect of the representation to relieve him of it (*n*).

SECT. 3. **Affirmative Defences to the Action.**

SUB-SECT. 3.—*Agreement to waive Inquiry etc.*

1726. A second affirmative plea available to the representor consists in establishing, not that the representee knew the truth, but that he neither knew, nor wanted to know it, having expressly or impliedly agreed to take upon himself all the risks involved in such ignorance, and dispense with all inquiry (*o*). This defence, like the first (since each of them shows that, though for opposite reasons, the representee was never deceived at all), is admissible whether the alleged misrepresentation was fraudulent or not, and whatever form the proceedings may assume (*p*). To prove merely the fact of the representee's abstention from investigation is, as has been shown, to prove nothing (*q*): there must be evidence of a contract to forgo inquiry on his own part, and to waive disclosure

Agreement to waive inquiry.

Admissible in all proceedings.

(1852), 1 De G. M. & G. 660, 687, 709, 710, C. A.; *Price* v. *Macaulay* (1852), 2 De G. M. & G. 339, 346, 347, C. A.; *Brandling* v. *Plummer* (1854), 2 Drew. 427, 431, 432; *Rawlins* v. *Wickham* (1858), 3 De G. & J. 304, 313, 314, C. A.; *Central Rail. Co. of Venezuela (Directors etc.)* v. *Kisch* (1867), L. R. 2 H. L. 99, 118, 120, 121, 123, 124; *Caballero* v. *Henty* (1874), 9 Ch. App. 447, 450; *Redgrave* v. *Hurd* (1881), 20 Ch. D. 1, 14, C. A.; *Mathias* v. *Yetts* (1882), 46 L. T. 497, 502, 504, C. A.; *Re London and Staffordshire Fire Insurance Co.* (1883), 24 Ch. D. 149, 154—156; *White* v. *Haymen* (1883), Cab. & El. 101, 103; *Arnison* v. *Smith* (1889), 41 Ch. D. 348, 370, 371, 372, 373, C. A; *Biggar* v. *Rock Life Assurance Co.*, [1902] 1 K. B. 516, 526; *M'Millan* v. *Accident Insurance Co.*, [1907] S. C. 484; *Moss & Co.* v. *Swansea Corporation* (1910), 74 J. P 351.

(*m*) *Barley* v. *Walford* (1846), 9 Q. B. 197, 209; *Wilson* v. *Short* (1847), 6 Hare, 366, 377; *Reynell* v. *Sprye*, *Sprye* v. *Reynell* (1852), 1 De G. M. & G. 660, 710; *Price* v. *Macaulay*, *supra*, at pp. 346, 347; *Central Rail. Co. of Venezuela (Directors etc.)* v. *Kisch*, *supra*, at pp. 120, 121; *Hunter* v. *Walters*, *Curling* v. *Walters*, *Darnell* v. *Hunter* (1871), 7 Ch. App. 75, 86; *Bloomenthal* v. *Ford*, [1897] A. C. 156, 161, 162, 168 (an estoppel case); *Betjemann* v. *Betjemann*, [1895] 2 Ch. 474, 479, 482, C. A.

(*n*) The representor is in this dilemma: either the untruth was fraudulent or it was not. If it was, the plea—"you should not have been such a fool as to trust such a rogue"—is of so shameless and impudent a character as to disentitle it even to a hearing; if it was not, the observations of JAMES, L.J., in *Re Arnold*, *Arnold* v. *Arnold* (1880), 14 Ch. D. 270, at p. 281 (a case where the misrepresentation was assumed to be innocent), apply: "how can the vendors be heard to say that the purchaser ought to have found out for them that very blunder which they never found out for themselves?"

(*o*) *Arnison* v. *Smith* (1889), 41 Ch. D. 348, C. A., *per* Lord HALSBURY, L.C., at p. 369: "unless it is shewn that he knew the facts, or that he avowedly did not rely upon the statement, whether he knew the facts or not." So, to a claim for money had and received on the ground of mistake, a plea of this character must establish that "the money intentionally passed without any reference to the truth or falsity of the facts, the plaintiff meaning to waive all inquiry into it" (*Kelly* v. *Solari* (1841), 9 M. & W. 54, *per* PARKE, B., at p. 59).

(*p*) Consequently the authorities are dealt with here once for all, and are made the subject of reference merely at pp. 747, 756, note (*g*), *post*.

(*q*) See note (*l*), *supra*.

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on the representor's part. Such a contract, however, like other contracts, or like the representation itself, may be inferred from acts and conduct, as well as expressed in words (*r*).

Express agreement to take with all faults.

1727. Where it is a case of an express agreement, or contractual term, such as to purchase property "with all faults" (*s*) or "at all risks" (*t*), or to assume the correctness of the representor's statements as to title (*a*), or of his plans and measurements (*b*), or to waive the statutory duties of exact statement and disclosure in the prospectus of a company (*c*), and the like, the claim is *primâ facie* defeated, subject to the removal of the bar by proof, the burden of which is thereupon shifted on to the representee's shoulders, of such circumstances as are mentioned below (*d*). The term or condition may be, and in the case of life insurance contracts frequently is, expressly, or (as in many cases of sale of land) impliedly, limited to innocent misrepresentations or errors (*e*). Any term or stipulation in a contract that such contract shall not be disputable or impeachable for fraudulent misrepresentation, or fraud generally, is, at least if the consent to such term or stipulation was itself obtained by fraud, a nullity (*f*).

(*r*) *Redgrave* v. *Hurd* (1881), 20 Ch. D. 1, C. A.

(*s*) *Baglehole* v. *Walters* (1811), 3 Camp. 154; *Pickering* v. *Dowson* (1813), 4 Taunt. 779; *Schneider* v. *Heath* (1813), 3 Camp. 506; *Ward* v. *Hobbs* (1878), 4 App. Cas. 13. The first three cases related to ships, the last to animals. The plea was proved in all of them except the third.

(*t*) *Brownlie* v. *Campbell* (1880), 5 App. Cas. 925, 936, 937, 956, 957 (agreement to take land "with all risk of errors in the particulars.")

(*a*) *Re Banister, Broad* v. *Munton* (1879), 12 Ch. D. 131, C. A. (where, however, the plea failed, on proof of the representor's fraud); *Re Sandbach and Edmondson's Contract*, [1891] 1 Ch. 99, 103, 104, C. A.; *Blaiberg* v. *Keeves*, [1906] 2 Ch. 175.

(*b*) *Pearson (S.) & Son, Ltd.* v. *Dublin Corporation*, [1907] A. C. 351; and *Boyd and Forrest* v. *Glasgow and South Western Rail. Co.*, [1911] S. C. 33 (in both of which cases, however, the plea, which was *primâ facie* good, was defeated by clear proof of fraud).

(*c*) See title COMPANIES, Vol. V., p. 125, as to the waiver clause in prospectuses of companies. These clauses, as to the matters therein specified, are now rendered void by the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 81 (4); but the authorities on the previous law are still relevant to the question now under consideration.

(*d*) "Where an article is sold with all faults, I think it is quite immaterial how many belonged to it within the knowledge of the seller. . . . The very object of introducing such a stipulation is to put the purchaser on his guard, and throw upon him the burden of examining all faults, both secret and apparent" (*Baglehole* v. *Walters*, *supra*, *per* Lord ELLENBOROUGH, C.J., at p. 156, a passage cited and approved in *Ward* v. *Hobbs*, *supra*, *per* Lord O'HAGAN, at p. 27). As to the kind of fraud which is necessary and sufficient to defeat the plea, see pp. 729, 780, *post*.

(*e*) As to life policies, see *Wheelton* v. *Hardisty* (1857), 8 E. & B. 232, Ex. Ch. (where, however, it was not proved that the representee was a party to the alleged agreement); *Hemmings* v. *Sceptre Life Association, Ltd.*, [1905] 1 Ch. 365; *Anstey* v. *British National Premium Life Association* (1908), 99 L. T. 765, C. A.; see title INSURANCE, Vol. XVII., pp. 548, 553; and, as to conditions of sale of land, requiring the purchaser to waive annulment in case of errors or omissions, see pp. 747 *et seq.*, *post*.

(*f*) *Pearson (S.) & Son, Ltd.* v. *Dublin Corporation*, *supra*, *per* Lord JAMES, at p. 362 ("as a general principle, I incline to the view that an express term that fraud shall not vitiate the contract, would be bad in law"),

SECT. 3. Affirmative Defences to the Action.

1728. It is much more difficult to establish an implied undertaking of the nature in question than an express term or condition. The conduct necessary to raise such an implication must be of a very remarkable and definite character, at least where the transaction is of an ordinary type (*g*). Where, however, the transaction is one of compromise, as distinguished from release, and more particularly in the case of a family arrangement, the inference is more readily made (*h*). Where the agreement is sought to be implied, not from positive acts, but from inaction, the difficulty is almost insuperable.

The like agreements when implied from acts and conduct.

Mere delay in suing, unless the period of delay exceeds that allowed by any statute of limitations (*i*), amounts of itself to nothing, even when rescission or analogous relief is the subject of the proceedings (*k*), and still more clearly is this so when the action is for damages, though, with other circumstances, it may constitute some evidence to negative the representee's allegation that he was ever deceived at all (*l*).

1729. Even an express agreement to the effect stated is wholly vitiated by proof of fraud on the part of the representor. Thus, an agreement to sell a chattel with all faults, or a condition that the purchaser of land shall accept such title as the vendor has, or shall assume certain facts, though it protects the representor under ordinary circumstances, even as regards faults and defects existing to his knowledge, is no protection at all if he uses positive means and devices to cover up or hide away faults which the purchaser would otherwise perceive (*m*), or if he volunteers a false, and therefore in the circumstances a fraudulent, statement that, so far as he

Use of positive devices to conceal a defect defeats the plea.

and *per* Lord ATKINSON, at p. 365; and see title CONTRACT, Vol VII., p. 398. In *Tullis* v. *Jacson*, [1892] 3 Ch. 440, at p. 444, CHITTY, J., recognised the above principles, whilst deciding (*ibid.*, at pp. 443—446) that an agreement not to impeach an arbitrator's award on any ground, even fraud or collusion, did not come within it, and was valid; and see title ARBITRATION, Vol. I., p. 481.

(*g*) There are scarcely any reported cases where a plea of an implied agreement to waive all inquiry etc. has succeeded by itself, even in proceedings for rescission, and none of its success in actions for damages. The affirmation cases referred to at p. 750, *post*, stand on a totally different footing.

(*h*) See title FAMILY ARRANGEMENTS, Vol. XIV., pp. 546 *et seq.* There are many reasons why, in such cases, an intention to waive inquiry and exact disclosure should be presumed; but even here such presumption may be rebutted by special facts, as it was in *Re Roberts*, *Roberts* v. *Roberts*, [1905] 1 Ch. 704, 710, 711, C. A.

(*i*) See title LIMITATION OF ACTIONS, Vol. XIX., p. 49.

(*k*) See pp. 752, 753, *post*.

(*l*) *Peek* v. *Gurney* (1873), L. R. 6 H. L. 377, 384, 385; *Eaglesfield* v. *Londonderry* (*Marquis*) (1876), 4 Ch. D. 693, 715, 717, C. A.; *Redgrave* v. *Hurd* (1881), 20 Ch. D. 1, 13, C. A.; *Peek* v. *Derry* (1887), 37 Ch. D. 541, 576, 577, C. A.; *Arnison* v. *Smith* (1889), 41 Ch. D. 348, 361, C. A.

(*m*) *Baglehole* v. *Walters* (1811), 3 Camp. 154, *per* Lord ELLENBOROUGH, C.J., at p. 157, "unless the seller by positive means renders it impossible for the purchaser to detect secret faults"; in that case, however, no use of such means was proved. The above passage was approved in *Ward* v. *Hobbs* (1878), 4 App. Cas. 13, *per* Lord O'HAGAN, at p. 27. In *Schneider* v. *Heath* (1813), 3 Camp. 506, the representee succeeded in defeating the plea of "sale with all faults" on proof that the representor had removed the vessel sold from the ways where she lay, and kept her continually afloat till the representee took delivery, so as to conceal from him the defects of her keel and bottom.

SECT. 3. Affirmative Defences to the Action.

knows and believes, the subject of the sale is free from some specified fault (*n*), provided that such statement is as explicit as the condition or term to which it relates (*o*), or if, whilst selling land subject to a condition which *primâ facie* refers only to accidental errors of description, or unknown and unsuspected defects of title, or whilst putting forward plans and drawings which are to be taken as correct, he is shown to have been aware of the inaccuracy or defect complained of (*p*). Indeed, such manœuvres not only deprive the representor of the benefit of the express agreement or term as a defence to an action for damages, but go far to prove the very fraud which is required to establish it (*q*).

SUB-SECT. 4.—*Previous Avoidance of Contract.*

Previous avoidance of contract.

1730. Where the representee's alteration of position consisted in the making of a contract with the representor, it is a good affirmative defence to an action for damages that such contract, whether by mutual consent or by order of the court, had in fact been avoided before the commencement of the proceedings (*r*). Avoidance by consent is not shown by proof of mere offer to rescind, without proof of acceptance, still less by a mere confession of misrepresentation unaccompanied by such an offer (*s*). The plea is available only where the contracting party was the actual representor: where the misrepresentation was made by the agent of such party, the representee has still a right, on satisfying the conditions upon which alone any action for fraudulent misrepresentation is maintainable, to recover against the actual representor any damage he may have sustained by reason of the total or partial irrecoverability from the contracting party of the moneys or property agreed, or adjudged, to be restored to him by way of restitution consequential upon rescission (*t*).

(*n*) *Ward* v. *Hobbs* (1878), 4 App. Cas. 13, *per* Lord CAIRNS, L.C., at pp. 20, 21.

(*o*) *Ibid.*, *per* Lord CAIRNS, at pp. 22, 23.

(*p*) *Re Banister, Broad* v. *Munton* (1879), 12 Ch. D. 131, 142, 143, 146, 147, 149, 150, C. A.; *Brownlie* v. *Campbell* (1880), 5 App. Cas. 925, 936, 937 (where, however, no fraud was proved); *Greenwood* v. *Leather Shod Wheel Co.*, [1900] 1 Ch. 421, C. A. (where the representors stated in a prospectus which contained a waiver-clause, on which they relied, that "there may be contracts," which were required by law to be disclosed, and it was held that this was equivalent to a statement that they did not know of any undisclosed contracts which were material, whereas in fact, as was proved, they knew of several, and on this ground, amongst others, the plea of waiver failed; *ibid.*, *per* LINDLEY, M.R., at pp. 435—437); *Pearson* (*S.*) *& Son, Ltd.* v. *Dublin Corporation*, [1907] A. C. 351; *Boyd and Forrest* v. *Glasgow and South Western Rail. Co.*, [1911] S. C. 33, 61, 76.

(*q*) See *Pearson* (*S.*) *& Son, Ltd.* v. *Dublin Corporation*, *supra*, at pp. 353, 354, 356, 359, 360, 362, 364—366.

(*r*) Just as, conversely, in proceedings for rescission, it is a good plea to allege and prove that, before the commencement thereof, the representee had affirmed the contract; see p. 749, *post*. Both in the one case and in the other the election between the two alternative remedies is made once for all; see p. 720, *ante*, and p. 740, *post*.

(*s*) *Arnison* v. *Smith* (1889), 41 Ch. D. 348, 369, 370, 372, 373, C. A.

(*t*) *Ship* v. *Crosskill* (1870), L. R. 10 Eq. 73; see note (*s*), p. 720, *ante*.

SUB-SECT. 5.—*Lord Tenterden's Act* (*a*).

SECT. 3. Affirmative Defences to the Action.

Statutory plea, in case of misrepresentation of third person's credit.

1731. A further affirmative plea is placed by statute at the disposal of any representor who chooses to avail himself of it, in the case of a representation relating to the character, conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such other person may obtain credit, money, or goods (*b*), unless such representation be made in writing, signed (*c*) by the party to be charged therewith (*d*).

Meaning of certain statutory expressions.

1732. The representations within the purview of the statute are not limited to those which are of a similar nature to the guarantees which form the subject of the Statute of Frauds (*e*), nor to such as are made wholly or partially for the benefit of the third person for whom the credit is obtained (*f*). The very wide terms in which the subject-matters of the representations falling within the enactment are expressed have been judicially interpreted so as to effectuate the plain intention of the legislature, as collected from the general tenor of the statute. Thus the term "character" has been confined to character for paying promptly (*g*), and the expression "trade or dealings" has been held not to apply to such dealings as have no direct relation to the question of a third person's credit (*h*). It is not yet settled whether a statement as to an incumbrance on a third person's estate is a representation as to his "ability," or as to his "credit," or not (*i*); but it is clear that any representation which relates to such "ability" or "credit" is none the less within the enactment, because the representor states facts of an impersonal character as a reason why the particular third person may safely be trusted (*k*). The third person intended by the expression

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(*a*) The Statute of Frauds Amendment Act, 1828 (9 Geo. 4, c. 14) (commonly known as Lord Tenterden's Act), s. 6.

(*b*) In the Parliament Roll of the statute the word "upon" follows the word "goods." It has been held in all the authorities that this obviously misplaced word, whatever be the true explanation of its misfit with the context, may be ignored.

(*c*) Personal signature is necessary; see titles AGENCY, Vol. I., pp. 149, 214; BANKERS AND BANKING, Vol. I., p. 644; COMPANIES, Vol. V., p. 294; GUARANTEE, Vol. XV., p. 457.

(*d*) Statute of Frauds Amendment Act, 1828 (9 Geo. 4, c. 14), s. 6. The cases decided under this provision are:—*Lyde* v. *Barnard* (1836), 1 M. & W 101; *Haslock* v. *Fergueson* (1837), 7 Ad. & El. 86; *Swann* v. *Phillips* (1838), 8 Ad. & El 457; *Devaux* v. *Steinkeller* (1839), 6 Bing. (N. C.) 84; *Tatton* v. *Wade* (1856), 18 C. B. 371, Ex. Ch.; *Williams* v. *Mason* (1873), 28 L. T. 232; *Swift* v. *Jewsbury* (1874), L. R. 9 Q. B. 301, Ex. Ch.; *Pearson* v. *Seligman* (1883), 48 L. T. 842, C. A.; *Clydesdale Bank* v. *Paton*, [1896] A. C. 381; *Hirst* v. *West Riding Union Banking Co.*, [1901] 2 K. B. 560, C. A.; *Parsons* v. *Barclay & Co.* (1910), 103 L. T. 196, C. A. In all of the above cases, except *Tatton* v. *Wade*, *supra*, the plea was established.

(*e*) *Devaux* v. *Steinkeller*, *supra*, at pp. 88, 89; see title GUARANTEE, Vol. XV., p. 454.

(*f*) *Pearson* v. *Seligman*, *supra*; *Clydesdale Bank* v. *Paton*, *supra*, at pp. 390, 391, 393, 394, 396, 397.

(*g*) *Haslock* v. *Fergusson*, *supra*.

(*h*) *Bishop* v. *Balkis Consolidated Co.* (1890), 25 Q. B. D. 512, 522, C. A.

(*i*) In *Lyde* v. *Barnard*, *supra*, the Court of Exchequer was equally divided on this question.

(*k*) *Swann* v. *Phillips*, *supra*, at pp. 461, 462.

SECT. 3. Affirmative Defences to the Action.

"another person" may be a member of a firm to which the representor himself also belongs (*l*).

Burden of proof.

1733. The burden of proof, in respect of the statutory plea, is on the representor (*m*), and, according to the modern pleading rules, the burden of allegation also (*n*).

Questions of law and fact

1734. In cases of written, but unsigned, or not personally signed, representations, or where there is no dispute as to the words used in any oral representation, all questions raised by the statutory plea are questions of law (*o*), though, in the latter class of case, it would seem that the safer course is for the judge to get a finding from the jury as to the matters to which the oral statement was intended to relate, where this question fairly admits of doubt, and then, accepting such finding, to rule on the question of law whether the representation is within the statute or not (*p*).

SUB-SECT. 6.—*Misrepresentation by Agent for his own Benefit or Purposes.*

Misrepresentation by agent to serve personal ends.

1735. Where a representee alleges fraudulent misrepresentation by an agent of the representor not having the express authority of the representor in that behalf, and makes a *primâ facie* case by proving facts from which such authority would be implied in the absence of any counter evidence, it is open to the representor to set up, as an affirmative answer to such *primâ facie* case, that his agent, in making the representation, though to all external appearances acting within the scope of his employment, was in fact acting for the sole purpose, and with the sole result, of serving his own or some third person's private ends, and not in his (the representor's) interests, but contrary thereto; and, if this allegation be established by evidence, the representor is entitled to succeed (*q*).

SECT. 4.—*Form and Measure of Relief: Rules for Assessment of Damages.*

Relief and remedy.

1736. Since the action of deceit, and its equitable equivalent, is based on the hypothesis that the representee has elected, or is compelled, to adhere to the contract, or put up with the situation into which he has been misled by the fraudulent misrepresentation, and there can be no question of undoing the past, it follows that the only relief obtainable in such a case is the award of a gross sum in

(*l*) *Devaux* v. *Steinkeller* (1839), 6 Bing. (N. C.) 84.

(*m*) And if there were two representations, the one oral and the other in writing and signed, the additional burden is cast on the representor of showing that the representee relied solely upon the former (*Tatton* v. *Wade* (1856), 18 C. B. 371, 385, 387, 388, Ex. Ch.).

(*n*) See R. S. C., Ord. 19, r. 15, and title PLEADING.

(*o*) Most of the cases cited in the text, *supra*, were cases of either nonsuit or demurrer, or their modern equivalents.

(*p*) *Lyde* v. *Barnard* (1836), 1 M. & W. 101, 111, 112.

(*q*) *Swift* v. *Jewsbury* (1874), L. R. 9 Q. B. 301, Ex. Ch.; *British Mutual Banking Co.* v. *Charnwood Forest Rail. Co.* (1887), 18 Q. B. D. 714, C. A.; *Lloyd* v. *Grace, Smith & Co.*, [1911] 2 K. B. 489, 509, C. A. In *Malcolm, Brunker & Co., Ltd.* v. *Waterhouse & Sons* (1908), 24 T. L. R. 854, the plea failed. Compare the estoppel case of *Whitechurch (George), Ltd.* v. *Cavanagh*, [1902] A. C. 117, 124, 125, 133, 134, 139—141.

money, payable once for all (*r*) as compensation, to represent the present value of the entire net loss sustained by him in the past, or likely to be sustained in the future. The meaning in law of "damage," and the causal relation which it is necessary to establish between it and the misrepresentation, have already been discussed (*s*). It remains to consider the rules of law which, on proof of the representee's right to relief, regulate the quantification of the damages.

SECT. 4. Form and Measure of Relief: Rules for Assessment of Damages.

1737. Where there is only one side to the account, that is to say, where the representee has received no money nor money's worth, and has simply parted with property, or paid money which is irrecoverable in law (*t*), or in fact (*u*), or is under liability in that behalf which he is unable to dispute (*a*), the calculation is simply a matter of addition, or (in the case of liability) an estimate of present values in accordance with simple accountancy rules. Where, however, the representee's alteration of position assumes the form of a contract with the representor or a third person, and there are two sides to the account, between which a balance has to be struck, questions of greater nicety arise, not as to the rules applicable, which are now well settled, but as to the application of them to the circumstances of the individual case. The governing principle of computation is this. On the one side of the account must be placed everything that under the contract in question the representee has paid, and the present value of everything he is compellable to pay thereunder in the future, and also the value (to be assessed) of any property or advantages, capable of estimation in money, which under the contract he has transferred, or is compellable to transfer, in the future. On the other side is to be set all money, and the value of all property or benefits, which he has received, together with the present value of all sums, property, or benefits which he is entitled to receive in the future, pursuant to the same contract (*b*). The balance represents the measure of damage. If the real value of the credit items is *nil*, as not infrequently has been found (*c*), the representee is entitled to the unreduced total of the debit items (*d*): but the claim to this total, though (if it consists of a mere addition of moneys paid) it may wear the aspect of a liquidated sum, is still in law a claim for damages, with all the disadvantages and

Rules for assessment of damages.

(*r*) See title DAMAGES, Vol. X., p. 309.

(*s*) See pp. 706, 707, *ante*.

(*t*) Such as the sums paid by the representee to third persons in *Richardson* v. *Silvester* (1873), L. R. 9 Q. B. 34, and (*quoad* the railway fares) in *Wilkinson* v. *Downton*, [1897] 2 Q. B. 57.

(*u*) As in the case of the cows which perished in *Mullett* v. *Mason* (1866), L. R. 1 C. P. 559, and the goods delivered on credit, or money advanced, to insolvent persons in the various "misrepresentation of credit" cases referred to in note (*d*), p. 731, *ante*.

(*a*) As in *Polhill* v. *Walter* (1832), 3 B. & Ad. 114, and, generally, all the cases of misrepresentation of authority; see p. 723, *ante*.

(*b*) *McConnel* v. *Wright*, [1903] 1 Ch. 546, C. A., *per* COLLINS, M.R., at pp. 554, 555.

(*c*) As in *Twycross* v. *Grant* (1877), 2 C. P. D. 469, C. A., and *Jury* v. *Stoker* (1882), 9 L. R. Ir. 385.

(*d*) *McConnel* v. *Wright*, *supra*, at pp. 554, 555. This is "the ultimate, final, highest standard of his loss."

SECT. 4. **Form and Measure of Relief: Rules for Assessment of Damages.**

advantages incident to such a claim (*e*). If, on the other hand, the credit items are a complete equivalent, the representee has sustained no damage at all (*f*).

Principle on which value of benefits received by representee is computed.

1738. The next rule, which it has been found necessary to apply rigorously in certain cases, is that the value of the property rights or interests received or receivable by the representee under the contract, to be deducted from the damages otherwise recoverable, means their real and actual value, to be determined by reference to the evidence adduced (*g*), and, in the case of marketable or saleable securities, without regard to market or current prices, which may be shown to have been manufactured by the very same fraudulent means which gave the representee his cause of action; or, in other words, it means the price which the property or securities would have fetched as between reasonable and honest vendors and purchasers acquainted with the whole truth of the facts proved at the trial to have then existed (*h*). The ascertainment of the "value," in this sense, usually results in reducing the figure to be deducted and enhancing the damages (*i*); but the application of the rule occasionally operates in the opposite direction, and enures for the benefit of the representor (*k*). The date at which the value is to be assessed is the date at which the property or rights were acquired (*l*). The representee is not bound to sell on discovery of the fraud, or at any subsequent time, but if he chooses to do so he must give credit for at least the sum received as purchase-money (*m*). But it does not follow that he may not have to give credit for more; for if he sells at any date subsequent to the

Date of assessment.

(*e*) Thus a representee by putting his claim in the form of a demand for a liquidated sum, or labelling his cause of action "money had and received," cannot alter its intrinsic nature, or escape the disabilities attaching thereto, such as incapacity to recover in respect of an innocent misrepresentation (see *Ship* v. *Crosskill* (1870), L. R. 10 Eq. 73, and *Manners* v. *Whitehead* (1898), 1 F. (Ct. of Sess.) 171), or to reach the estate of a deceased representor (see *Re Duncan, Terry* v. *Sweeting*, [1899] 1 Ch. 387, 390, 392). On the other hand, the fact that the sum claimed was in law damages, though liquidated, was used to help the representee in *Kettlewell* v. *Refuge Assurance Co.*, [1908] 1 K. B. 545, C. A., *per* Lord ALVERSTONE, C.J., at p. 550.

(*f*) *McConnel* v. *Wright*, [1903] 1 Ch. 546, 555, C. A.

(*g*) *Pearson* v. *Wheeler* (1825), Ry. & M. 303, 304, and see, generally, the authorities cited in note (*h*), *infra*.

(*h*) *Twycross* v. *Grant* (1887), 2 C. P. D. 469, 489—491, 503—505, 542—546, C. A.; *Jury* v. *Stoker* (1882), 9 L. R. Ir. 385; *Arkwright* v. *Newbold* (1881), 17 Ch. D. 301, C. A., *per* FRY, J., at pp. 312, 313; *Peek* v. *Derry* (1887), 37 Ch. D. 541, 591—594, C. A.; *Glasier* v. *Rolls* (1889), 42 Ch. D. 436, C. A., *per* KEKEWICH, J., at p. 455; *McConnel* v. *Wright*, *supra*, at pp. 552—559; *Cackett* v. *Keswick*, [1902] 2 Ch. 456, 468, C. A.; *Shepheard* v. *Broome*, [1904] A. C. 342, 347, 348. The reversal of the above decisions of FRY, J., and of KEKEWICH, J., by the Court of Appeal, and of the Court of Appeal in *Peek* v. *Derry*, *supra*, by the House of Lords, in no way detracts from the authority of those cases on the question of damages, which it became unnecessary for the respective appellate tribunals to deal with.

(*i*) As in all the cases cited in note (*h*), *supra*.

(*k*) As in *Pearson* v. *Wheeler*, *supra*, where evidence of the defendant's surveyor was admitted in reduction of damages.

(*l*) See *Peek* v. *Derry*, *supra*; *Glasier* v. *Rolls*, *supra*; *Cackett* v. *Keswick*, *supra*; *McConnel* v. *Wright*, *supra*; and *Shepheard* v. *Broome*, *supra*, at the pages cited in note (*h*), *supra*.

(*m*) *Peek* v. *Derry*, *supra*, at the pages cited in note (*h*), *supra*.

SECT. 4. Form and Measure of Relief: Rules for Assessment of Damages.

expiration of a reasonable time from the date of his discovery, in which to consider his position and study the market or make the necessary inquiries, and if the price in the meantime has gone down from causes independent of the representor's fraud, or of the inherent defects of the property or business or undertaking which was the subject of the misrepresentation, the actual purchase-money received is no criterion, and the representee must give credit for the higher real value which he could have obtained at the material date above mentioned (*n*).

Grounds for reduction of damages.

1739. It is both the interest and the duty of the representee to avail himself of any fair opportunity of minimising the damages in the interests of whichever party it may ultimately concern. This does not mean that a representor, who has made an ambidextrous and tardy admission of the falsity of his representation, unaccompanied by any offer of restitution, can plead these facts in reduction of damages, or that the representee, in such circumstances, is not entitled, and bound, to continue discharging his periodical liabilities under the contract, and adding the amount of cash payments to the damages (*o*). Equally unavailing for this purpose is the mere fact that a representor company, shortly after the date when the representee, being a shareholder, acquired his shares, made good, or attempted to make good, its representations; for the material date, as already stated, is the date of the allotment to the representee, who, on such allotment, became entitled to have his damages assessed there and then (*p*).

Errors as to proper measure of damages.

1740. The damages, as follows from the rules already enunciated, on the one hand comprise, and on the other are limited to, the net loss arising from the representee's alteration of position, and, therefore, on the one hand, the representor is not entitled to say that they are confined to the difference (if any) between the value of the property when acquired and the value which it would have had if the representation had been true (*q*); nor, on the other hand, can the representee claim as damages loss of the prospective profits which he would have obtained under the contract if such representation had been true (*r*). The unsuccessful attempts which have been made in this direction are really survivals of the discarded doctrine of "making good" (*s*).

SECT. 5.—*Parties to the Action.*

SUB-SECT. 1.—*In Case of Assignment by Operation of Law.*

Parties to the action.

1741. The possible parties to an action for damages for deceit are ordinarily the parties to the representation, but in case of the death

(*n*) *Peek* v. *Derry* (1887), 37 Ch. D. 541, 591—594, C. A.; *Waddell* v. *Blockey* (1879), 4 Q. B. D. 678, C. A.

(*o*) *Arnison* v. *Smith* (1889), 41 Ch. D. 348, C.A., *per* Lord HALSBURY, L.C., at pp. 369, 370.

(*p*) *McConnel* v. *Wright*, [1903] 1 Ch. 546, 554, C. A.; see title COMPANIES, Vol. V., pp. 135, 137.

(*q*) This contention as to the measure of damages was pressed upon the Court of Appeal by the representor in *Twycross* v. *Grant* (1877), 2 C. P. D. 469, C. A.

(*r*) *Cassaboglou* v. *Gibb* (1883), 11 Q. B. D. 797, C. A.

(*s*) See pp. 721—723, *ante*.

SECT. 5. Parties to the Action.

or disability of representee or representor, if and so far as the right to sue or liability to be sued in respect of such a tort is transmissible to other persons, such other persons may, subject to the conditions under which the transmission is permitted, be parties to the action (*t*).

SUB-SECT. 2.—*Right to Sue for Damages not Assignable.*

Bare right to sue for damages not assignable.

1742. As regards assignments *inter vivos*, the bare right to sue for damages for misrepresentation is not marketable, or saleable, or transferable (*a*).

SUB-SECT. 3.—*Incapacity of Member to Sue Corporation or Firm.*

Incapacity to sue company in certain cases.

1743. There is an important exception to the general rule that the representee may sue the representor for damages for deceit, namely, where the representor is a limited company and the representee is a member thereof, and the misrepresentation is one whereby it is alleged that the representee was induced to become such member. In any such case the shareholder is incapacitated from suing, unless and until he severs his connection with the company, either by agreement or by judgment of the court in proceedings properly instituted for that purpose (*b*); for by so doing he would be taking up two wholly inconsistent positions, namely, that of a member of the society and that of a creditor of the whole body of members, including himself, and he is in this dilemma: either the shareholders, other than himself, whom he is suing, are as innocent as himself, or he is as fraudulent as

(*t*) As to the persons who may sue, or are liable to be sued, in tort, as representing the estate of a representor or representee who is deceased, or under disabilities, such as insolvency, infancy, lunacy, and the like, see generally, titles ACTION, Vol. I., pp. 17—22; PRACTICE AND PROCEDURE. As to transmission on death, see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 226, 227, 312—314; as to transmission on bankruptcy, see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 136, 138, and on the winding up of a company, title COMPANIES, Vol. V., pp. 446, 447; as to infants, and lunatics or persons of unsound mind, see, respectively, titles INFANTS AND CHILDREN, Vol. XVII., pp. 133, 140, and LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., pp. 462—466. As to the position of married women, see title HUSBAND AND WIFE, Vol. XVI., pp. 436—439, 453—468. As to the position of corporations, see title CORPORATIONS, Vol. VIII., pp. 386 *et seq.*

(*a*) *De Hoghton* v. *Money* (1866), 2 Ch. App. 164, *per* TURNER, L.J., at p. 169, "the right to complain of a fraud is not a marketable commodity," and see title CHOSES IN ACTION, Vol. IV., p. 402. The reason is that such a traffic savours of champerty, or, if no money passes, of maintenance. The rule applies equally to proceedings for rescission, where nothing is assigned but the bare right to sue; see p. 753, *post*.

(*b*) *Houldsworth* v. *City of Glasgow Bank* (1880), 5 App. Cas. 317, 323—336, 338—341; *Burgess's Case* (1880), 15 Ch. D. 507, 511—514; see title COMPANIES, Vol. V., p. 310. There is no doubt as to the right of the shareholder, on the one hand, to take any other kind of proceeding against the company in respect of the species of misrepresentation in question (*Western Bank of Scotland* v. *Addie*, *Addie* v. *Western Bank of Scotland* (1867), L. R. 1 Sc. & Div. 145, 163, 164), or, on the other hand, to sue for damages in respect of any other species of misrepresentation (*Houldsworth* v. *City of Glasgow Bank*, *supra*, *per* Lord SELBORNE, at p. 329). It is where the above particular form of remedy is pursued in respect of the above particular type of misrepresentation that the vice of simultaneous approbation and reprobation becomes apparent.

they (*c*). This reasoning would equally apply to the case of any other corporation, or to that of a firm (*d*). SECT. 5. Parties to the Action.

SECT. 6.—*Statutory Modification of the General Law in the Case of Prospectuses of Companies.*

1744. In the case of misrepresentations contained in prospectuses of limited companies, the legislature has, in several important particulars, altered the rules of the common law already stated. These alterations are the subject of special treatment in their proper place (*e*). Statutory provisions as to prospectuses of companies.

Part XI.—Proceedings for Rescission.

SECT. 1.—*Nature and Conditions of the Right to Rescind.*

SUB-SECT. 1.—*General Statement.*

1745. Where the representee has been induced by misrepresentation, whether fraudulent or innocent, to enter into a contract or transaction (*f*) with the representor, which, unless and until rescinded, would be binding on the parties, such contract or transaction is voidable at the option of the representee. This means that the representee, on discovery of the truth, has a right to elect whether he will affirm or disaffirm the contract or transaction, and, if he adopts the latter course, is entitled to give notice to the representor of repudiation, and demand from him a complete restoration of the *status quo*. In the event of his demand not being complied with, he may, subject to certain conditions (*g*) and affirmative defences (*h*), maintain an action or analogous proceedings for the purpose of having the contract or transaction declared void and rescinded by the court, in which event it is deemed to have been void *ab initio*; and restitution *in specie*, and other relief consequential upon such declaration and rescission, may be decreed (*i*). Nature and limits of right to avoid a contract induced by misrepresentation.

SUB-SECT. 2.—*Immaterial whether Misrepresentation Fraudulent or Innocent.*

1746. For the purpose of proceedings to set aside a contract or transaction, it is immaterial whether the representation was fraudulent or innocent (*k*). This being so, unnecessary and Unnecessary to prove fraud;

(*c*) *Houldsworth* v. *City of Glasgow Bank* (1880), 5 App. Cas. 317, 329, 330, 333.
(*d*) *Ibid.*, *per* Lord CAIRNS, L.C., at pp. 323—326. As to a firm, see *Manners* v. *Whitehead* (1898), 1 F. (Ct. of Sess.) 171, and title PARTNERSHIP.
(*e*) See title COMPANIES, Vol. V., pp. 136—140.
(*f*) For the meaning of "transaction," see p. 704, *ante*.
(*g*) See pp. 740—742, *post*.
(*h*) See pp. 746—752, *post*.
(*i*) See pp. 742—746, *post*.
(*k*) *Re Deposit and General Life Assurance Co., Ex parte Ayre* (1858), 27 L. J. (CH.) 579, 583; *Ross* v. *Estates Investment Co.* (1868), 3 Ch. App. 682, 685; *Redgrave* v. *Hurd* (1881), 20 Ch. D. 1, 12, 13, C. A.; *Derry* v. *Peek* (1889), 14 App. Cas. 337, 359; *Re Metropolitan Coal Consumers' Association, Wainwright's Case* (1890), 63 L. T. 429, 431, C. A.; *Stewart* v. *Kennedy* (1890), 15 App. Cas. 108,

SECT. 1. Nature and Conditions of the Right to Rescind.

unproved allegations of fraud in any such proceedings are visited with costs (*l*), though it is no longer thought right to dismiss the action entirely on that ground (*m*), unless it is framed in such a way that, after striking out of the plaintiff's pleading all averments of fraud, no intelligible cause of action or title to relief remains (*n*).

SUB-SECT. 3.—*Immaterial whether Contract Disadvantageous to Representee or not.*

or that contract would have been detrimental.

1747. If the representee proves that he was misled by the misrepresentation into making the contract which he seeks to avoid, it is immaterial whether it has affected, or is likely to affect, his interests prejudicially or beneficially. The representee is the sole judge; it is for him to elect whether, for reasons sufficient to himself, he will adhere to, or repudiate, the contract. The representor has no voice in the matter, and he cannot invite the court to speculate as to the supposed inadequacy or insagacity of the representee's reasons for insisting on that to which he is entitled (*o*).

SUB-SECT. 4.—*Contract induced by Misrepresentation Voidable not Void.*

Contract ordinarily voidable not void.

1748. In general (*p*) a contract induced by misrepresentation is valid until disaffirmed, not invalid until affirmed, that is to say, it is voidable, not void (*q*). The consequences of this rule are of the

121, 122; *Ferguson* v. *Wilson* (1904), 6 F. (Ct. of Sess.) 779, 783. The rule stated in the text has always been the rule in equity, subject to an exception where the contract has been completed by a conveyance for value; see p. 741, *post*, and title EQUITY, Vol. XIII., p. 15. At common law the rule was limited to cases where the innocent misrepresentation went to the root of the contract (*Kennedy* v. *Panama etc. Mail Co.* (1867), L. R. 2 Q. B. 580, 587; but this decision was before the passing of the Judicature Acts, and may be regarded as now obsolete); see title EQUITY, Vol. XIII., p. 61.

(*l*) *London Chartered Bank of Australia* v. *Lemprière* (1873), L. R. 4 P. C. 572, 597.

(*m*) This was apparently the view of Lord COTTENHAM, L.C., in *Wilde* v. *Gibson* (1848), 1 H. L. Cas. 605, at pp. 620, 621, 625, though he afterwards either disclaimed, or modified, what he was reported to have said (*Archbold* v. *Commissioners of Charitable Bequests for Ireland* (1849), 2 H. L. Cas. 440, at pp. 459, 460); see also *Espey* v. *Lake* (1852), 10 Hare, 260, 261, 265; *Parr* v. *Jewell* (1855), 1 K. & J. 671, 673, 674; *Hickson* v. *Lombard* (1866), L. R. 1 H. L. 324, 331.

(*n*) *Anderson* v. *Thornton* (1853), 8 Exch. 425, 428, as contrasted with *Thom* v. *Bigland* (1853), 8 Exch. 725, 730—732; *Swinfen* v. *Chelmsford* (*Lord*) (1860), 5 H. & N. 890, 920, 921; *Hickson* v. *Lombard*, *supra*, at p. 336; *London Chartered Bank of Australia* v. *Lemprière*, *supra*; *Connecticut Fire Insurance Co.* v. *Kavanagh*, [1892] A. C. 473, 479, P. C.; *Behn* v. *Bloom* (1911), 105 L. T. Jo. 87. As to pleading generally, see title PLEADING.

(*o*) *Ayles* v. *Cox* (1852), 16 Beav. 23 (a case in which a purchaser insisted on being relieved of his contract to buy land which, being represented as copyhold, was in fact freehold, and it was in vain objected by the representor that he was getting what most people would consider to be a more, and not a less, valuable estate, *per* ROMILLY, M.R., at pp. 24, 25: "the motives and fancies of mankind are infinite, and it is unnecessary for a man who has contracted to purchase one thing to explain why he refuses to accept another"). Compare the other cases cited on this point in note (*g*) to p. 756, and the non-disclosure case of *Gillett* v. *Peppercorne* (1840), 3 Beav. 78 ("it is not necessary to show that loss afterwards took place in consequence of these transactions").

(*p*) See the exception mentioned, p. 739, *post*.

(*q*) *Stevenson* v. *Newnham* (1853), 13 C. B. 285, 302, 303, Ex. Ch.; *Feret* v. *Hill* (1854), 15 C. B. 207, 223—227; *Re Overend, Gurney & Co., Oakes* v. *Turquand and Harding, Peek* v. *Same* (1869), L. R. 2 H. L. 325, 346; *Ogilvie* v. *Currie*

utmost importance in relation both to the conditions of relief (*r*), and also to some of the affirmative defences which may be set up by the representor (*s*).

SECT. 1. Nature and Conditions of the Right to Rescind.

1749. There is one exception—apparent rather than real—to the rule. When the misrepresentation relates to the character class or nature of an instrument which the representee is induced thereby to execute, and, therefore, of the contract which the instrument is supposed to effectuate or record (*t*), or when it relates to the identity of the individual with whom he is contracting (*a*), so as to produce, in the one case, "essential error" as to the

When contract void, not voidable.

(1868), 37 L. J. (CH.) 541, 546; *Reese River Silver Mining Co.* v. *Smith* (1869), L. R. 4 H. L. 64, 69, 73, 74; *Clough* v. *London and North Western Rail. Co.* (1871), L. R. 7 Exch. 26, 34, Ex. Ch.; *Erlanger* v. *New Sombrero Phosphate Co.* (1878), 3 App. Cas. 1218, 1227, 1228; *Re Scottish Petroleum Co.* (1883), 23 Ch. D. 413, 430–432, C. A.; *Aaron's Reefs* v. *Twiss*, [1896] A. C. 273, 290, 291, 294; *Re Glubb, Bamfield* v. *Rogers*, [1900] 1 Ch. 354, 361, 362, C. A. (applied to the case of a gift); *United Shoe Machinery Co. of Canada* v. *Brunet*, [1909] A. C. 330, 339, P. C.

(*r*) See pp. 740–742, *post*.

(*s*) See pp. 749–752, *post*.

(*t*) As in *Thoroughgood's Case* (1584), 2 Co. Rep. 9a (where an unlettered man executed a release of land on a fraudulent misrepresentation that the instrument was a mere acquittance for arrearages of rent); *Kennedy* v. *Green* (1834), 3 My. & K. 699, 714, 718 (assignment of mortgage fraudulently stated to be a mere formal document for ensuring punctual payment of interest under such mortgage); *Foster* v. *Mackinnon* (1869), L. R. 4 C. P. 704 (representee induced to sign a bill of exchange fraudulently stated to be a guarantee); *Bagot* v. *Chapman*, [1907] 2 Ch. 222 (mortgage deed fraudulently misdescribed as merely a document enabling the representor to raise money, if necessary, at some future time); *Carlisle and Cumberland Banking Co.* v. *Bragg*, [1911] 1 K. B. 489, C. A (where a guarantee was pretended to be an insurance paper). On the other hand, where the misrepresentation relates only to the legal effect, or the contents (in the sense of the terms or provisions) of the instrument, as in *National Provincial Bank of England* v. *Jackson* (1886), 33 Ch. D. 1, C. A; *Howatson* v. *Webb*, [1908] 1 Ch. 1, C. A.; and *Lloyd* v. *Grace, Smith & Co.*, [1911] 2 K. B. 489, 500, 501, C. A., such instrument is not void, but only voidable; because in such cases the representee does intend to enter into the contract, whereas, in the others, he has no such intention. For an exposition of the principles on which the two types of case are distinguished, and on which *non est factum* is, or is not, pleadable, see *Edwards* v. *Brown* (1831), 1 Cr. & J. 307, 312; *Foster* v. *Mackinnon*, *supra*; *Hunter* v. *Walters*, *Curling* v. *Walters*, *Darnell* v. *Hunter* (1871), 7 Ch. App. 75, *per* MELLISH, L.J., at p. 88 ("where a man knows that he is conveying or doing something with his estate, but does not ask what is the precise effect of the deed, because he is told that it is a mere form, a deed so executed, though it may be voidable on the ground of fraud is not void"); *Howatson* v. *Webb*, *supra*, at pp. 3, 4 (approving the exhaustive judgment and reasoning of WARRINGTON, J., in the court below, S. C. [1907] 1 Ch. 537); *Carlisle and Cumberland Banking Co.* v. *Bragg*, *supra*, at pp. 495—498. See, further, title DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 404—407.

(*a*) See *Parker* v. *Patrick* (1793), 5 Term Rep. 175; *Kingsford* v. *Merry* (1856), 1 H. & N. 503, Ex. Ch.; *Higgons* v. *Burton* (1857), 26 L. J. (EX.) 342; *Hardman* v. *Booth* (1863), 1 H. & C. 803; *Cundy* v. *Lindsay* (1878), 3 App. Cas. 459; *Henderson & Co.* v. *Williams*, [1895] 1 Q. B. 521, C. A. In all these cases, where the fraud in a criminal aspect would have amounted to larceny by a trick, it was held that no property passed, and no contract was made, and in all of them, except the last (where he had estopped himself), the representee succeeded. On the other hand, where the fraud would have, in a criminal

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contract itself, and, in the other, *error personæ* as to the contractee, the so-called contract is, and was *ab initio*, wholly void; because, to make a contract, consent and intention are indispensable, and, *ex hypothesi*, the representee never intended to make any contract whatsoever of the nature alleged, or with the pretended contractee (as the case may be), and his mind did not accompany the signature or acts which under other circumstances would have indicated his consent (*b*).

Right of election in representee, which, once exercised, is irrevocable.

1750. The right which accrues to the representee, on discovery of the real facts, is, in the first instance, a right of choice or election only. Such a right, when once exercised, is exhausted; whence it follows that, if by express notice, or impliedly by conduct, the representee elects to affirm, he can never afterwards claim to avoid (*c*); and that, if he has once elected to avoid, he can never afterwards be allowed to affirm in his own interests; nor, on the other hand, at the suggestion of the representor setting up a plea of affirmation, can he be held to have affirmed in virtue of subsequent acts which otherwise might raise such an inference (*d*). There is no *locus pœnitentiæ* in either case. But if his right to relief is no more than a right to choose, on the other hand it is no less. That is to say, he is not bound to choose one course rather than the other; nor is he bound to make any choice at all within any particular period of time, though he delays doing so at his own risk and peril (*e*). Further, should he choose to adhere to the contract, he is still entitled, if the representation was fraudulent, but not otherwise, to all such remedies in damages as are available to a representee under such circumstances (*f*).

SECT. 2.—*What must be alleged and proved.*

Burden of proof—constituent elements.

1751. In any proceedings for rescission, the burden is on the representee of alleging and proving each and every of the facts and matters required to be established in an action for damages (*g*), except fraud and damage (*h*). Further, he must, if challenged, be prepared to show that the contract or transaction which it is sought to annul is an existing executory contract or transaction which,

court, been deemed no more than obtaining goods by false pretences, the property is held not to have passed, and the contract to be voidable only (*Whitehorn Brothers* v. *Davison*, [1911] 1 K. B. 463, C. A.).

(*b*) See the authorities cited in notes (*t*) and (*a*), p. 739, *ante*.

(*c*) *Clough* v. *London and North Western Rail. Co.* (1871), L. R. 7 Exch. 26, 34, Ex. Ch. Conversely, having elected to avoid, he cannot, for his own benefit, afterwards treat the contract as subsisting (*ibid.*, at p. 36).

(*d*) *Tomline's Case*, [1898] 1 Ch. 104, *per* WRIGHT, J., at p. 109.

(*e*) See p. 752, *post*.

(*f*) Thus, after unsuccessfully suing the cost-book mining company (in the names of the proper officers) for rescission in *Clarke* v. *Dickson* (1858), E. B. & E. 148, the representee, on afterwards suing the directors for the same misrepresentations (which were proved to be fraudulent) in *Clarke* v. *Dickson* (1859), 6 C. B. (N. S.) 453, was held entitled to damages.

(*g*) See pp. 724, 725, *ante*.

(*h*) See pp. 737, 738, *ante*.

unless and until avoided by the court, is valid and binding on the parties; for otherwise there is nothing in respect of which judicial intervention is requisite.

SECT. 2. What must be alleged and proved.

A subsisting executory contract must be shown.

1752. It follows from the last-mentioned requirement that the court can no more be asked to rescind than to enforce an alleged contract which has never in fact or in law come into being (*i*); or which was void *ab initio* (*k*); or which, having come into being, has been determined by the parties (*l*); or which,—except in cases of fraud (*m*), or of misrepresentation as to the entire

(*i*) As, for instance, in *Re Etna Insurance Co., Slattery's Case* (1873), 7 I. R. Eq. 245 (application for shares withdrawn before allotment resulting in no concluded contract); *Tomline's Case*, [1898] 1 Ch. 104 (a similar plea, but, not having been set up in the first instance, shareholder had precluded himself from relying upon it); *Re Scottish Petroleum Co.* (1883), 23 Ch. D. 413, 431, 432, 438, C. A. (attempt to show no binding contract, on grounds that allotment not made by the requisite number of directors, and that company had not unqualifiedly accepted the application, but had made a counter proposal which was not accepted; failed for want of proof). As to when negotiations become a concluded contract, see title CONTRACT, Vol. VII., pp. 345—354. In the above and numerous other company cases the court might have refused to interfere if they had been ordinary cases of rescission; but, inasmuch as the statutory register *prima facie* stands on record against the alleged shareholder or contributory, and justifies a company in retaining the name on the register, or the liquidator in settling it on the list of contributories, it is necessary for him to come to the court for relief, which, on proof of the necessary facts, will be granted, against, not the contract, but the consequences of the statutory record of it, whether the alleged contract was non-existent, or void, or voidable.

(*k*) As, for instance, when the alleged contract was induced by a misrepresentation of the character mentioned in notes (*t*) and (*a*), p. 739, *ante*, or where it was illegal, as to which see title CONTRACT, Vol. VII., pp. 391—403; or, though not illegal, made void by statute, as to which see *ibid.*, pp. 403—405, and titles BILLS OF SALE, Vol. III., pp. 53—64; GAMING AND WAGERING, Vol. XV., pp. 271 *et seq.*; INFANTS AND CHILDREN, Vol. XVII., pp. 67 *et seq.*, and MONEY AND MONEY-LENDING.

(*l*) As by forfeiture, pursuant to the articles of a company; see *Re Home Counties and General Life Assurance Co., Ex parte Woollaston* (1859), 7 W. R. 645; *Re London and Mediterranean Bank, Wright's Case* (1868), L. R. 12 Eq. 334, n.; *Wright's Case* (1871), 7 Ch. App. 55; and *Aaron's Reefs* v. *Twiss*, [1896] A. C. 273, 293. The rule assumes that the forfeiture was *bonâ fide*. Where it was a fraudulent device of the shareholders, in collusion with the company's secretary, the contract was held not to have been put an end to (*Gowers' Case* (1868), L. R. 6 Eq. 77, 81). Here again, as in the cases cited in note (*i*), *supra*, it was necessary for the party to come to the court for relief, though asserting the contract to have been determined, because until he did so the register and list of contributories stood on record against him; but, if the proceeding had been an ordinary action for rescission, relief would have been refused on the ground that the court does not make unnecessary orders, nor rescind what is non-existent.

(*m*) Instances of rescission being granted, even after completion of the contracts by conveyance, on the ground that the misrepresentation was fraudulent, though the word was not always used in the judgments, are: *Sturge* v. *Sturge* (1849), 12 Beav. 229; *Reynell* v. *Sprye*, *Sprye* v. *Reynell* (1852), 1 De G. M. & G. 660, C. A.; *Garrard* v. *Frankel* (1862), 30 Beav. 445; *Harris* v. *Pepperell* (1867), L. R. 5 Eq. 1; *Hart* v. *Swaine* (1877), 7 Ch. D. 42; *Paget* v. *Marshall* (1884), 28 Ch. D. 255. In *Feret* v. *Hill* (1854), 15 C. B. 207, though a court of common law had, at that time, no jurisdiction to grant relief, the estate having passed, it seems to have been recognised that such relief might even then have been obtained in equity on the ground of fraud.

SECT. 2. What must be alleged and proved.

substance of the subject-matter (*n*),—has been completely executed and exhausted on both sides (*o*).

Marriage cannot be dissolved for misrepresentation unless such as to render it void.

1753. Further, where the contract in question is that and something more, such as a contract of marriage, which confers and involves status and legitimacy, it cannot be dissolved or nullified on the ground that it was induced by misrepresentation, even if fraudulent, unless the fraud was of such a nature as to render it, not voidable, but void, and then only by the appropriate tribunal (*p*).

SECT. 3.—*Form and Extent of Relief.*

Nature and form of relief.

1754. The object of all proceedings of the nature now under consideration is, first, to obtain a judicial declaration and judgment that the contract in question has always been, and still is, voidable by reason of the misrepresentation; secondly, the annulment thereof by the court, pursuant to its declaration, which annulment relates back to the date of the contract (*q*); and, thirdly, such consequential directions and relief as will restore the parties to the exact position in which they were before the contract was entered into, this being the inevitable operation of any avoidance *ab initio*.

(*n*) See *Brownlie* v. *Campbell* (1880), 5 App. Cas. 925, 937; *Debenham* v. *Sawbridge*, [1901] 2 Ch. 98, 109. Relief was granted, even after completion by conveyance, though no fraud was shown, on the ground of *error in substantialibus*, in *Bingham* v. *Bingham* (1748), 1 Ves. Sen. 126 (a decision approved by Lord CRANWORTH in *Cooper* v. *Phibbs* (1867), L. R. 2 H. L. 149, at p. 164); *Jones* v. *Clifford* (1876), 3 Ch. D. 779, 791, 792; and *Hart* v. *Swaine* (1877), 7 Ch. D. 42.

(*o*) Illustrations of relief being refused after conveyance, or after complete execution on both sides, in cases not falling within either of the above two exceptions, and expositions both of the rule and of the exceptions, are to be found in *Attwood* v. *Small* (1838), 6 Cl. & Fin. 232, 319, 352, H. L.; *Wilde* v. *Gibson* (1848), 1 H. L. Cas. 605, 625, 632, 633; *Brownlie* v. *Campbell*, *supra*; *Soper* v. *Arnold* (1887), 37 Ch. D. 96, 101, 102, C. A.; affirmed (1889), 14 App. Cas. 429; *May* v. *Platt*, [1900] 1 Ch. 610; *Debenham* v. *Sawbridge*, *supra*; *Lurgan's* (*Lord*) *Case*, [1902] 1 Ch. 707, 709; *Seddon* v. *North Eastern Salt Co., Ltd.*, [1905] 1 Ch. 326; *Milch* v. *Coburn* (1910), 27 T. L. R. 170 (lease); reversed on another point (1911), 27 T. L. R. 372, C. A.; and *Angel* v. *Jay*, [1911] 1 K. B. 666 (lease). It is to be observed that complete execution on both sides must be established; the mere fact that one party has been during the currency of the contract entitled to advantages under it in certain events which have not happened, whilst the other party has been at risk during that period, does not make the contract an executed one, for, at this rate, every voidable contract might be said to be executed (*Kettlewell* v. *Refuge Assurance Co.*, [1908] 1 K. B. 545, 549, 550, 551, C. A.). Where by a term in the contract compensation is to take the place of rescission, and no limitation of time is fixed, the above rule does not apply, and such compensation may, and must, be awarded after conveyance (*Bos* v. *Helsham* (1866), L. R. 2 Exch. 72; *Palmer* v. *Johnson* (1884), 13 Q. B. D. 351, 356, C. A.).

(*p*) See title HUSBAND AND WIFE, Vol. XVI., pp. 278—281; *Swift* v. *Kelly* (1835), 3 Knapp, 257, P. C. Some *dicta* of BUTT, J., in *Scott* v. *Sebright* (1886), 12 P. D. 21, to the effect that a marriage may be annulled on the same grounds as any other contract, are clearly wrong, though the decision itself may be supported on the ground that in that case too there was really no consent. In *J.* v. *J.* (1884), 53 L. J. (CH.) 1014, PEARSON, J., held that a marriage settlement could no more be set aside on the ground that it was induced by the fraudulent misrepresentation of the wife as to her past conduct, than the marriage itself could, which was the consideration for it.

(*q*) *Reese River Silver Mining Co.* v. *Smith* (1869), L. R. 4 H. L. 64, 73, 74, 77, 78, 81.

SECT. 3. Form and Extent of Relief.

The rescission is granted *in toto*, or not at all (*r*), except where there are separate and severable covenants or stipulations (*s*), or where the instrument impeached may serve two purposes, or operate in two directions, in which case it may be rescinded in one of such characters, whilst allowed to stand in the other (*t*).

Forms of order and directions in actions for rescission.

1755. The ordinary form in which the aid of the court is invoked is an action, or counterclaim (*a*) for rescission, in which, on discharging the necessary burden of allegation and proof (*b*), unless countervailed by any affirmative plea successfully raised by the representor (*c*), the representee is entitled to relief of a nature to effectuate the objects already indicated (*d*)—that is to say, to

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(*r*) *Myddleton* v. *Kenyon* (*Lord*) (1794), 2 Ves. 391, 408; *Beaumont* v. *Dukes* (1822), Jac. 422, 426; *Clarke* v. *Dickson* (1858), E. B. & E. 148, 155; *United Shoe Machinery Co. of Canada* v. *Brunet*, [1909] A. C. 330, 340, P. C.

(*s*) *Henley* v *Stone* (1840), 3 Beav. 355, *per* LORD LANGDALE, M.R. (as to a person partially interested being entitled to set aside a conveyance, so far as it affected such partial interest, without disturbing the residue, or joining the parties having the other partial interests); *Bagot* v. *Chapman*, [1907] 2 Ch. 222 (where the rule was correctly stated by SWINFEN EADY, J., though his application of it to the case before him has been commented upon; see *Howatson* v. *Webb*, [1908] 1 Ch. 1, C. A., *per* COZENS-HARDY, M.R., at pp. 2, 3, and *per* FARWELL, L.J., at p. 2).

(*t*) *Haygarth* v. *Wearing* (1871), L. R. 12 Eq. 320; *Re Gomersall* (1875), 1 Ch. D. 137, C. A.; affirmed, *sub nom. Jones* v. *Gordon* (1877), 2 App. Cas. 616.

(*a*) *Redgrave* v. *Hurd* (1881), 20 Ch. D. 1, C. A. (successful counterclaim for rescission); see also the cases cited in note (*d*), p. 755, *post*.

(*b*) As stated in pp. 740—742, *ante*.

(*c*) See pp. 746—752, *post*.

(*d*) The numerous examples of actions (or counterclaims) for rescission in which the representee discharged his burden of proof, and was not defeated by any affirmative plea, and in which therefore he obtained relief, may be roughly classified according to their subject-matter as follows:—(i.) Sale, mortgage, or lease of land (*Murray* v. *Palmer* (1805), 2 Sch. & Lef. 474; *Kennedy* v. *Green* (1834), 3 My. & K. 699; *Reynell* v. *Sprye*, *Sprye* v. *Reynell* (1852), 1 De G. M. & G. 660, C. A.; *Stanton* v. *Tattersall* (1853), 1 Sm. & G. 529; *Torrance* v. *Bolton* (1872), 8 Ch. App. 118; *Lindsay Petroleum Co.* v. *Hurd* (1874), L. R. 5 P. C. 221; *Lempriere* v. *Lange* (1879), 12 Ch. D. 675; *Re Arnold*, *Arnold* v. *Arnold* (1880), 14 Ch. D. 270, C. A.; *Nottingham Patent Brick and Tile Co.* v. *Butler* (1886), 16 Q. B. D. 778, C. A.; *Whittington* v. *Seale-Hayne* (1900), 82 L. T. 49; *Baker* v. *Moss* (1902), 66 J. P. 360; *Mahomed Kala Mea* v. *Harperink* (*A. V.*) (1908), 25 T. L. R. 180, P. C.); (ii.) Sale or transfer of goods or securities (*Wilson* v. *Short* (1847), 6 Hare, 366; *Murray* v. *Mann* (1848), 2 Exch. 538; *Walsham* v. *Stainton* (1863), 1 De G. J. & Sm. 678, C. A.; *Maturin* v. *Tredennick* (1864), 12 W. R. 740; *Donaldson* v. *Gillot* (1866), L. R. 3 Eq. 274; *Mathias* v. *Yetts* (1882), 46 L. T. 497, C. A.; *Moorhouse* v. *Woolfe* (1882), 46 L. T. 374; *Whurr* v. *Devenish* (1904), 20 T. L. R. 385); (iii.) Insurance (*Fenn* v. *Craig* (1838), 3 Y. & C. (EX.) 216; *Traill* v. *Baring* (1864), 4 De G. J. & Sm. 318, C. A.; *Life and Health Assurance Association, Ltd.* v. *Yule* (1904), 6 F. (Ct. of Sess.) 437); (iv.) Partnership, practice, or business (*Stainbank* v. *Fernley* (1839), 9 Sim. 556; *Rawlins* v. *Wickham* (1858), 3 De G. & J. 304, C. A.; *Redgrave* v. *Hurd*, *supra*; *Ferguson* v. *Wilson* (1904), 6 F. (Ct. of Sess.) 779, 783); (v.) Compromises (*Beadles* v. *Burch* (1839), 10 Sim. 332; *Davis* v. *Chanter* (1855), 3 W. R. 321; *Brooke* v. *Mostyn* (*Lord*) (1864), 33 Beav. 457; *Fane* v. *Fane* (1875), L. R. 20 Eq. 698; *Re Roberts*, *Roberts* v. *Roberts*, [1905] 1 Ch. 704, C. A.); (vi.) Contents of an instrument or document (*Lewellin* v. *Cobbold* (1853), 1 Sm. & G. 376; *Lee* v. *Angas* (1866), 7 Ch. App. 79, n.); (vii.) Applications and subscriptions for shares in limited companies; see title COMPANIES, Vol. V., pp. 127—132; (viii.) Miscellaneous, as *Cooper* v. *Joel* (1859), 1 De G.

SECT. 3. Form and Extent of Relief.

an order rescinding or setting aside the contract, with or without a prefatory declaration (*e*), and, in certain special cases, to an order for the delivery up of the instrument in which the contract is contained or recorded to be cancelled (*f*), or for rescission of the conveyance by which it was completed (*g*); and to such further orders for repayment of money with interest (*h*), reconveyance and retransfer (*i*), indemnity (*k*), not being in the nature of damages (*l*), injunction (*m*), accounts and inquiries (*n*), rectification of any entry in a statutory register which otherwise would or might import liability (*o*), and generally, and otherwise, all such directions as, in the circumstances of the particular case, may be required for the purposes of complete *restitutio ad integrum*; which means that, on his part,

F. & J. 240 (guarantee); *A.-G.* v. *Ray* (1874), 9 Ch. App. 397 (annuity); *Lemprière* v. *Lange* (1879), 12 Ch. D. 675 (infancy)).

(*e*) In all the cases cited in note (*d*), p. 743, *ante*, an order was made for rescission, and in most of them a declaration was prefixed to the decree or judgment. In one instance (*Brooke* v. *Mostyn* (*Lord*) (1864), 33 Beav. 457) the declaration made was substantially all that the plaintiff obtained or required.

(*f*) As to the considerations which will move the court to order the physical surrender or destruction of an instrument, see title EQUITY, Vol. XIII., pp. 53, 54.

(*g*) See notes (*m*) and (*n*), pp. 741, 742, *ante*.

(*h*) In all the cases cited in note (*d*), p. 743, *ante*, where the representor had received any cash benefit under the contract he was ordered to refund it with interest at 4 per cent. or 5 per cent., according to the circumstances.

(*i*) This is ordered, where the representee was a vendor, as, for instance, in *Addis* v. *Campbell* (1841), 4 Beav. 401.

(*k*) *Stainbank* v. *Fernley* (1839), 9 Sim. 556; *Newbigging* v. *Adam* (1886), 34 Ch. D. 582, C. A.; *Whittington* v. *Seale-Hayne* (1900), 82 L. T. 49.

(*l*) That is to say, the indemnity extends only to expenses and liabilities incurred pursuant to obligations contained in the contract which is set aside, not to those which "arise out of the contract," for this expression, if taken literally, would include damages: see *Newbigging* v. *Adam*, *supra*, at pp. 588—596, and *Whittington* v. *Seale-Hayne*, *supra*, where FARWELL, J., acting on the rules laid down in *Newbigging* v. *Adam*, *supra*, particularly those laid down by BOWEN, L.J. (*ibid.*, at pp. 591—595), in setting aside a lease of premises misrepresented to be sanitary, gave the plaintiff an indemnity against the rent, rates, taxes, and repairing expenses to which he had become liable thereunder, and also against certain sums payable to the local authority by reason of the unsanitary state of the premises, but not the prospective profits which he had lost in the business there carried on by him.

(*m*) *Walsham* v. *Stainton* (1863), 1 De G. J. & Sm. 678, C. A. (injunction against transferring shares); *Henderson* v. *Lacon* (1868), L. R. 5 Eq. 249 (against calls); *Lemprière* v. *Lange*, *supra* (against removal of furniture); and, generally, see title INJUNCTION, Vol. XVII., pp. 265—268. Where a representee has repudiated his liability as a shareholder, and refused to pay calls on the ground of misrepresentation, the company will not be allowed to take advantage of the articles enabling them to forfeit the shares for such non-payment, and will be restrained by interlocutory injunction from so doing until the trial of the action, on the representee paying the amount of the calls into court (*Lamb* v. *Sambas Rubber and Gutta Percha Co., Ltd.*, [1908] 1 Ch. 845; *Jones* v. *Pacaya Rubber and Produce Co., Ltd.*, [1911] 1 K. B. 455, C. A., disapproving *Ripley* v. *Paper Bottle Co.* (1887), 57 L. J. (CH.) 327).

(*n*) *Haygarth* v. *Wearing* (1871), L. R. 12 Eq. 320, and see, generally, those of the cases cited in note (*d*), p. 743, *ante*, in which it was found necessary or desirable.

(*o*) As to cases where rectification of the register of members of a limited company has been ordered as part of the relief granted in an action, see title COMPANIES, Vol. V., pp. 127—132. As to rectification on motion, pursuant to the statutory procedure, see title COMPANIES, Vol. V., pp. 153—156.

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the representee must also make all such corresponding repayments, retransfers, and reconveyances as are necessary to restore the *status quo* on both sides (*p*). Where the representee has simply paid money to the representor under the contract, and has received neither money nor money's worth in exchange, and so has nothing to restore, the proceeding assumes the form of an action for money had and received (*q*), which succeeds, or fails, on precisely the same principles as if the action were for rescission (*r*); and, similarly, where the representee has parted with property or an instrument, without receiving any money or other benefit, the action may be in trover (*s*), or for the mere delivery up of the instrument to be cancelled (*t*), in which case, again, the same principles apply.

Statutory procedure in company cases.

1756. Where it is sought to rescind a contract to take shares in a limited company on the ground of misrepresentation, and for that purpose it is necessary, or advisable, to obtain an order of the court for rectification of the register of members, or (if the company is in liquidation) for variation of the list of contributories, a summary form of procedure by motion or summons is provided by statute (*a*).

Procedure in cases of sales by order of court.

1757. Where a purchaser of property, sold by direction of a judge

(*p*) See pp. 750, 751, *post*.

(*q*) As to actions for money had and received, see title CONTRACT, Vol. VII., pp. 473 *et seq*. This equitable form of action was introduced into the courts of common law by Lord MANSFIELD, C.J., who, in *Moses* v. *Macferlan* (1760), 2 Burr. 1005, at p. 1012, describes its nature and the classes of cases to which it is applicable, including, *inter alia*, any case of "money got through imposition (express or implied)."

(*r*) See *Stone* v. *City and County Bank, Collins* v. *Same* (1877), 3 C. P. D. 282, 294, 309, 310, 312, C. A.; *Manners* v. *Whitehead* (1898), 1 F. (Ct. of Sess.) 171. So, in *Kettlewell* v. *Refuge Assurance Co.*, [1908] 1 K. B. 545, C. A., it was assumed, as the basis of the judgments, that the rule which precludes relief by way of rescission, where the contract has been completely executed on both sides, equally precludes relief in an action for money had and received. Representees have successfully asserted claims, in this form of proceeding, to recover deposits or other moneys paid on purchases of property, or under a building contract, as in *Jones* v. *Edney* (1812), 3 Camp. 285; *Schneider* v. *Heath* (1813), 3 Camp. 506; *Flight* v. *Booth* (1834), 1 Bing. (N. C.) 370; *Dobell* v. *Hutchinson* (1835), 3 Ad. & El. 355; *Hutchinson* v. *Morley* (1839), 7 Scott, 341; *Thornett* v. *Haines* (1846), 15 M. & W. 367; and *Moss & Co.* v. *Swansea Corporation* (1910), 74 J. P. 351; or moneys paid on applications for shares, as in *Stone* v. *City and County Bank, Collins* v. *Same, supra*; or premiums paid on insurance, as in *Duffell* v. *Wilson* (1808), 1 Camp. 401; *Blake* v. *Albion Life Assurance Society* (1878), 4 C. P. D. 94; *British Workman's and General Assurance Co.* v. *Cunliffe* (1902), 18 T. L. R. 502, C. A.; and *Kettlewell* v. *Refuge Assurance Co., supra*. Interest in addition is recoverable when the misrepresentation was fraudulent (*Johnson* v. *R.*, [1904] A. C. 817, 822).

(*s*) See *Jones* v. *Keene* (1841), 2 Mood. & R. 348 (trover of life policy), and several of the cases cited in the notes to pp. 753, 754, *post*. As to trover generally, see title TROVER AND DETINUE.

(*t*) *Moorhouse* v. *Woolfe* (1882), 46 L. T. 374 (where the defendant, a moneylender, the plaintiff borrower having repaid all that was due, was ordered to deliver up the bill of sale to be cancelled).

(*a*) See title COMPANIES, Vol. V., pp. 153—156 (as to the statutory procedure for rectification of the register, when the company is a going concern), and *ibid.*, pp. 496—500, 502 (as to the like for variation of lists of contributories, and rectification of the register, when the company is being wound up).

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of the Chancery Division in any cause or matter, complains that he has been induced to purchase by misrepresentation, the proper mode of obtaining relief is by application to the judge, in that cause or matter, to be discharged from the purchase, and such application is governed by the same rules as those which regulate an action for rescission (*b*).

Statutory procedure in cases of sale of land.

1758. Under the summary procedure authorised by statute for determining questions arising on the sale and purchase of land (*c*), a declaration may be obtained, but no consequential relief (*d*).

Physical resumption of property.

1759. In a certain class of cases, namely, where the representee has a right to avoid a contract for the delivery of goods which he was induced to make by misrepresentation, and to "resume," in the legal sense, his property in the goods so parted with, he may, without resorting to any court, physically "resume" the possession of them, by recapture or rescue, wherever, and in whomsoever's hands, other than those of a *bonâ fide* holder for value, he finds them (*e*).

SECT. 4.—*Defences to Proceedings.*

SUB-SECT. 1.—*Affirmative Defences.*

Special affirmative pleas.

1760. By way of answer to any proceedings for rescission or analogous relief, in whichever of the forms already mentioned (*f*) they may be instituted, the representor may set up any of the affirmative pleas mentioned below which are special to proceedings of this nature, in addition to those which may be raised to any other action founded on contract (*g*). In every case, the burden of allegation and, except so far as any averment may be expressly

(*b*) *Martin* v. *Cotter* (1846), 3 Jo. & Lat. 496, 505; *Lachlan* v. *Reynolds* (1853), Kay, 52, 55; *Brandling* v. *Plummer* (1854), 2 Drew. 427; *Whittemore* v. *Whittemore* (1869), L. R. 8 Eq. 603; *Re Banister, Broad* v. *Munton* (1879), 12 Ch. D. 131, 141, C. A.; *Re Arnold, Arnold* v. *Arnold* (1880), 14 Ch. D. 270, 273, 274, 277, C. A.; *Mahomed Kala Mea* v. *Harperink* (*A. V.*) (1908), 25 T. L. R. 180, P. C. The purchaser was relieved in all the above cases, except in *Re Arnold, Arnold* v. *Arnold, supra*, and in most of them it was pointed out that the fact that the sale was under the direction of the court, and that the misrepresentation was, in a sense, that of its officers, was a ground for granting relief not less, but more, readily than in an ordinary case.

(*c*) Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), s. 9.

(*d*) *Re Davis and Cavey* (1888), 40 Ch. D. 601, 609; and see title SALE OF LAND. This provision expressly excludes any "question affecting the existence or validity of the contract."

(*e*) *Clough* v. *London and North Western Rail. Co.* (1871), L. R. 7 Exch. 26, 34, 37, Ex. Ch.; *Re Eastgate, Ex parte Ward*, [1905] 1 K. B. 465; *Tilley* v. *Bowman, Ltd.*, [1910] 1 K. B. 745, 750. The representee must at the same time restore to the representor any benefit he has received under the contract, or pay any third party, in whose hands the goods may be, such sums as may be due to him for moneys advanced, or for charges. This was the case in the first and third of the above authorities.

(*f*) See pp. 742 *et seq.*, *ante*.

(*g*) Whether at common law, or by statute, such as the Statute of Limitations, as to which see title LIMITATION OF ACTIONS, Vol. XIX., pp. 38 *et seq.*

or impliedly admitted (*h*), of proof is in the first instance (*i*) on the representor (*k*).

SECT. 4. Defences to Proceedings.

1761. The defence that the representee knew the truth is common to proceedings for rescission and actions for damages, and has already been dealt with (*l*).

(1) Representee's knowledge of the truth.

1762. A second defence, namely, that the representee agreed to dispense with inquiry, or to take with all faults or defects, is also as available against claims to avoid a contract as it is against claims for damages, and on precisely the same grounds, which have already been discussed (*m*).

(2) Agreement to waive inquiry etc.

1763. A third possible plea is that the representee has waived his right to rescission. This plea is a different one to that last mentioned, which imports an agreement on the part of the representee to waive all rights and remedies of whatever kind which he would otherwise have in respect of misrepresentation, while this plea is based on an alleged agreement to waive only the right to annul the contract, with an express reservation of a substituted right to compensation, abatement or allowance. Such an agreement is frequently to be found in the form of a condition in contracts of sale; and the common form of such condition is that errors or mistakes of description in, or omissions from, the particulars or conditions of sale shall not annul nor vitiate the contract, but shall be the subject of compensation (*n*).

(3) Express agreement to waive rescission, and to accept compensation in lieu thereof.

1764. Whenever the representor can point to a stipulation of this kind to which the representee was a party, his plea is *primâ facie* entitled to succeed (*o*), so far as regards rescission, or analogous relief, unless the representee, on whose shoulders the burden of so doing is thereupon shifted, can establish any of these three countervailing matters (*p*), namely, (1) that the representation

Plea defeated by proof of fraud or total difference in nature of subject-matter.

(*h*) Either at or before the trial (on pleading or discovery) In the case of one of the affirmative pleas, namely, liquidation of the company (see p. 752, *post*), the admission of the fact usually appears from the very title of the proceedings.

(*i*) But, when *primâ facie* discharged, the burden may be shifted back on to the shoulders of the representee, as in the classes of defence mentioned at pp. 729, 730, *ante*, in the text, *infra*, and at pp 748, 751, 752, *post*.

(*k*) The very character of the defence ("affirmative") imports this As to lapse of time, laches etc., see *Aaron's Reefs* v. *Twiss*, [1896] A. C. 273, 295.

(*l*) See pp. 726, 727, *ante*.

(*m*) See pp. 727—730, *ante*.

(*n*) See, generally, title SALE OF LAND.

(*o*) The defence succeeded in *Leslie* v. *Tompson* (1851), 9 Hare, 268; *Price* v. *Macaulay* (1852), 2 De G. M. & G. 339, C. A. (as to one of the lots there in question); *Whittemore* v. *Whittemore* (1869), L. R. 8 Eq. 603; *Re Fawcett and Holmes' Contract* (1889), 42 Ch. D. 150, C. A.; *Re Brewer and Hankins's Contract* (1889), 80 L. T. 127, C. A.; *Debenham* v. *Sawbridge*, [1901] 2 Ch. 98; *Shepherd* v. *Croft*, [1911] 1 Ch. 521 (to the counterclaim for rescission). In all of these cases the representee failed, because the misstatements in the particulars of sale were held to be of a character which came within the condition, and not within any of the three exceptions to the rule.

(*p*) These three exceptions, though there stated as four, are set out in *Re Fawcett and Holmes' Contract*, *supra*, *per* Lord ESHER, M.R., at pp. 156,

SECT. 4. Defences to Proceedings.

was fraudulent (*q*); or (2) that the misdescription, or omission, was such that the representee, if compelled to take the property, would be accepting something different in nature, quality, or substance from that which it was represented as being, or such that, if he had known the whole truth, he would never have contracted at all (*r*); or (3) that the circumstances are such that compensation would be no remedy, or that the amount thereof is impossible or difficult to compute (*s*); in any of which events he is, notwithstanding the condition, entitled to rescission, or to have his deposit returned to him, as the case may be.

Case of express agreement to waive both rescission and compensation.

1765. Sometimes the condition provides against both rescission and compensation, in the event of any such errors or omissions: in that case the representee is entitled to neither remedy (*t*), unless he proves circumstances which bring the case within one or other of the two first of the above-mentioned exceptions (*u*), whereupon he retains his right to rescission.

(4) Affirmation of the contract.

1766. A fourth defence is that the representee has elected to

157; and the existence of the first two of them, and particularly the second, is insisted on by BYRNE, J., in *Debenham* v. *Sawbridge*, [1901] 2 Ch. 98, at p. 109. The validity of the first is recognised by LINDLEY, L.J., in *Re Terry and White's Contract* (1886), 32 Ch. D. 14, C. A., at pp. 29, 30.

(*q*) On this ground the plea failed, and the representee was held entitled to rescission, in *Dimmock* v. *Hallett* (1866), 2 Ch. App. 21.

(*r*) It was on this ground alone that the plea was defeated, and rescission granted, or a return of the deposit ordered (which presupposes a right to rescission (see p. 745, *ante*), or specific performance refused, in *Flight* v. *Booth* (1834), 1 Bing. (N. C.) 370; *Dobell* v. *Hutchinson* (1835), 3 Ad. & El. 355; *Madeley* v. *Booth* (1848), 2 De G. & Sm. 718; *Price* v. *Macaulay* (1852), 2 De G. M. & G. 339, C. A. (as to one of the lots put up for sale); *Ayles* v. *Cox* (1852), 16 Beav. 23; *Stanton* v. *Tattersall* (1853), 1 Sm. & G. 529; *Re Davis and Cavey* (1888), 40 Ch. D. 601 (where, however, owing to the statutory form of procedure not admitting of a direct order on any question affecting the validity of the contract, STIRLING, J., limited the relief to a declaration, without prejudice to an action for recovery of the deposit, which, in his view, would clearly succeed); *Jacobs* v. *Revell*, [1900] 2 Ch. 858 (where also the defendant's counterclaim for specific performance was dismissed); *Re Puckett and Smith's Contract*, [1902] 2 Ch. 258, C. A.; *Carlish* v. *Salt*, [1906] 1 Ch. 335. As to claims for specific performance, see title SPECIFIC PERFORMANCE.

As in *Brooke (Lord)* v. *Rounthwaite* (1846), 5 Hare, 298.

(*t*) See *Re Terry and White's Contract*, *supra*, and *Re Simpson and Thomas Moy, Ltd.'s Contract* (1909), 53 Sol. Jo. 376, where no relief whatever was given, the representee failing to prove a substantial discrepancy in the first case, or bad faith in the second. In *Whittemore* v. *Whittemore* (1869), L. R. 8 Eq. 603, where there was both a condition of the common type, and also one of the unusual type now under consideration, MALINS, V.-C., held that the representee would have been entitled under the former to compensation, though not to rescission, in respect of a misstatement of the area of the property, and he further thought that the latter did not prevent him giving relief to this extent, because the statement, though not dishonest, was "reckless and careless." The decision seems illogical, and Lord ESHER, M.R., in *Re Terry and White's Contract*, *supra*, at p. 26, doubted its correctness.

(*u*) In *Re Davis and Cavey*, *supra*, the representee brought himself within the second exception, the premises sold being misdescribed as "business premises," as also in *Jacobs* v. *Revell*, *supra* (misdescription of area of property); and in *Re Puckett and Smith's Contract*, *supra* (where a culvert was found to exist under land described as having "a valuable prospective building element").

affirm the contract. It follows, from what has already been shown (*a*), that if, after discovery of the whole of the material facts giving him a right to avoid the contract (*b*), the representee has, by word or act (*c*), definitely elected to adhere to it, the representor has a complete defence to any proceedings for rescission (*d*). The acts and conduct relied upon as evincing the representee's affirmance must be such as are more consistent, on a reasonable view of them, with that than with any other theory. It is not sufficient to point to acts of a neutral character, or acts which are

(*a*) See p. 740, *ante*.

(*b*) No less than this must be shown to support the plea. It is insufficient to prove partial information, giving rise to suspicion merely; there can be no effective affirmance or election which is not based on complete and exact knowledge. The plea, on this ground, failed in *Jarrett* v. *Kennedy* (1848), 6 C. B. 319, 326; and in *Lachlan* v. *Reynolds* (1853), Kay, 52, with which contrast the cases, where the plea succeeded, of *Ogilvie* v. *Currie* (1868), 37 L. J. (CH.) 541, 544, and *Sharpley* v. *Louth and East Coast Rail. Co.* (1876), 2 Ch. D. 663, 685, C. A., which are good illustrations of the kind and degree of knowledge required.

(*c*) In nearly all the cases cited in note (*d*), *infra*, the affirmation was implied from acts and conduct rather than from words spoken or written; in no instance was an express agreement proved.

(*d*) In the following cases (all of which, except one, related to company transactions) the representee's acts and conduct were held to signify affirmation, after full knowledge of the facts giving him the right to repudiate:—*Campbell* v. *Fleming* (1834), 1 Ad. & El. 40 (sale of shares); *Pulsford* v. *Richards* (1853), 17 Beav. 87 (purchase of further shares); *Re Royal British Bank, Mixer's Case* (1859), 4 De G. & J. 575, 586, 587, C. A. (receiving dividends); *Ex parte Briggs* (1866), L. R. 1 Eq. 483 (instructing broker to sell the shares at a premium, though no actual sale); *Lawrence's Case* (1867), 2 Ch. App. 412, 423, 424 (paying calls without protest); *Kincaid's Case* (1867), 2 Ch. App. 420, 426, 427; *Whitehouse's Case* (1867), L. R. 3 Eq. 790, 793, 794; *Taite's Case* (1867), L. R. 3 Eq. 795, 798 (the like); *Scholey* v. *Central Rail. Co. of Venezuela* (1868), L. R. 9 Eq. 266, n. (receipt of a dividend, and payment of call without protest); *Ogilvie* v. *Currie*, *supra* (attempts to compromise after months of suspicion); *Campbell's Case, Hippisley's Case* (1873), 9 Ch. App. 1, 7, 15 (taking part in appointment of liquidators, and paying calls under balance orders without objection); *Sharpley* v. *Louth and East Coast Rail. Co.*, *supra*, at pp. 677—684 (attending meetings, and pressing on the enterprise); *Cargill* v. *Bower* (1878), 10 Ch. D. 502, 508, 509 (support of petition for liquidation, with costs awarded to him in that character, and dropping claim for rescission in the course of the action); *Clynoweth's Case* (1880), 15 Ch. D. 13, 17, 18, C. A. (company seeking to put transferor's name on the register instead of transferee's, having demanded payment of calls from transferee and forfeited his shares for non-payment, held to have affirmed the contract with him); *Reid* v. *London and Staffordshire Fire Insurance Co.* (1883), 53 L. J. (CH.) 351 (giving notice of discontinuance of former proceedings for rescission) *Re Dunlop-Truffault Cycle and Tube Manufacturing Co., Ex parte Shearman* (1896), 66 L. J. (CH.) 25 (payment of allotment moneys and instalments after giving clear written notice of repudiation); *Lurgan's (Lord) Case*, [1902] 1 Ch. 707, 710, 711 (acts showing an intention to keep the shares for the purpose of selling them at a premium); *Seddon* v. *North Eastern Salt Co., Ltd.*, [1905] 1 Ch. 326, 334 (continuing to carry on at a profit the business the purchase of which it was sought to set aside). For illustration of acts and conduct, or inaction, held not to amount to affirmation, see *Re Metropolitan Coal Consumers' Association, Ex parte Edwards* (1891), 64 L. T. 561 (attending one meeting for a few minutes, and asking the secretary, on one occasion, the price of the shares); *Karberg's Case*, [1892] 3 Ch. 1, C. A. (mere inaction and reasonably waiting for the result of a similar case).

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equally consistent with a possible ultimate intention to disaffirm (*e*), or with a mere suspension of judgment (*f*).

Affirmation of contract induced by two distinct misrepresentations.

1767. Affirmation of a contract induced by two distinct misrepresentations, with knowledge of the true facts as regards the one, but not as regards the other, does not debar the representee from relief (*g*). Nor does the fact that the representee has claimed and recovered damages against one of two representors, parties to the contract, even though they are partners, preclude him from obtaining rescission against the other (*h*). But, where the contract was induced by a single representation, and the representee, with knowledge of its falsity in one particular, has affirmed the contract, he cannot escape from the consequences, or defeat the representor's plea, by proof that, since the affirmation, he has discovered another particular in which the same representation departed from the truth (*i*).

(5) Impossibility or injustice of specific restitution.

1768. A fifth defence is based on the impossibility of specific restitution, or on the intervention of the *jus tertii*. One of the conditions of rescission is, as has been indicated (*k*), restoration *in specie* by the representee to the representor of all property, if any, which he acquired under the contract, so far as it is capable of specific reconveyance or retransfer. If, therefore, the representor can show that the representee received under the contract anything which, whether a thing in possession or a thing in action, was upon its acquisition capable of being specifically retransferred (*l*), and which the representee has either lost or destroyed, or so dealt with as to produce an entire alteration of its physical, commercial, or legal character, quality and substance, as distinct from mere depreciation, decay or deterioration in the ordinary course of events (*m*),

(*e*) As in *Wontner* v. *Shairp* (1847), 4 C. B. 404, 442, 443, where the representee was present as a shareholder at a meeting of the company, but only for the purpose of proposing the very thing which it was the object of the action to obtain.

(*f*) For, subject to the attendant risks, he is not bound to make any election either one way or the other; see p. 752, *post*.

(*g*) *Re London and Provincial Electric Lighting and Power Generating Co., Ex parte Hale* (1886), 55 L. T. 670.

(*h*) *Rawlins* v. *Wickham* (1858), 3 De G. & J. 304, 315, 322, C. A.

(*i*) *Campbell* v. *Fleming* (1834), 1 Ad. & El. 40; *Whitehouse's Case* (1867), L. R. 3 Eq. 790, 794.

(*k*) See pp. 744, 745, *ante*.

(*l*) Where the representee has received nothing which he can restore, the plea has no application. It has no place, therefore, where the action is one of money had and received, or trover or detinue, under the conditions described in p. 745, *ante*. Nor does it apply to any case where the representee has nothing to restore but money.

(*m*) *Clough* v. *London and North Western Rail. Co.* (1871), L. R. 7 Exch. 26, 34, 35, Ex. Ch. The following are illustrations of such alteration in the physical or mercantile properties of the subject-matter as are sufficient to support this defence, and to disentitle the representee to rescission:—*Attwood* v. *Small* (1838), 6 Cl. & Fin. 232, 357, H. L. (collieries and iron mines and works); *Vigers* v. *Pike* (1842), 8 Cl. & Fin. 562, 651, H. L. (mines worked out); *Clarke* v. *Dickson* (No. 1) (1858), E. B. & E. 148, 153, 154, 155 (mines worked and legal character of securities altered from shares in a cost-book mine to shares in a joint stock company); *Western Bank of Scotland* v. *Addie*, *Addie* v. *Western Bank of Scotland* (1867), L. R. 1 Sc. & Div. 145, 165, 166 (conversion

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the plea is valid, since it would obviously be unjust to the representor to order rescission when the representee has put it out of his power to perform one of the conditions on which such relief is granted, unless the representor, by his own conduct in standing by and tacitly permitting or encouraging the representee in his course of action, has precluded himself from taking the objection (*n*). Where the future capacity of the representee to make the necessary restitution *in specie* is still possible, an alternative form of order may be made (*o*).

Intervention of *jus tertii*.

1769. Further, circumstances may arise which would render it unjust, not to the representor, but to innocent third parties, to grant rescission. In all such cases, still more clearly than in those above mentioned (*p*), rescission is impossible. Where, on the faith of the subsistence and validity of the contract sought to be avoided, third persons have given credit to the supposed parties to that contract, or to the assets purporting to be allocated thereby to their demands, it would be a violation of the plainest principles of equity, in cancelling the contract, to destroy the rights which those persons were justified in thinking they had so acquired (*q*). This is one of the risks run by a representee who hesitates to exercise his right of election. Though he owes no duty to anyone to do so within any particular time, or at all (*r*), it is in his own interests to make his choice promptly, because, the longer he delays and deliberates, the greater is the chance of the intervention of the *jus tertii* (*s*). In the case of contracts to take shares in limited companies the risk is peculiarly grave, since, should the company go into liquidation before the representee has not merely repudiated, but taken active steps to get his name off the register, this event of itself is an absolute bar (*t*): but, apart from this, it has been said that any such representee, even where there is no question of a winding up from first to last,

of an unincorporated banking company into an incorporated joint stock company); *Sheffield Nickel Co.* v. *Unwin* (1877), 2 Q. B. D. 214 (position of both parties in relation to the patents and business in question materially changed); *Clynoweth's Case* (1880), 15 Ch. D. 13, 20, C. A. (having forfeited the shares, the company had put it out of its power to restore the *status quo*); *Lagunas Nitrate Co.* v. *Lagunas Syndicate*, [1899] 2 Ch. 392, 433, 434, C. A. (continued working of business at a profit, after accrual of right to rescind, and distributing dividends, and calling upon the syndicate to make outlays etc.). On the other hand, mere depreciation or deterioration of the subject-matter of the contract, from no fault of the representee, and without altering its character, is no bar to rescission (*Western Bank of Scotland* v. *Addie*, *Addie* v. *Western Bank of Scotland* (1867), L. R. 1 Sc. & Div. 145, 165, 166; *Adam* v. *Newbigging* (1888), 13 App. Cas. 308, 323, 330, 331).

(*n*) As in *Maturin* v. *Tredennick* (1864), 12 W. R. 740.

(*o*) *Lindsay Petroleum Co.* v. *Hurd* (1874), L. R. 5 P. C. 221 (where, there being a doubt whether the company, which was dissolved, was in a position to reconvey, the order (see *ibid.*, p. 245) provided that, if it should appear that the reconveyance was possible, then there was to be rescission, but, if not, then the bill was to be dismissed without costs).

(*p*) See the text, *supra*.

(*q*) *Clough* v. *London and North Western Rail. Co.* (1871), L. R. 7 Exch. 26, 34, 35, Ex. Ch.

(*r*) See p. 752, *post*.

(*s*) *Clough* v. *London and North Western Rail. Co.*, *supra*.

(*t*) See p. 752, *post*.

SECT. 4. Defences to Proceedings.

is, if not under a special obligation, at least deeply concerned, to repudiate speedily, if at all (*u*); and particularly is this so when the misrepresentation alleged relates to matters disclosed in the deed or memorandum or articles of association of the company, and of which, on becoming a member, every shareholder is by statute deemed to have had notice (*a*).

(6) Liquidation of the company in case of contracts to take shares.

1770. A sixth defence arises where the contract sought to be rescinded is a contract whereby the representee became a member of a limited company, in which case the winding up of the company is a bar to any relief by way of rescission, unless such representee has, before the commencement of the liquidation, procured his name to be removed from the register, or the company has agreed to do so, or unless he has commenced proceedings for rescission and for rectification of the register, or has entered into a contract with the company to be bound by the result of proceedings for that purpose instituted by some other shareholder (*b*).

SUB-SECT. 2.—*Effect of Delay, Laches, and Acquiescence.*

Effect of delay.

1771. Delay (or laches) is not, *per se*, a defence to proceedings for rescission. No representee is either punished for, or prejudiced by, mere dilatoriness and inaction (*c*). The importance of delay lies in its risks and possible results. With other facts, or even without them, if it is very great, it may constitute evidence of affirmation (*d*); and in any case it gives scope and opportunity for alteration of the subject-matter of the contract (*e*), or for the intervention of the *jus tertii* (*f*).

Acquiescence

Acquiescence, if it amounts to affirmation, is a defence; if otherwise, it is not (*g*).

(*u*) The reason is that, in the interim, persons may have become members of the company, as well as creditors, on the faith of the names they find on the register, which is a document to which the public have access; see title COMPANIES, Vol. V., pp. 152, 153. The duty therefore (for it was put as high as that) of the shareholder to move promptly is insisted upon in *Central Rail. Co. of Venezuela (Directors etc.)* v. *Kisch* (1867), L. R. 2 H. L. 99, 125; *Scholey* v. *Central Rail Co. of Venezuela* (1868), L. R. 9 Eq. 266, n., 267, n.; *Ogilvie* v. *Currie* (1868), 37 L. J. (CH.) 541, 548; *Burgess's Case* (1880), 15 Ch. D. 507, 512; *Re Snyder Dynamite Projectile Co., Skelton's Case* (1893), 68 L. T. 210; *Aaron's Reefs* v. *Twiss*, [1896] A. C. 273, 294; and *Re Christineville Rubber Estates, Ltd.* (1911), 28 T. L. R. 38.

(*a*) *New Brunswick and Canada Railway and Land Co.* v. *Conybeare* (1862), 9 H. L. Cas. 711, 734; *Lawrence's Case* (1867), 2 Ch. App. 412, 423, 424; *Kincaid's Case* (1867), 2 Ch. App. 420, 426, 427; *Wilkinson's Case* (1867), 2 Ch. App. 536, 540, 541; *Peel's Case* (1867), 2 Ch. App. 674, 684.

(*b*) See title COMPANIES, Vol. V., pp. 131, 497.

(*c*) *Redgrave* v. *Hurd* (1881), 20 Ch. D. 1, 13, C. A. (as regards both specific performance and rescission, delay is not an answer, unless there is such delay as constitutes a defence under the Statute of Limitations); see titles EQUITY, Vol. XIII., p. 168; LIMITATION OF ACTIONS, Vol. XIX., pp. 33 *et seq.*, 60, 143, 144; SPECIFIC PERFORMANCE.

(*d*) *Clough* v. *London and North Western Rail. Co.* (1871), L. R. 7 Exch. 26, 35, Ex. Ch.; *Lindsay Petroleum Co.* v. *Hurd* (1874), L. R. 5 P. C. 221, 239, 240; *Aaron's Reefs* v. *Twiss, supra.*

(*e*) *Clough* v. *London and North Western Rail. Co., supra; Lindsay Petroleum Co.* v. *Hurd, supra.*

(*f*) *Clough* v. *London and North Western Rail. Co., supra; Re Murray, Dickson, and Murray* (1887), 57 L. T. 223.

(*g*) Acquiescence must, for this purpose, mean such quiescence as amounts to

SECT. 5.—*Parties to the Proceedings.*

SECT. 5. Parties to the Proceedings.

SUB-SECT. 1.—*In Case of Assignment by Operation of Law.*

1772. The possible parties to proceedings for rescission or analogous relief are ordinarily the persons who were, or who are deemed to have been, the parties to the representation (*h*). But in case of the death or the disability of the representee or representor, the right to sue, or the liability to be sued, is transmissible to other persons in accordance with the same rules, and subject to the same conditions, as in the case of any other action or proceeding founded on contract (*i*). Parties to the proceedings.

SUB-SECT. 2.—*In Case of Assignment by Act of the Parties.*

1773. A bare equity to rescind a contract on the ground of misrepresentation is not assignable nor saleable (*k*); but where property or an interest in property is assigned, there passes with it every such equity as is incidental to its effectual enjoyment, or necessary to secure it for the benefit of the assignee, including the equity of avoiding, or obtaining the order of the court to avoid, any conveyance or contract which stands in the way of such enjoyment, or destroys or prejudices such interest (*l*). A claim for money had and received (*m*), or to any money or property which can be described as, in equity, the money or property of the representee, as distinct from a mere claim to damages, can also be assigned (*n*). Rights of an assignee from the representee.

1774. Any representee, who has become entitled to avoid a contract or transaction as against the representor, is also entitled to avoid it against any other person who claims under or through the representor by assignment, because choses in action are only assignable subject to equities, including the equity to rescind (*o*). But Liability of an assignee from the representor.

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an assent or adherence to the contract, in other words, an election to abide by it; see title EQUITY, Vol. XIII., p. 166.

(*h*) As to who are deemed representees and representors respectively, see pp. 708—719, *ante*.

(*i*) See, generally, title ACTION, Vol. I., pp. 17—22; as to transmission by death, see titles CONTRACT, Vol. VII., pp. 461, 462; EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 305—312; as to transmission on insolvency, see titles BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 136—138; COMPANIES, Vol V., pp. 446, 447; and as to married women, infants, and lunatics and persons of unsound mind, see the respective titles HUSBAND AND WIFE, Vol. XVI., pp. 453—468; INFANTS AND CHILDREN, Vol. XVII., pp. 133—144; LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., pp. 396—400 and 462—466.

(*k*) Because savouring of champerty or maintenance; see *Wood* v. *Downes* (1811), 18 Ves. 120, 125; *Prosser* v. *Edmonds* (1835), 1 Y. & C. (EX.) 481, 496, 497, 500; *Dawson* v. *Great Northern and City Rail. Co.*, [1905] 1 K. B. 260, 270, 271, C. A.; *Fitzroy* v. *Cave*, [1905] 2 K. B. 364, 371, C. A.

(*l*) *Prosser* v. *Edmonds*, *supra*, at pp. 486, 487, 499; *Wilson* v. *Short* (1848), 6 Hare 366, 384; *Cockell* v. *Taylor* (1852), 15 Beav. 103, 116, 117; *Stump* v. *Gaby* (1852), 2 De G. M. & G. 623, 630, 631; *Dickinson* v. *Burrell*, *Dickinson* (*Ann*) v. *Burrell*, *Stourton* v. *Burrell* (1866), L. R. 1 Eq. 337, 342; *Dawson* v. *Great Northern Rail. Co.*, *supra*, at p. 271.

(*m*) See p. 745, *ante*.

(*n*) It is on this principle that claims against delinquent directors and officers of a company are assignable and saleable; see title COMPANIES, Vol. V., p. 483.

(*o*) *Davis* v. *Chanter* (1855), 3 W. R. 321; *Cockell* v. *Taylor* (1852), 15 Beav. 103, 118; and *Barnard* v. *Hunter* (1856), 2 Jur. (N. S.) 1213, 1215; and see title CHOSES IN ACTION, Vol. IV., pp. 386—391.

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where the representee, being so entitled as against the representor, and therefore also entitled as against him to recover any property which he parted with under the voidable contract, sues for the purpose of taking such property out of the hands of any assignee from the representor, the burden is on the representee of establishing that he avoided the contract before the assignment (*p*), or that the assignee took as a volunteer, or with notice, or in bad faith (*q*), or that the contract was not voidable, but void (*r*), or that there had never been any contract at all with the assignor, and that no property had ever passed to him (*s*).

Part XII.—Misrepresentation as a Defence.

SECT. 1.—*When Misrepresentation may be set up as a Defence.*

Misrepresentation as a defence to proceedings to enforce a contract induced thereby.

1775. Whenever any representee is in a position to obtain from the court, if he chooses to sue for it, rescission of any contract, or other analogous relief, on the ground of misrepresentation, he is also in a position, if the representor seeks to enforce the contract against him, to set up the misrepresentation as a defence or answer to the claim (*t*), whether the proceedings instituted by the representor are brought to enforce the agreement directly, though not specifically, as in the case of an action for money due thereunder (*u*),

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(*p*) In that case nothing passes, any more than if the contract had been void *ab initio*. Where the representee has not so avoided before the assignment, as he admittedly had not in *Truman* v. *Attenborough* (1910), 103 L. T. 218, or in *Whitehorn Brothers* v. *Davison*, [1911] 1 K. B. 463, C. A., his claim to take the property out of the assignee (so far) fails, and he is driven to prove, if he can, notice, or absence of value or good faith.

(*q*) It is sufficient for the representee to establish either that the assignee was a volunteer, though acting in good faith, or that he acted in bad faith, or with notice, though he gave value. The first of these *probanda* was shown in *Bridgeman* v. *Green* (1757), Wilm. 58, 64; *Huguenin* v. *Baseley* (1807), 14 Ves. 273, 288—290; *Vaughan* v. *Vanderstegen* (1854), 2 Drew. 363, 379—383; and *Haygarth* v. *Wearing* (1871), L. R. 12 Eq. 320. For this purpose the assignees or trustee of the property of an insolvent representor are volunteers (*Kennedy* v. *Green* (1834), 3 My. & K. 699; *Load* v. *Green* (1846), 15 M. & W. 216; *Re Eastgate, Ex parte Ward*, [1905] 1 K. B. 465; *Gamage (A. W.), Ltd.* v. *Charlesworth*, [1910] S. C. 257. The second, and alternative, position was made good in *Sheffield (Earl)* v. *London Joint Stock Bank* (1888), 13 App. Cas. 333 (by proof of notice). On the other hand, in both the cases cited in note (*p*), *supra*, the representee failed to prove that, in either respect, the assignee or pledgee was otherwise than a holder for value without notice and in good faith, and, since the burden of establishing this fact, as much as the burden of showing a prior avoidance, was upon him (as was clearly held in *Whitehorn Brothers* v. *Davison*, *supra*, at pp. 476, 477, 481, 482, 487), and admittedly there had been no avoidance before assignment in either case, the action failed.

(*r*) As in all cases to which *non est factum* would be a good plea; see p. 739, *ante*.

(*s*) As in the last-mentioned class of cases, and also in all other cases where the representee had no intention of making, and did not in point of law make, any contract at all with the representor; or where, in its criminal aspect, the transaction would amount to larceny, as distinguished from the offence of obtaining the property by false pretences. See pp. 739, 740, *ante*.

(*t*) As to pleading generally, see title PLEADING.

(*u*) The following are examples of a successful plea of misrepresentation to

SECT. 1. When Misrepresentation may be set up as a Defence.

or to enforce it indirectly, as in proceedings to recover damages (*a*) or to enforce it specifically (*b*); and whether the representor's claim be asserted in the form of an action (*c*) or counterclaim (*d*), or in accordance with any authorised summary procedure (*e*) or otherwise, and whether the representee does or does not add to his defence or answer a counterclaim for rescission (*f*).

actions for debt in covenant, or for liquidated sums alleged to be due, or to recover chattels the property in which was alleged to have passed under the contract, or otherwise for the purpose of directly, though not specifically, enforcing such contract:—*M'Carthy* v. *Decaix* (1831), 2 Russ. & M. 614 (agreement of compromise); *Wainwright* v. *Bland* (1836), 1 M. & W. 32 (moneys due under life policy); with which compare the numerous insurance cases, whether life, marine, or otherwise, cited under title INSURANCE, Vol. XVII., pp. 412—416, 532—534, 550, 573; *Stone* v. *Compton* (1838), 5 Bing. (N. C.) 142 (promissory note); *Mallalieu* v. *Hodgson* (1851), 16 Q. B. 689 (release, to which the reply of fraudulent misrepresentation was held good as against the defendant setting up the release, though the plaintiff failed because it was shown that both parties were defrauding creditors); *Evans* v. *Edmonds* (1853), 13 C. B. 777 (money due under covenant in deed); *Bannerman* v. *White* (1861), 10 C. B. (N. S.) 844 (price of goods); *Lee* v. *Jones* (1864), 17 C. B. (N. S.) 482, Ex. Ch. (guarantee); *Dawes* v. *Harness* (1875), L. R. 10 C. P. 166 (cheque); *Hirschfeld* v. *London, Brighton and South Coast Rail. Co.* (1876), 2 Q. B. D. 1 (deed of release); *Eyre* v. *Smith* (1877), 2 C. P. D. 435, C. A. (liquidation by arrangement); *Auron's Reefs* v. *Twiss*, [1896] A. C. 273 (call moneys on forfeited shares); *Gordon* v. *Street*, [1899] 2 Q. B. 641, C. A. (promissory note); *Components Tube Co.* v. *Naylor*, [1900] 2 I. R. 1 (calls on shares).

(*a*) *Wharton* v. *Lewis* (1824), 1 C. & P. 529 (action for damages for breach of promise of marriage); *Foote* v. *Hayne* (1824), 1 C. & P. 545 (the same); *Canham* v. *Berry* (1855), 15 C. B. 597 (action for damages for breach of agreement to deliver possession).

(*b*) As to actions for specific performance, see, generally, title SPECIFIC PERFORMANCE. The following are examples of refusal to grant specific performance on the ground of the plaintiff's misrepresentation, set up by the defendant as a defence:—*Cadman* v. *Horner* (1810), 18 Ves. 10; *Beaumont* v. *Dukes* (1822), Jac. 422; *Harris* v. *Kemble* (1831), 5 Bli. (N. S.) 730, H. L.; *Brooke* (*Lord*) v. *Rounthwaite* (1846), 5 Hare, 298; *Price* v. *Macaulay* (1852), 2 De G. M. & G. 339, C. A. (as to one of the two lots the subject of the sale); *Reynell* v. *Sprye*, *Sprye* v. *Reynell* (1852), 1 De G. M. & G. 660, C. A. (as to the cross-action); *Higgins* v. *Samels* (1862), 2 John. & H. 460; *Caballero* v. *Henty* (1874), 9 Ch. App. 447; *Redgrave* v. *Hurd* (1881), 20 Ch. D. 1, C. A.; *Smith* v. *Land and House Property Corporation* (1884), 28 Ch. D. 7, C. A.; *Archer* v. *Stone* (1898), 78 L. T. 34; *Jacobs* v. *Revell*, [1900] 2 Ch. 858 (as to the defendant's counterclaim).

(*c*) See all the cases cited in notes (*u*), (*a*), and (*b*), *supra*, except those of them which are referred to in note (*d*), *infra*.

(*d*) In the following cases the representee set up misrepresentation as a reply or answer to the representor's counterclaim or cross-bill:—*M'Carthy* v. *Decaix*, *supra*, *Mallalieu* v. *Hodgson*, *supra*; *Hirschfeld* v. *London, Brighton and South Coast Rail. Co.*, *supra*; and *Eyre* v. *Smith*, *supra*; and *Reynell* v. *Sprye*, *Sprye* v. *Reynell*, *supra*, and *Jacobs* v. *Revell*, *supra*.

(*e*) Such as the statutory proceedings for settling the list of contributories in the winding up of a company, which any person named therein as a contributory can resist on the ground of misrepresentation set forth in an affidavit (see title COMPANIES, Vol. V., pp. 496, 500, 502), or applications under R. S. C., Ord. 14, in which case also the defendant can resist by affidavit and obtain leave to defend on the like ground, and his having done so will even be held tantamount to such an initiation of proceedings as is necessary to countervail the operation of the liquidation of a company as a bar to a claim for rescission (*Whiteley's Case*, [1900] 1 Ch. 365, C. A.).

(*f*) A counterclaim for rescission was added in *Redgrave* v. *Hurd*, *supra*; *Smith* v. *Land and House Property Corporation*, *supra*; *Components Tube Co.* v.

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SECT. 2.—*Conditions under which the Defence is Valid.*

Conditions under which the Defence is Valid.

Conditions to the validity of the defence.

1776. Substantially the conditions precedent to the validity of the defence are the same as the conditions under which relief by way of rescission is granted. The evidence which will support the one will support the other, with the two exceptions mentioned below; and what is a good affirmative plea to proceedings for rescission constitutes an equally good affirmative reply or answer to the defence (*g*).

In cases where the action is for specific performance.

1777. The first of the two exceptions referred to is where the representor is suing for specific performance of the contract. In such cases, the jurisdiction being discretionary, less strong evidence will induce the court to give effect to the representee's case than if he were claiming rescission (*h*), or were defending himself against a claim to enforce the contract otherwise than *in specie*; for in the last two forms of proceeding the relief, if granted at all, is such

Naylor, [1900] 2 I. R. 1; *Shepherd* v. *Croft*, [1911] 1 Ch. 521 (where, however, it failed, as also did the defence, and on the same grounds); and a cross-bill was filed for the like purpose in *Reynell* v. *Sprye*, *Sprye* v. *Reynell* (1852), 1 De G. M. & G. 660, C. A.

(*g*) See *United Shoe Machinery Co. of Canada* v. *Brunet*, [1909] A. C. 330, 338, P. C., where the constituent elements of a good defence are described, and appear to be substantially the same as the ingredients in a cause of action or proceeding for rescission, as stated in pp. 740—742, *ante*. For illustrations see, generally, the cases cited in this note, and note (*h*), *infra*, and notes (*i*)—(*l*), p. 757, *post*. It is not necessary to prove fraud in the one class of case, any more than in the other (*Bannerman* v. *White* (1861), 10 C. B (N. S.) 811, where the jury expressly negatived it, but nevertheless the plea prevailed; *Redgrave* v. *Hurd* (1881), 20 Ch. D. 1, C. A., where the defendant's defence, as well as his counter-claim, succeeded, though there was no evidence of fraud). In both cases it is immaterial whether the representee would be likely to suffer loss or detriment by adhering to the contract, or whether his grounds for refusing to do so were rational or not (*Knatchbull* v. *Grueber* (1817), 3 Mer. 124; *Brooke* (*Lord*) v. *Rounthwaite* (1846), 5 Hare, 298, 302, 303; *Madeley* v. *Booth* (1848), 2 De G. & Sm. 718; *Ayles* v. *Cox* (1852), 16 Beav. 23, 24, 25; *Denny* v. *Hancock* (1870), 6 Ch. App. 1, 10). For illustrations of the statement that the affirmative pleas to proceedings for rescission mentioned in pp. 746—752 are equally applicable by way of reply or answer to the defence, see, as to the pleas of the representor's knowledge, and of an agreement to waive etc. or accept compensation, some of the cases cited in the notes to pp. 726—730, and 747—750, *ante*, respectively; as to the plea of affirmation, *Wakefield and Barnsley Banking Co.* v. *Normanton Local Board* (1881), 44 L. T. 697, C. A.; *Hemmings* v. *Sceptre Life Association, Ltd.*, [1905] 1 Ch. 365; *United Shoe Machinery Co. of Canada* v. *Brunet*, *supra*; as to the plea of impossibility of specific restitution, *Harris* v. *Kemble* (1831), 5 Bli. (N. S.) 730, 752, H. L.; *Urquhart* v. *Macpherson* (1878), 3 App. Cas. 831, 838, P. C. In some of the above, the plea succeeded, in others it failed, but, whatever the result, the identical principles were applied.

(*h*) *Cadman* v. *Horner* (1810), 18 Ves. 10, 12; *Re Banister*, *Broad* v. *Munton* (1879), 12 Ch. D. 131, 142, C. A. Where, therefore, the representee is in a position to apply for rescission, it is usually prudent to do so, and in some cases he comes to the court with a better equity if he adopts that course in preference to a waiting attitude (*Penn* v. *Craig* (1838), 3 Y. & C. (EX.) 216, 222, where an insurance company applied to set aside a policy, instead of taking premiums until the death of the insured, and then disputing liability). On the other hand, where the representor company has forfeited the representee's shares, and there is, therefore, no contract to avoid, it is both prudent and proper to await the attack (*Aaron's Reefs* v. *Twiss*, [1896] A. C. 273, *per* Lord MACNAGHTEN, at p. 293).

SECT. 2. Conditions under which the Defence is Valid.

that the contract is avoided, or deemed a nullity, for all purposes; whereas, when specific performance is refused, it is merely a question of denying the party a particular and very special remedy, leaving all others open to him, or of withholding relief except upon equitable terms as to abatement of price, compensation, or otherwise (*i*).

Burden on representee of alleging and proving his previous repudiation and non-recognition of the contract.

1778. The second difference between the rules relating to rescission and those relating to the defence of misrepresentation concerns the burden of allegation and proof. In the case of a claim to have the contract set aside it is not necessary for the representee to allege or prove that he has exercised his right of election by repudiating the contract, the writ or counterclaim being itself sufficient repudiation (*k*), and the burden being on the representor to prove affirmation and not on the representee to prove avoidance; in the case of a defence, on the other hand, it would appear that the burden is on the representee of alleging in his defence, reply, or affidavit, not merely that the contract was induced by misrepresentation, but also that, having become voidable on that ground, it was in fact avoided by him within a reasonable time after discovery of the truth, and that he has ever since disclaimed any benefit and repudiated any liability thereunder (*l*).

(*i*) Thus, in *Scott* v. *Hanson* (1829), 1 Russ. & M. 128 (as to part of the property); *King* v. *Wilson* (1843), 6 Beav. 124, 128, 129 (as to part of the property); and *Hughes* v. *Jones* (1861), 3 De G. F. & J. 307, C. A., specific performance was only granted with compensation. Where, however, as in *Beaumont* v. *Dukes* (1822), Jac. 422, 426, it would be unjust to the representee, or, as in *Brooke* (*Lord*) v. *Rountheaite* (1846), 5 Hare, 298, 305 (though there was an express condition of sale here providing for compensation), it would be impracticable to make a decree subject to compensation, specific performance will be absolutely, and not conditionally, refused. Further, though an abatement or allowance may be forced upon the misrepresenting plaintiff as the condition of specific performance, and if the plaintiff is content to accept the condition, the representor to that extent fails to establish a complete defence, there is no right in the representor, under such circumstances, to this conditional or qualified remedy unless he derives it from some express term in the contract (*Cordingley* v. *Cheeseborough* (1862), 4 De G. F. & J. 379, 384—389; *Re Terry and White's Contract* (1886), 32 Ch. D. 14, 31, C. A.).

(*k*) *Hyde* v. *Watts* (1843), 12 M. & W. 254, 270; *Capel & Co.* v. *Sun's Ships Composition Co.* (1888), 58 L. T. 807, 811.

(*l*) This would seem to be the result, so far as regards the burden of proof, of what was said in *Dawes* v. *Harness* (1875), L. R. 10 C. P. 166, 167, 168, *Jaquhart* v. *Macpherson* (1878), 3 App. Cas. 831, 836—838, P. C., and *United Shoe Machinery Co. of Canada* v. *Brunet*, [1909] A. C. 330, 338, P. C. As to the burden of allegation, see *Deposit and General Life Assurance Co.* v. *Ayscough* (1856), 6 E. & B. 761, 763, 764; *Meldon* v. *Lawless* (1869), 18 W. R. 261 (an Irish case); *Anderson* v. *Costello* (1871), 19 W. R. 628 (another Irish case); and *Dawes* v. *Harness, supra*; in all of which cases it was held that the plea or defence should contain the matters mentioned in the text, in addition to the allegations of misrepresentation and inducement. In *Dawes* v. *Harness, supra*, the pleading was, after verdict, assumed to have contained averments of all these matters, though it did not because otherwise it would have been bad. On the other not been made, Lord HALSBURY, L.C., at pp. 214—219, discusses the question, but in his view it was not necessary to decide it, because it had not there been proved, nor even argued, that the defendant had adhered to the contract, which statement seems rather to indicate an opinion that the burden is the other way.

SECT. 3. Conditions under which Defence is Valid as against an Assignee.

SECT. 3.—*Conditions under which the Defence is Valid as against an Assignee from the Representor.*

Validity of defence as against assignee from representor.

1779. Where the representee is being sued by one who was not, and is not deemed to have been, the representor (*m*), but who claims in respect of rights or property the subject of the contract under an assignment from such representor, the conditions under which the defence is held valid or invalid depend upon the nature of the thing transferred, that is to say, whether it is a chose in action, non-negotiable or negotiable, or a chose in possession.

Assignee of chose in action takes subject to equity to rescind.

1780. If that which was assigned was a mere chose in action (*n*), not negotiable either by statute or by the law merchant, the assignee can only take subject to subsisting and continuing equities, including the representee's right to avoid the contract for misrepresentation (*o*). If, then, at the date of the assignment the representee was entitled to repudiate as against the representor, though he had not exercised that right, he remains so entitled as against the assignee after the assignment (*p*), though he may lose the right by any subsequent acts or conduct, indicative of affirmation or otherwise, which are as available for the benefit of the assignee as, if taking place before the assignment, they would have been for the benefit of the assignor (*q*). It follows that, subject to the above, the representee's defence to any action to enforce any right under the contract is good as against the assignee.

Special rules in case of negotiable instruments.

1781. To this rule the law has created an exception in the case of negotiable choses in action, whether made so or recognised as such by statute, such as bills of exchange, promissory notes, cheques, and bills of lading (*r*), or by mercantile custom, such as bonds and other securities passing from hand to hand as currency, and transferring, with the instrument, the right to sue thereon (*s*). Choses in action of this nature pass free from all equities to any "holder in due course"; and every assignee is presumed to be such until the contrary is proved. It is open to the representee—but the burden is on him of establishing it—to set up that the negotiable instrument was obtained from him by fraud, and, on proof of this fact, the burden is cast back on to the assignee of proving value,

(*m*) As to this, see pp. 708—714, *supra*.

(*n*) For the definition of "chose in action" and an enumeration of the various instruments and rights which fall within the definition, see title CHOSES IN ACTION, Vol. IV., pp. 360—365.

(*o*) See *Cory* v. *Gertcken* (1816), 2 Madd. 40, 51; *Wakefield and Barnsley Banking Co.* v. *Normanton Local Board* (1881), 44 L. T. 697, C. A.; title CHOSES IN ACTION, Vol. IV., pp. 386—391.

(*p*) See *Wakefield and Barnsley Banking Co.* v. *Normanton Local Board*, *supra*, *per* BRAMWELL, L.J., at p. 699.

(*q*) *Ibid.*, *per* LUSH, L.J., at p. 700. *Stoddart* v. *Union Trust, Ltd.* (1911) *Times*, 24th October.

(*r*) See title CHOSES IN ACTION, Vol. IV., pp. 393—397; and, as to bills of lading, see title SHIPPING AND NAVIGATION.

(*s*) See *Crouch* v. *Credit Foncier of England* (1873), L. R. 8 Q. B. 374, 381, 382, and titles BILLS OF EXCHANGE, PROMISSORY NOTES, AND NEGOTIABLE INSTRUMENTS, Vol II., pp. 564—570; CHOSES IN ACTION, Vol. IV., p. 397.

absence of notice, and good faith (*t*). Any representee, therefore, who can show that the representor induced him, by fraudulent misrepresentation, to sign, or transfer, or otherwise render himself liable under, a negotiable instrument, has a good defence to an action at the suit of any indorsee or transferee who fails to prove that he became the holder in due course, but not otherwise (*u*).

SECT. 3. Conditions under which Defence is Valid as against an Assignee.

1782. Where, however, the property, whether real or personal, was a thing in possession and not in action, the representee has no defence against any purchaser or assignee from the representor, unless he alleges and proves either that the contract, being voidable as against the representor, was in fact avoided before the conveyance or assignment (*a*), or that the purchaser or assignee acquired the property in bad faith or with notice (in which case it is immaterial whether value was given or not), or that he was a volunteer (in which case it does not signify whether he acted in good faith or not) (*b*). If, however, the representee is in a position to establish that the misrepresentation was of such a character as to render the alleged contract no contract at all or void, the above rules are inapplicable, for no property ever passed to the assignee (*c*).

Where the assignment is of a chose in possession, the defendant must prove that the plaintiff took in bad faith, or without value, or with notice.

Part XIII.—Fraud other than Fraudulent Misrepresentation.

SECT. 1.—*In General.*

1783. Except as qualifying an act or omission, fraud is neither an actionable wrong nor a criminal offence. No man can sue or indict another for fraud *simpliciter*. In one sense, therefore, it has no place in English jurisprudence; in another, it fills every place; for, regarded as a quality which may characterise, and when so characterising will vitiate and vacate, any transaction known to the law, of however high a degree or solemnity (*d*), it belongs equally

Fraud other than fraudulent misrepresentation.

(*t*) See titles CHOSES IN ACTION, Vol. IV., p. 391; BILLS OF EXCHANGE, PROMISSORY NOTES, AND NEGOTIABLE INSTRUMENTS, Vol. II., pp. 499, 500, 508, 514. If restrictively indorsed, or overdue when negotiated, there is no protection, and the assignee of such an instrument is in no better position than the assignee of any ordinary chose in action.

(*u*) See title BILLS OF EXCHANGE, PROMISSORY NOTES, AND NEGOTIABLE INSTRUMENTS, Vol. II., p. 499.

(*a*) The defence succeeded, on proof of bad faith, though value was given, in *Clough* v. *London and North Western Rail. Co.* (1871), L. R. 7 Exch. 26, 30, Ex. Ch. It failed, because there had been no avoidance before the assignment, in *White* v. *Garden* (1851), 10 C. B. 919; *Pease* v. *Gloahec* (1866), L. R. 1 P. C. 219; and *Babcock* v. *Lawson* (1880), 5 Q. B. D. 284, C. A. On this topic, see, generally, titles EQUITY, Vol. XIII., pp. 78, 84, *et seq.*; PERSONAL PROPERTY; REAL PROPERTY AND CHATTELS REAL; SALE OF GOODS; SALE OF LAND.

(*b*) See the titles referred to in note (*a*), *supra*.

(*c*) See pp. 740—742, *ante*.

(*d*) Such as deeds or judgments (see *Kingston's (Duchess) Case* (1776), 20 State Tr. 355; 2 Smith, L. C., 11th ed., 731, and title JUDGMENTS AND ORDERS, Vol. XVIII., p. 216), or even, under certain circumstances (see p. 742, *ante*), marriage.

SECT. 1. In General.

and indifferently to every department of our juridical system. For this reason it is only possible here to indicate, with appropriate references (*e*), and classify, the various acts and omissions, other than those constituting fraudulent misrepresentation, and, as such, already discussed (*f*), which, when tainted by bad faith in any of its infinite varieties, or by what is deemed, or classed with, fraud in the extended meaning of that term favoured by equity (*g*), are the subject of civil or criminal proceedings.

SECT. 2.—*Non-disclosure.*

Breaches of duty of disclosure not amounting to positive misrepresentation.

1784. Non-disclosure may, under certain conditions, amount to positive misrepresentation (*h*). There are, however, various transactions and relations of such a nature as to give rise to a duty of disclosure, the breach of which duty, though not amounting to misstatement, is actionable, and, though for that purpose it is not strictly necessary to establish fraud, is usually accompanied by and always tends to encourage it, and hence, in the eye of equity, is commonly regarded in the same light. These transactions and relations comprise all those in which, from the necessity of the case, one of the parties must have full knowledge of the material facts, and the other cannot have such full knowledge, and must, therefore, rely upon the good faith of the first party for exact and complete information as to all such circumstances as would affect his judgment in determining whether or not he will do business with him on the terms proposed. Of this class of transaction, insurance is the typical illustration (*i*).

SECT. 3.—*Abuse of Influence, and Oppression.*

Abuse of influence etc.

1785. Further, there are numerous classes of relations in which one of the parties stands in such a relation of superiority towards the other, and is in a position to exercise such domination and influence over his will and judgment, that the law imposes an obligation upon the dominant party to establish, if challenged, that he has not abused that influence, or taken undue or improper advantage of the servient party's subjection, distress, or necessities. This obligation cannot be discharged except by establishing, not only that the dominant party made full disclosure of all relevant facts, and of the rights to which they gave rise, but also that the servient party had independent and competent advice from a person having full knowledge of those facts and rights, and (in the

(*e*) See the text, *infra*, and pp. 761, 762, *post*.
(*f*) See pp. 687—691 and p. 724, *ante*.
(*g*) See title EQUITY, Vol. XIII., pp. 15 *et seq.*
(*h*) See pp. 681—685, *ante*.
(*i*) See title INSURANCE, Vol. XVII., pp. 404—412, 532, 550. As to disclosure required in cases of arrangements with creditors, see titles BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 335, 336; EQUITY, Vol. XIII., p. 20. To a much less degree, there is a similar duty on a vendor, in cases of sale and purchase; see titles SALE OF GOODS; SALE OF LAND. Similarly, though contracts of suretyship are not strictly *uberrimæ fidei*, the creditor has some duties in this respect towards the surety; see title GUARANTEE, Vol. XV., pp. 539—542.

case of purchases) received adequate value. The rule is applied to cases of family relationship, or professional or other fiduciary connection, and cases in which one of the parties is under a permanent or temporary incapacity or disability of mind, body, or estate (*k*). Such cases, again, by reason of the tendency and temptation to fraud, though it is wholly unnecessary to prove actual dishonesty in the particular case, are usually comprised, in equity, under the head of fraud.

SECT. 8. Abuse of Influence and Oppression.

SECT. 4.—*Fraud on Third Persons.*

1786. Where a party is injured by a deceit practised not upon himself (which would amount to ordinary misrepresentation), but upon an English or foreign tribunal (*l*), or a domestic forum, or a person in a *quasi*-judicial position, such as an architect or engineer in the case of certain contracts (*m*), or the Crown (*n*), whereby a judgment, award, decision, or grant of a charter or letters patent, is

Fraud on public authorities etc.

(*k*) As to these relations generally, see titles CONTRACT, Vol. VII., pp. 357—360; EQUITY, Vol. XIII., pp. 17—19; FRAUDULENT AND VOIDABLE CONVEYANCES, Vol. XV., pp. 103—111; GIFTS, Vol. XV., pp. 402, 403, 419—421. The family relationships referred to are those of parent and child, guardian and ward etc., as to which see titles EQUITY, Vol. XIII., pp. 18, 19; FRAUDULENT AND VOIDABLE CONVEYANCES, Vol. XV., pp. 107, 108; INFANTS AND CHILDREN, Vol. XVII., p. 118; and as to family arrangements and compromises, see titles EQUITY, Vol. XIII., pp. 18, 20; FAMILY ARRANGEMENTS, Vol. XIV., pp. 539 *et seq.* As to the relation of husband and wife, which does not stand on the same footing as the others, see title FRAUDULENT AND VOIDABLE CONVEYANCES, Vol. XV., pp. 110, 111; HUSBAND AND WIFE, Vol. XVI., pp. 391, 396, 402. For the professional relations referred to, such as those of solicitor or counsel and client, medical adviser and patient, or spiritual director and penitent or disciple, see titles BARRISTERS, Vol. II., pp. 394, 395; FRAUDULENT AND VOIDABLE CONVEYANCES, Vol. XV., pp. 108—110; SOLICITORS. Other fiduciary relations are, besides those of trustee and *cestui que trust* (as to which see title TRUSTS AND TRUSTEES), the relation between principal and agent (see title AGENCY, Vol. I., pp. 189—192, 216, 217); between partners (see title PARTNERSHIP); between executors and administrators and beneficiaries (see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 323); and between promoters or directors and companies (see title COMPANIES, Vol. V., pp. 47—58, 228—230). For cases of advantage being taken of another's permanent helplessness, such as lunacy, see titles EQUITY, Vol. XIII., pp. 15, 16; LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., pp. 396 *et seq.* Cases of unconscionable bargains, where advantage is taken of the temporary distress and necessities of expectant heirs, and others (for the doctrine is not confined to them), see titles EQUITY, Vol. XIII., pp. 20—22; FRAUDULENT AND VOIDABLE CONVEYANCES, Vol. XV., pp. 111—116; MONEY AND MONEY-LENDING. Lastly, as to contracts and payments extorted from a person in a state of intoxication, or under duress, see titles CONTRACT, Vol. VII., pp. 342, 356; EQUITY, Vol. XIII., pp. 16, 19—22.

(*l*) See titles ESTOPPEL, Vol. XIII., pp. 351, 352; JUDGMENTS AND ORDERS, Vol. XVIII., p. 216; and, as to foreign judgments, CONFLICT OF LAWS, Vol. VI., pp. 287, 288.

(*m*) See title ARBITRATION, Vol. I., pp. 478—481, as to the awards of arbitrators, and title BUILDING CONTRACTS, ENGINEERS, AND ARCHITECTS, Vol. III., pp. 217, 218, 303, as to collusion and fraud with, and on the part of, engineers, architects etc.

(*n*) As to the remedies available to the party aggrieved when the King is deceived in his grant, see titles CONSTITUTIONAL LAW, Vol. VI., p. 482; CORPORATIONS, Vol. VIII., pp. 400, 401 (as to charters); PATENTS AND INVENTIONS (as to letters patent).

SECT. 4. Fraud on Third Persons.

obtained against him, or to his prejudice, he may obtain relief by way of rescission (except in the case of a foreign judgment), or by way of defence, as the case may be, and according to the procedure respectively appropriate.

Contracts in fraud of the public etc., though not of defendant, unenforceable on grounds of public policy.

1787. There is a second class of case in which the party for whose benefit the application of the principle enures was himself neither deceived nor injured, but where, nevertheless, the court, on grounds of public policy, or (in some cases) pursuant to statute, and without any regard whatever to the merits or demerits of the parties, will treat a contract or transaction as void; namely, where it appears that the object of such contract or transaction was to defraud third persons, whether specific individuals (*o*), or the public in general, or a class or section of the community (*p*).

SECT. 5.—*Statutory Fraud.*

Statutory fraud.

1788. There are various acts and omissions which, whether amounting to fraud at common law or not, are recognised as, or declared to be, or treated as, fraudulent by express statutory provisions (*q*).

SECT. 6.—*Criminal Fraud.*

Criminal fraud.

1789. Most of the acts and omissions which are deemed fraudulent for the purposes of civil responsibility also constitute criminal offences, whether at common law or by statute (*r*).

(*o*) *Jackson* v. *Duchaire* (1790), 3 Term Rep. 551.

(*p*) As to this class of case, see, generally, title EQUITY, Vol. XIII., p. 20, and the following cases:—*Pidding* v. *How* (1837), 8 Sim. 477 (fraud on public purchasing the plaintiff's tea); *Wright* v. *Tallis* (1845), 1 C. B. 893 (fraud on the reading public by means of false title-page and preface); *Begbie* v. *Phosphate Sewage Co.* (1875), L. R. 10 Q. B. 491 (invention intended to be used to deceive the public); *Post* v. *Marsh* (1880), 16 Ch. D. 395 (lending name to deceive purchasers of directory); *Re Great Berlin Steamboat Co.* (1884), 26 Ch. D. 616, C. A. (scheme to defraud Berlin bankers); *Bile Bean Manufacturing Co.* v. *Davidson* (1906), 8 F. (Ct. of Sess.) 1181 (fraud on public purchasing the pursuers' "bile beans"); *Slingsby* v. *Bradford Patent Truck and Trolley Co.*, [1906] W. N. 51, C. A. (a catalogue published to deceive the public). As to conveyances, transfers, preferences, and transactions in fraud of creditors, see titles BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 260—262, 275—287, 300, 335—337; BILLS OF SALE, Vol. III., pp. 61, 62; COMPANIES, Vol. V., p. 544; FRAUDULENT AND VOIDABLE CONVEYANCES, Vol. XV., pp. 78—92, and (for the like in fraud of subsequent purchasers), *ibid.*, pp. 92—102. As to the procuring of wills by fraud, see titles EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 179, 180, and WILLS; and for frauds on powers, see title POWERS.

(*q*) See, *e.g.*, titles AUCTION AND AUCTIONEERS, Vol. I., pp. 508, 509; COMPANIES, Vol. V., pp. 120—126, 429—434, 478—485; FRAUDULENT AND VOIDABLE CONVEYANCES, Vol. XV., pp. 78—102; MONEY AND MONEY-LENDING; PARTNERSHIP; PATENTS AND INVENTIONS; SALE OF GOODS; SHIPPING AND NAVIGATION; TRADE MARKS, TRADE NAMES, AND DESIGNS.

(*r*) See for examples of such offences, titles CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 484, 485, 489, 535—537, 554, 555, 566—569, 582, 688—710, 759; BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 345—351; COMPANIES, Vol. V., pp. 311—318; COPYRIGHT AND LITERARY PROPERTY, Vol. VIII., pp. 169—171; ELECTIONS, Vol. XII., pp. 278—304, 345—349; FOOD AND DRUGS, Vol. XV., pp. 16—34; MONEY AND MONEY-LENDING; PRESS AND PRINTING; REVENUE; TRADE MARKS, TRADE NAMES, AND DESIGNS; WEIGHTS AND MEASURES.

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